



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 57 OF 2018

BETWEEN

SAFARICOM LIMITED.....APPELLANT/RESPONDENT

AND

JACK K. KHANJIRA.....1ST RESPONDENT/APPLICANT

JOASH N. MORURI.....2ND RESPONDENT/APPLICANT

(Being an Application to strike out the Notice of Appeal and the Record of Appeal against the Order of the High Court of Kenya at Mombasa (Otieno J.) issued on

6th March, 2018

in

High Court Civil Case No. 231 of 2011)

RULING OF THE COURT

[1] By an application dated 7th June, 2018, the respondents in the main appeal (*hereinafter applicants*) have sought the striking out of the Notice of Appeal and the Record of Appeal herein. The application is expressed to be brought under **Rules 84 and 104 (b) of the Court of Appeal Rules**. It is based on grounds that the Notice of Appeal is incurably defective, having been filed out of time without leave; also, that service thereof was never effected on the applicants as stipulated under **rule 77 (1)** of the rules; that the Notice of Appeal was never signed or endorsed by the Deputy Registrar and that as a result of the foregoing, the Notice of Appeal and by extension the Record of Appeal should be struck out.

[2] The applicants added that the Record of Appeal was also defective on account of its failure to contain a copy of the superior court proceedings or Judge's notes. Yet another ground advanced by the applicants was that the respondent had filed an application before the superior court below, in which she sought stay of proceedings in **Nairobi Civil Appeal No. 295 of 2015** but that application was dismissed. The applicants hereby contend that they were not party to the said Nairobi Civil Appeal No. 295 of 2015 and that as a result, the present appeal is calculated to divert attention from the applicants' claim in a dispute regarding the M- Kesho mobile money platform. On that note, the applicants termed this appeal a miscarriage of justice and urged this Court to strike it out.

[3] Opposing the application, the respondent filed a replying affidavit sworn on 22nd June, 2018 by one Daniel Mwenja Ndara, in which he deposed that the instant appeal is against the orders issued on 6th March, 2018 in **Mombasa HCCC No. 231 of 2011**; that accordingly, since the Notice of Appeal was filed on 19th March, 2018, the same was filed within the statutory 14 days and cannot be said to have been out of time. Further, the respondent contended that contrary to the applicants' assertions, the Notice of appeal was duly endorsed by the Deputy Registrar on 14th June, 2018; and that since the applicants' physical address was unknown, the respondent dispatched the Notice of Appeal to P.O Box 42521-80100 Mombasa, which was the applicants' last known postal address. To the respondent, the inclusion of the judge's notes or proceedings was unnecessary in this case, given that this is an interlocutory appeal. The respondent urged this Court to find the application misconceived and dismiss it, since both the Notice and Record of Appeal are in order.

[4] The application was canvassed through written submissions, with oral highlights at the hearing hereof. Appearing in person, the

applicants submitted that on 29th May, 2018, they received a text message from the respondent's counsel directing them to collect a parcel from the Coast Bus company offices at Mombasa. They duly collected the parcel the following day and the contents thereof turned out to be copies of the Notice of Appeal and Record of appeal herein. Their argument is that the Record of Appeal was however incomplete given that it lacked a copy of the typed proceedings. Citing an excerpt from The African Human Rights Law Journal, the applicants contend that the Record of Appeal is only deemed complete once the typed proceedings have been included.

[5] In addition, that since the Notice of Appeal was only sent via courier alongside the Record of Appeal as aforesaid, its service was 2 months and 24 days out of time, contrary to **rule 77(1)**, incurably defective and thus liable to be struck out. Aside from the foregoing, they asserted that since the Notice of Appeal was not endorsed by the Deputy Registrar, it offended the rules of pleadings. The applicants submitted that where a pleading is not signed, the same must be struck out. In this regard, the decision in **Cheraik Management Limited vs. Fund Board Trustees & Another [2012] eKLR** was cited to buttress the applicants' argument. Turning to the missing typed proceedings, the applicants reiterated that the non inclusion of the judge's notes in the Record of Appeal is a fatal omission and that contrary to what was deposed by the respondent, this is not an interlocutory appeal.

[6] Opposing the application was learned counsel for the respondent **Mr. Kiche**. In his oral address and written submissions, he pointed out that the subject of this appeal is the order issued on 6th March, 2018. Consequently, that any party desirous of appealing had to lodge its Notice of Appeal within 14 days of that order; meaning not later than 20th March, 2018. In this case he said, the Notice of Appeal was filed on 19th March, 2018 and was thus within time. He added that the Notice of Appeal was endorsed by the Deputy Registrar on 14th June, 2018 and that on service, the applicants did not contest the assertion that they were served by post. On the whole, counsel submitted that the applicants' contestations do not hold any water. To the contrary, that the appeal raises substantive issues of law and that this Court should uphold the overriding objective and decline the invitation to strike out the appeal. Learned counsel contended that the application is based on technicalities of procedure and urged this Court to resist granting it. In any event, he contended, the applicants had not demonstrated any prejudice they suffered on account of the late service (if at all).

[7] The power of this Court to strike out an appeal is discretionary and its exercise is based on the peculiar circumstances of each case. That said, one of the primary issues raised by the applicants was that the Notice of Appeal was lodged and served out of time. Given that the instant appeal is against the orders issued on 6th March 2018, the Notice of Appeal needed to be lodged within 14 days, that is by 22nd March, 2018. On the face of the Notice of Appeal, it is apparent that the same was presented at the court registry and filed on 19th March, 2018 and was thus lodged within time. This dispenses with the argument that the Notice of Appeal was filed out of time.

[8] As to whether the Notice was duly endorsed by the Deputy Registrar, it is equally apparent that the same was endorsed on 14th June, 2018. The other issue raised by the applicants was that service of the Notice of Appeal was effected out of time by way of Coast Bus courier services. However, the respondent rebutted this assertion by stating that they had also served the applicants through postal mail immediately upon filing the Notice of Appeal. A waybill was indeed produced by the respondent as evidence of that service. The alleged service through post was never controverted by the applicants, nor did they deny that the said postal address was theirs. Under **Order 2 Rule 11** of the **Civil Procedure Rules**

“... any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposing party unless it is traversed by that party in his pleading or a joinder of issue under rule 10 operates as a denial of it.”

Given the uncontroverted advance service by way of post, this Court finds that service was effected in time. On the premises, the Notice of Appeal is in order and properly on record.

[9] Lastly, is the issue of whether the Record of Appeal was defective for non inclusion of typed proceedings. According to the applicants, proceedings are an integral part of the appeal process and constitute the primary documents that must be included in the record. Having failed to be so included in this case, rendered the record of appeal incurably defective. An excerpt from The African Human Rights Law Journal was cited to buttress this assertion. It is common ground that the typed proceedings were neither included in the record nor were they applied for. In her defence, the respondent simply contends that the same were unnecessary, given that this is an interlocutory appeal. For avoidance of doubt, an interlocutory appeal is an appeal which occurs before the trial court's ruling on the entire case (See **Black's Law Dictionary 9thEdn**). This is thus an interlocutory appeal, given that proceedings in the trial court are still pending judgment.

[10] The question to be answered therefore, is whether the typed proceedings were necessary given that this is an interlocutory appeal. According to **Rule 87** of this court's rules, the primary documents to be carried by the record of appeal are stipulated as follows:

(1) For the purpose of an appeal from a superior court in its original jurisdiction, the record of appeal shall, subject to sub-rule (3), contain copies of the following documents—

(a) an index of all the documents in the record with the numbers of the pages at which they appear;

(b) a statement showing the address for service of the appellant and the address for service furnished by the respondent and as regards any respondent who has not furnished an address or service as required by rule 79, his last known address and proof of service on him of the notice of appeal;

(c) the pleadings;

(d) the trial judge's notes of the hearing;

(e) the transcript of any shorthand notes taken at the trial;

(f) the affidavits read and all documents put in evidence at the hearing, or, if such documents are not in the English language, certified translations thereof;

(g) the judgment or order;

(h) the certified decree or order;

(i) the order, if any, giving leave to appeal;

(j) the notice of appeal; and

(k) such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant:

Provided that the copies referred to in paragraphs (d), (e) and (f) shall exclude copies of any documents or any parts thereof that are not relevant to the matters in controversy on the appeal. (Emphasis added)

[11] The proviso to the rule above clearly gives the appellant leeway to exclude copies of some of the primary documents or parts thereof that he feels are not relevant to his appeal. However, this leeway is not without limitation; as the proviso also specifies and confines the documents that may be so precluded to; the trial judge's notes (or parts thereof), the transcript or shorthand notes taken at the trial (or parts thereof) and/or the affidavits read and documents put in evidence at the hearing or certified translations thereof. Therefore, the non inclusion of the typed proceedings in this case is not a fatal defect. While it is appreciated that the excerpt from the African Human Rights Law Journal cited by the applicants addressed the issue of importance of typed proceedings, a contextual reading thereof reveals that its main focus was on trial proceedings in criminal law and not civil cases. The same is thus clearly distinguishable from the appeal presently before this court; which is of a civil nature.

[12] From the foregoing it is clear to us that the appeal being Civil Appeal, No. 57 of 2018 is not for striking out and the same should be heard and determined on merit. We are not persuaded that this application has merit and we consequently dismiss it with costs in the appeal.

Dated and delivered at Mombasa this 15th day of November, 2018

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M.K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR