



IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL (APPLICATION) NO. 35 OF 2017

BETWEEN

TOTAL KENYA LIMITED.....APPELLANT

AND

REUBEN MULWA KIOKO..... RESPONDENT

(An application to strike out the notice and Record of Appeal against the Ruling

of the High Court of Kenya at Malindi (Chitembwe, J.) dated 27th March, 2017

in

H. C. C. No. 27 of 2016)

RULING OF THE COURT

1. **Reuben Mulwa Kioko** (the respondent) is seeking for the Notice of Appeal and Record of Appeal filed by **Total Kenya Limited** (the appellant) on 7th April, 2017 and 7th June, 2017 respectively to be struck out under **Rule 84** of the **Court of Appeal Rules** (the Rules). For the reasons that firstly, the appellant had failed to take essential steps, that is, it had not served him with the Notice of Appeal. In addition, despite lodging the Record of Appeal on 7th June, 2017 the appellant served the same on 15th November, 2017, outside the stipulated time frame without leave of the Court. Secondly, the certified order of the High court's (Chitembwe, J.) ruling dated 27th March, 2017 subject matter of the appeal had not been included in the Record.

2. In response, **Mr. Kamami Njoroge**, the appellant's advocate, deposed that following the delivery of the impugned ruling the Notice and Record of Appeal were filed on behalf of his client in good time. Thereafter, he instructed his clerk whose name he did not disclose, to effect service. He then went on to request for a date for case management before the Deputy Registrar of this Court which was fixed for 15th November, 2017. On the said date, he was taken aback when the respondent's counsel alleged that the respondent had not been served with the Notice and Record of Appeal.

3. Consequently, he made copies of the Notice and Record of Appeal and personally served the respondent's advocate on the same date. He expressed that the failure to effect service within the requisite time frame was not deliberate or intended to prejudice the respondent. In any event, the respondent having been served with the Notice and Record of Appeal on 15th November, 2017 should have filed the current application within 30 days, that is, on or before 15th December, 2017 as delineated under the proviso to **Rule 84** of the Rules. It followed that the application which was filed on 29th December, 2017 was incompetent.

4. Both Mr. Mkombe who appeared for the appellant and Mr. Mbura who appeared for the respondent relied entirely on the written submissions filed on behalf of the parties.

5. Citing **Rule 77 (1)** of the Rules, it was the respondent's submission that a Notice of Appeal should be served within 7 days of being lodged. He believed that the rationale behind that requirement was aptly set out by this Court in **Daniel Nkirimpa Monirel vs Sayialel Ole Koilel & 4 Others [2016] eKLR**:

“The purpose of service of a Notice of Appeal is to alert the parties being served that the case in question has not been concluded yet as the same has been escalated to another level. This enables the party to prepare and get ready for another fight, be it by way of gathering resources or just getting mentally prepared for defending the intended appeal. Failure to serve a party with a Notice of Appeal within the time prescribed by law gives a party false belief that the matter has been concluded, only to be ambushed later with the record of appeal in which the said notice is tucked away somewhere in the record. That occasions prejudice to the ambushed party, and it is in our view a habit that should not be countenanced in any fair and just process. That would explain why Rule 77 (1) of the Court of Appeal Rules is couched in mandatory terms.”

6. Similarly, **Rule 90 (1)** of the Rules is clear that a Record of Appeal should be served within 7 days of filing. In this case, the appellant served the Record after a period of over five months. All in all, there was no valid Notice or Record of Appeal on record hence they should be struck out.

7. Last but not least, the respondent argued that the appellant had failed to include the certified copy of the order in issue contrary to **Rule 87 (h)** of the Rules. Urging us to strike out the Record on this ground, the respondent placed reliance on the case of **Bwana Mohamed Bwana vs Silvano Boru Bonaya & 2 Others - SC Petition No. 15 of 2015 (UR)**.

8. On the appellant’s part, the application before us was incompetent since it had not been filed within the statutory timeline stipulated in the proviso to **Rule 84** of the Rules. We were invited to dismiss the application on that ground.

9. Whilst conceding that the Record and Notice of appeal were served out of time, the appellant contended that it was as a result of an inadvertent error on the part of its advocate who was under the impression that service thereof had been effected by his clerk. In a bid to convince the Court to overlook the delay, we were referred to the following sentiments of this Court in **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR**:

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.”

10. In the appellant’s view, no harm or prejudice had been occasioned to the respondent as a result of the delay. We were urged to allow the appeal to be determined on merit.

11. We have considered the application, submissions made on behalf of the respective parties and the law. We shall begin by considering the issue of the competency of the application which was raised by the appellant. **Rule 84** of the Rules is the basis upon which an application for striking out a Notice or Record of Appeal can be made. It provides:

“A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.”

12. Of relevance is the proviso thereto which has received considerable deliberation by this Court and in particular its import. In **Joyce Bochere Nyamweya vs Jemima Nyaboke Nyamweya & Another [2016] eKLR**, this Court held that parties are bound by the mandatory nature of the proviso to **Rule 84** of the Rules and the failure to comply with the same renders an application filed thereunder defective. See also **Salama Beach Hotel Limited & 4 Others vs Kenyariri & Associates Advocates & 4 Others [2016] eKLR**, **Pickwell Properties Ltd vs Kenya Commercial Bank Ltd. [2016] eKLR** and **Michael Mwalo vs Board of Trustees of National Social Security Fund [2014] eKLR**.

13. Was the application before us filed within the requisite time frame? It is not in dispute that the Record of Appeal was served upon the respondent on 15th November, 2017. Therefore, the window within which the application could be filed as per the proviso was on or before the 18th of December, 2017 taking into account the Jamuhuri day holiday which falls on 12th December. Accordingly, the application which was filed on 29th December, 2017 was out of time, incompetent and amenable to be being struck out.

14. In the circumstances, we have no alternative but to strike out the application dated and filed in this Court on 29th December, 2017 which we hereby do. We make no orders as to costs.

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

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR