



IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPLICATION NO. 40 OF 2017

BETWEEN

MISTRY PREMJI GANJI (INVESTMENTS) LIMITED.....APPLICANT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT

(Being an application to strike out an Appeal and/or Appeal from the Ruling of the Environment and Land Court at Mombasa (Omollo J.) delivered at Mombasa on 1st February, 2017 in Environment and Land Court Case No. 106 of 2016

RULING OF THE COURT

[1] By a notice of motion dated 18th July, 2017, the applicant moved this Court seeking to strike out the appeal filed by the respondent being, Civil **Appeal No. 40 of 2017**. The grounds upon which the motion is premised are that the respondent's Notice of Appeal dated 13th February, 2017 and filed in the High court registry on 14th February, 2017 is incompetent as it was neither endorsed with the filing date nor was it signed by the deputy registrar. In addition, the said Notice of Appeal was served on the applicant on 22nd February, 2017, which was outside the time prescribed under **Rule 77 (1)** of the **Court of Appeal Rules (Rules)**. Besides, the letter bespeaking the proceedings was never served upon the applicant as prescribed by **Rule 82 (2)** and lastly, that the record of appeal was equally defective, having been filed outside the time prescribed under **Rule 82 (1)** of the Rules.

[2] The application was opposed vide the replying affidavit sworn by Charles Orinda Dulo, the respondent's counsel on 23rd July, 2018. He deposed that the Notice of Appeal was in order and was filed in accordance to the Rules; that lack of signature or an endorsement of date on the Notice of Appeal did not render it any less defective, as the document still served its purpose and that the Notice of Appeal was served within the time prescribed under **Rule 77 (1)** of the Rules. Regarding the letter bespeaking proceedings, the deponent stated that even though the respondent inadvertently failed to serve the applicant with the Notice of Appeal as a single document, the same was nonetheless served upon him as an annexure in an affidavit sworn on 15th June, 2017 which was filed by the respondent in a separate application in **Civil Application No. 20 of 2017** and that in any event, the applicant was in court when the application for leave to appeal was allowed. Thus, the applicant was undoubtedly made aware of the respondent's intention to appeal. In any case, a letter from the High court registry dated 29th May, 2017, informed both the applicant and the respondent that the typed proceedings were ready which also must have alerted the applicant that an appeal was underway.

[3] Counsel for the respondent went on to state that the record of appeal was also served upon the applicant on 21st June, 2017 and that it bore a copy of the letter bespeaking proceedings. He contended that owing to the tardiness of the High court registry, the typed proceedings were delayed which was the ultimate cause for delay in filing the record of appeal. He asserted that the appellant had not shown any intentional default on the part of the respondent as regards non service, which he termed excusable. He thus urged this court to take judicial notice of the fact that proceedings in **ELC No. 106 of 2015** were stayed on the strength of the impugned Notice of Appeal and as such, find that the Notice of Appeal was redeemable. The respondent thus prayed for the dismissal of this application as no prejudice had been visited upon the applicant.

[4] During the plenary hearing, the application was canvassed through written submissions, with counsel making some brief oral highlights to buttress their respective positions. For the appellant, learned Counsel **Ms. Onyango** once more reiterated that the Notice of Appeal is fatally defective since it neither bears the signature of the deputy registrar nor is it endorsed with the date upon which it was filed. Counsel pointed out that from the record, there is no indication that the filing fees in respect of the Notice of appeal was even paid. According to counsel, the respondent might have succeeded in persuading this Court that the Notice of Appeal was duly filed had he at the very least, furnished a copy of the filing fee receipt. In absence thereof and coupled with the unendorsed and unsigned Notice of Appeal, this Court

should be hesitant to deem the Notice of Appeal as having been duly filed.

[5] Counsel further contended that the Notice of Appeal was served eight days after the alleged filing; which was contrary to **section 57 of the Interpretation and General Provisions Act** as read together with **Rule 77 (1)** of the rules. Citing the case of **Daniel Nkirimpa Monirei [2016] eKLR**, counsel submitted that **Rule 77 (1)** is couched in mandatory terms and the respondent cannot purport to invoke the provisions of **Article 159 of the Constitution** in a bid to avoid the consequences of non-compliance with that Rule. As regards service of the letter bespeaking proceedings, it was submitted that strict compliance with **Rule 82 (2)** is necessary in order for an appellant to take advantage of the extension of time afforded by **Rule 82(1)**. In this case however, the respondent never served the appellant with the letter bespeaking proceedings. Consequently, the respondent was ineligible for the issuance of a certificate of delay; meaning he was obligated to file his record of appeal within 60 days of the filing of the Notice of Appeal. Having failed to file it within the time prescribed, the record of appeal was thus out of time and by extension, the Court was bereft of the jurisdiction to entertain the appeal.

[6] Opposing the application was learned counsel **Mr. Dulo** for the respondent who conceded that the Notice of Appeal was indeed served a day late. He was however quick to add that the Notice of Appeal was competent and that the omission of signature or endorsement of date are not fatal defects. As regards the letter bespeaking proceedings, counsel once again conceded that no such letter was served upon the applicant as per the Rules. However, he submitted, the typed proceedings were duly requested for and eventually typed and that the delay in filing the appeal was occasioned by the court registry that took three months to prepare and furnish the respondent with the typed proceedings. Lastly, counsel was of the view that this court is *functus officio* in the present application, as the appeal, the subject of this application, namely **Civil Appeal No. 20 of 2017** has already been heard and determined, with the effect that the proceedings in **ELC Case No. 106 of 2015** were stayed. On the whole, that since the substantive appeal has been dispensed with, the substratum of this application too, fails, and thus the respondent urged the dismissal of this application.

[7] The above is the summary of the contentious matters as presented in the application, and submissions made before us out of which we have been able to distil the following issues for determination;-

- a) Whether failure to sign and endorse the filing date on a Notice of Appeal is a fatal defect;
- b) Whether failure to serve the Notice of Appeal on time is a fatal defect;
- c) Whether the Record of Appeal herein was incompetent and lastly;
- d) Whether the court is *functus officio* and if the appeal should be struck out.

[8] On the first issue, being the effect of lack of signature and endorsement of the date on a Notice of Appeal by the Deputy Registrar. We find this issue has been dealt with by this Court in the **Monirei case (supra)**. It was held that under **Rule 77 (1)**, the appellant must not only be seen to have lodged the Notice of Appeal, but must have served it upon the respondent; that a Notice of Appeal which bears no rubberstamp of the High court and/or which lacks any other endorsement by the registrar of the High court is fatally defective. The Court went on to add that such a Notice of Appeal cannot be said to have been duly lodged and termed it a glaring deficiency in authentication. We see no reason to depart from that finding as in doing so we would send a message out there that parties can ignore the Rules and introduce a Notice of Appeal any time in the cause of the appeal without a signature or endorsement. Signature and endorsement is a form of authentication of a document that eventually forms the foundation of an appeal.

[9] On the second issue, the **Monirei case (supra)** also settles it because **Rule 77(1)** is couched in mandatory terms that service of the Notice of Appeal must always be effected upon the respondent in accordance with the Rule. This position is also supported by other decisions of this Court, see **Stephen Kinoro Kamau vs. Wanjiku Kinuthia & another [2005] eKLR** However, we hasten to add that failure to serve the Notice of Appeal on time may be excused for good reason(s), if the appellant is able to satisfy the Court that the same was excusable in the circumstances (See **Kamlesh Mansukhalal Damji Pattni vs. Director of Public Prosecutions & 3 others [2015] eKLR** and **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 others [2013] eKLR** and also **Francis Mwanza Mulwa vs. Pamela Mary Kikumu [1995] eKLR**).

For avoidance of doubt, **rule 77 (1)** stipulates as follows:

“An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal.” (Emphasis added)

On this ground, it is common ground that the Notice of Appeal was served out of time, on the eighth day after it was ‘filed.’ Though the respondent has urged us to disregard his blatant flouting of the Rules of procedure herein, which he termed a mere technicality, that should not impede dispensation of justice, he has not attempted to offer any explanation for his delay and disregard for the Rule which we find inexcusable as no reasons were given.

[10] On the third issue, the applicant entreated us to find there was no valid appeal, since the same is premised on a defective Notice of Appeal and also because the record of appeal was filed out of time. Indeed, a Record of Appeal founded on a defective Notice of Appeal cannot stand. This is because, an appeal is instituted by the Notice of Appeal and once the same is found to be fatally defective (as is the case herein) the fate of the record of appeal is equally sealed. Furthermore, had the Notice of Appeal been valid, the fate of the record of appeal would still face challenges since it was filed out of time; under **Rule 82**, the institution of appeals is provided for on terms *inter alia* that:

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(1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the

notice of appeal was lodged -

(a) a memorandum of appeal, in quadruplicate;

(b) the record of appeal, in quadruplicate;

(c) the prescribed fee; and

(d) security for the costs of the appeal

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.” (Emphasis added)

[11] In this case, the Notice of Appeal was ‘filed’ on 14th February, 2017, thus if the period of 60 days within which to appeal are factored, the deadline for the filing of the record of appeal fell on 25th April, 2017. Instead, the record herein was filed 20th June, 2017; 48 days out of time. The appellant has blamed the High court registry for the delay in lodging the record of appeal. However, this argument that the registry was to blame cannot hold because, under the proviso to **Rule 82 (1)** aforesaid, an appellant is afforded some reprieve in so far as computation of time is concerned, if there was delay in preparation of the proceedings upon making a written request for the proceedings. In other words, the computation of the 60 day window within which he should lodge the record of appeal is suspended during the typing of proceedings **provided** the appellant serves the letter bespeaking proceedings upon the court and the respondent. A certificate of delay is usually issued in such cases, specifying the time taken for the proceedings to be typed, for purposes of exclusion of the same during computation. It is common ground that the letter bespeaking proceedings was never served upon the respondent in this case. The appellant therefore was obliged to file the record of appeal strictly within sixty uninterrupted days of filing the Notice of appeal, this period lapsed on 25th April, 2017. Having failed to pursue a certificate of delay, it is too late for the respondent to visit blame on the registry for his own misapprehension of the Rules. The record of appeal was thus inexcusably filed out of time, without leave of Court and premised on a defective Notice of Appeal.

[12] Lastly, on the respondent’s submission that this application should be disallowed because the court is *functus officio* on account of the determination of the appeal the subject of this application; that contention was not supported by any evidence. The pleadings in this application do not support the respondent’s assertion at all. To begin with, the appeal that the respondent alleges to have been determined appears to be different from the appeal that is the subject matter of this application. As per the instant application, the appeal sought to be struck out is **Civil Appeal No. 40 of 2017 (the impugned appeal)**; whereas the appeal the respondent contends was determined is **Civil Appeal No. 20 of 2017**. Furthermore, a perusal of court records reveals that the parties to **Civil Appeal No. 20 of 2017** were **Majid Brek Karama vs. Zainab Abidin & Another**; which was marked withdrawn on 27th February, 2018. On the face of it therefore, that appeal appears to be manifestly distinct from the impugned appeal herein. Also, the records show the parties to the impugned appeal as being Kenya National Highways Authority vs. Mistry Premji Ganji Investment Limited; and that the same is still pending determination. The claim by the respondent that this Court is *functus officio* on account of the appeal in question having been determined, therefore fails as there was no material to support it. If anything, the impugned appeal appears to be live and pending determination.

[13] In conclusion however, as we have outlined in the preceding paragraphs, the Notice of Appeal which is the foundation of the appeal was found to be defective, so was the record of appeal. For the foresaid reasons, we find this application has merit. We accordingly allow the notice of motion dated 18th July, 2017 with costs to the applicant.

Dated and delivered at Mombasa this 6th day of December, 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