



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, MWILU & AZANGALALA, JJ.A)**

**CIVIL APPEAL (APPLICATION) NO. 54 OF 2015**

**BETWEEN**

**CHAIRMAN BOARD OF GOVERNORS**

**NG'UYA GIRLS HIGH SCHOOL .....APPELLANT/RESPONDENT**

**AND**

**MESHACK OCHIENG' T/A MECKO ENTERPRISES ..... 1ST RESPONDENT**

**THE PRINCIPAL SECRETARY**

**MINISTRY OF EDUCATION ..... 2ND RESPONDENT**

**ATTORNEY GENERAL ..... 3RD RESPONDENT**

**SECRETARY COORDINATOR ECONOMIC**

**STIMULUS PROGRAMME REPUBLIC WORKS ..... 4TH RESPONDENT**

**CABINET SECRETARY NATIONAL TREASURY ..... 5TH RESPONDENT**

*(An application to strike out the record of appeal pending appeal from the Ruling and Order of the High Court of Kenya at Nairobi (J. Kamau, J) dated 19<sup>th</sup> December, 2014*

**in**

***H.C. Misc. Civil Appl. No. 445 of 2013)***

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**RULING OF THE COURT**

**Rule 84** of the Rules of the Court of Appeal (“the Rules”) states as follows:

***“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.***

The 30-day time period, stipulated in the proviso to the above rule, is framed in mandatory terms. That proviso was brought in through Legal Notice No. 152 of 2002, and became effective on 4<sup>th</sup> July, 2002 (see ***Charles Murithi Muthuri vs Esther Karambu (Nyeri C. A. No. 341 of 2002)***).

If, therefore, the application to strike out a notice of appeal or the record of appeal is not brought within the stipulated time, the same is incompetent and must be struck out on that basis alone.

Such is the situation before us. The motion to strike out the record of appeal before us was filed on 25<sup>th</sup> August, 2015, some five months after the record of appeal was served upon the applicant on 10<sup>th</sup> March, 2015. There is no dispute about those facts. Mr. David Otieno, in his replying affidavit to the motion to strike out, avers that the appeal was filed on 9<sup>th</sup> March, 2015, and served upon the applicant on 10<sup>th</sup> March, 2015. In his further affidavit sworn the 5<sup>th</sup> October, 2015 in reply, the applicant, Mr. Meshack Ochieng, does not deny those facts, and simply avers that *“the application is properly on record and was filed timely by the fact that time did not ran (sic) during the consenting period.”* Whatever that means, the fact is that he was served on 10<sup>th</sup> March, 2015. The motion was, therefore, filed out of time, and we agree with Mr. Otieno, learned counsel for the respondent, that the same is incompetent and must be struck out, which we hereby do, with costs to the respondent.

**Dated and delivered at Nairobi this 5<sup>th</sup> day of February, 2016.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**P. M. MWILU**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**