



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, MUSINGA & GATEMBU, J.J.A)**

**CIVIL APPEAL (APPLICATION) NO. 3 OF 2015**

**BETWEEN**

**OKENO & SONS BUILDING**

**CONTRACTORS ..... APPELLANTS**

**VERSUS**

**BUKURA AGRICULTURAL**

**COLLEGE ..... RESPONDENT**

*(An Appeal from the Ruling and Orders of the High Court of Kenya at Kakamega, (G. Dulu, J.) dated 3<sup>rd</sup> October, 2014 and delivered by (A. C. Mrima, J.) on 23<sup>rd</sup> October, 2014*

**in**

**H.C MISC. CIVIL APPLICATION NO.206 OF 2013)**

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**RULING OF THE COURT**

1. Bukura Agricultural College, the respondent (the applicant in the present application) has sought an order to strike out the appeal lodged in this Court by Okeno & Sons Building Contractors, the appellant, under Rule 42 of the Rules of the Court.
2. Ms. J. Langat, learned counsel for applicant, referred to grounds in support of the application and submitted that the appeal was filed out of time and without leave of Court or consent of the parties; that no appeal lies to this Court from the decision of the High Court appealed from being a decision arising from an application under Section 35 of the Arbitration Act to set aside an arbitral award; and that the appeal is contrary to public policy as it contravenes the principle of limited intervention by the courts in arbitration matters and the principle of finality of arbitral awards.
3. Opposing the application, learned counsel for the appellant Mr. M. Orenge referred to the replying affidavit sworn by Romanus Okeno Osonye, a partner in the appellant firm and submitted that the

application was unprocedurally filed by the office of the Attorney General notwithstanding that the firm of Shitsama & Company advocates had all along represented the respondent; that the application is incompetent as it was not presented within the thirty days period prescribed under rule 84 of the Rules of the Court; that on 23<sup>rd</sup> October 2014 when the impugned decision was pronounced, the parties consented to leave being granted for the filing of the appeal; and that the application is devoid of merit and should be dismissed with costs.

4. We have considered the application and the rival submissions. Briefly, the background to the application is that the parties entered into a building contract under which the parties agreed to refer any disputes that might arise to arbitration. A dispute arose under the contract. That dispute was referred to arbitration. An arbitral award was made on 13<sup>th</sup> August 2013. The applicant applied to the High Court under Section 35 of the Arbitration Act to set aside that award. A ruling dated 3<sup>rd</sup> October 2014 was delivered on 23<sup>rd</sup> October 2014 by the High Court partially allowing the application to set aside the arbitral award by setting aside an award of Kshs.4, 000,000.00 that the arbitrator had awarded to the appellant.
5. Being aggrieved by that decision, the respondent filed a notice of appeal dated 3<sup>rd</sup> November 2014 and subsequently lodged the memorandum and record of appeal on 14<sup>th</sup> January 2015. It is deposed in the appellant's replying affidavit, and it was not contested, that the notice of appeal was served on 12<sup>th</sup> November 2014 while the memorandum and record of appeal was served on 21<sup>st</sup> January 2015.
6. Rule 84 of the Rules of the Court provides that:

*“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.”*

7. That rule is self-explanatory. By the time the present application was filed on 5<sup>th</sup> August 2015, the thirty day window provided under the proviso to rule 84 for doing so had long since been shut. The application is therefore incompetent and the same is hereby struck out with costs to the appellant.

Orders accordingly.

**Dated at Kisumu this 4<sup>th</sup> day of March, 2016.**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

I certify that this is a true

Copy of the original.

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**DEPUTY REGISTRAR**