



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)**

**CIVIL APPEAL/APPLICATION NO. 48 OF 2015**

**BETWEEN**

**SALAMA BEACH HOTEL LIMITED.....1<sup>ST</sup> APPLICANT**

**HANS JUERGEN LANGER.....2<sup>ND</sup> APPLICANT**

**TOURISTIC AND TECHNOLOGY GMBH**

**(TOUR AND TECH GMBH).....3<sup>RD</sup> APPLICANT**

**ACCREDO AG.....4<sup>TH</sup> APPLICANT**

**AND**

**KENYARIRI & ASSOCIATES ADVOCATES .....RESPONDENT**

*(Being an application for stay of execution of the order of the High Court of Kenya at Malindi (Chitembwe, J.) dated 19<sup>th</sup> June, 2015)*

*In*

*H.C.C.C. No. 20 of 2015)*

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**AND**

**CIVIL APPEAL/APPLICATION NO. 62 OF 2015**

**BETWEEN**

**KENYARIRI & ASSOCIATES ADVOCATES .....APPLICANT**

**AND**

**SALAMA BEACH HOTEL LIMITED.....1<sup>ST</sup> RESPONDENT**

HANS JUERGEN LANGER.....2<sup>ND</sup> RESPONDENT

TOURISTIC AND TECHNOLOGY GMBH

(TOUR AND TECH GMBH).....3<sup>RD</sup> RESPONDENT

ACCREDO AG.....4<sup>TH</sup> RESPONDENT

*(Being an application to strike out Civil Appeal No. 48 of 2015 from a ruling and order of the High Court of Kenya at Malindi (Chitembwe, J.) dated 19<sup>th</sup> June, 2015*

*in*

*H.C. C. C. No. 20 of 2015)*

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### **RULING OF THE COURT**

Because the two applications before us, though brought separately by the parties they are so intertwined and interlinked, it behooves us to craft one ruling so as to put to good use valuable judicial time. The two rival applications are **Civil Application Nos. 48 and 62 of 2015**. The former, filed contemporaneously with an appeal by **Salama Beach Hotel Limited & 3 others** (“*the former clients*”) seeks to stay the execution of taxed costs awarded to their erstwhile advocates, **Messrs. Kenyariri & Associates** “*the advocates*” pending the hearing and determination of the appeal; while the latter application, filed by the advocates, seeks to have the appeal declared incompetent and struck out.

Both applications were opposed and with leave of court, parties were allowed to canvass them through written submissions. In their application for stay of execution, the former clients contend that they have an arguable appeal and that unless the execution is stayed, substantial loss shall be visited upon them and the appeal may as well be rendered nugatory. Opposing the application, the advocates submitted that this Court lacked jurisdiction to grant the orders sought, as there is no proper appeal before us. In addition, that the issues intended to be made grounds of appeal have already been conclusively determined, making this application *res judicata* and that in any event, there can be no stay in respect of advocate’s taxed costs.

The appeal stems from an application dated 25<sup>th</sup> May, 2015, in which the former clients sought stay of execution of the advocates’ costs as taxed in **Nairobi High Court Misc. Application Nos. 769 and 770 of 2013** and **Nairobi Misc. Application Nos. 298, 299 and 300 of 2016** as well as **Malindi Misc. Application No. 16** (consolidated with **Misc. Applications Nos. 13, 14, 15, 17 41 & 42 of 2013**). That application was dismissed with costs, hence the appeal and the instant application.

But as already stated, the advocates filed an application of their own, through which they sought to have the appeal struck out *in limine*. Agitating this application, the advocates advanced three broad grounds; firstly, that the order sought to be appealed against is none existent as it had not been extracted in the manner provided for under **Order 21 Rule 8(2)** of the Civil Procedure Rules. In addition, that the purported appeal is premised on a defective notice of appeal, given that the notice of appeal on record bears a different set of litigants from those in the originating suit and that notwithstanding, the notice was never lodged at this Court’s Registry as evidenced by the lack of the court stamp thereon and endorsement by the Deputy Registrar, which renders the intended appeal a nonstarter. Secondly, that the issues sought to be addressed by this appeal have already been conclusively determined and therefore the appeal was *res judicata*. Elaborating on this, the advocates contend that prior to the application of 25<sup>th</sup> May, 2015 which is the application that gave rise to the appeal, the former clients had filed an application dated 4<sup>th</sup> December, 2014 in a different suit, namely **Malindi High Court Misc. Application No. 16 of 2013**, in which they sought orders similar to those in the application dated 25<sup>th</sup> May, 2015. That

application is said to have been heard on merit and dismissed with costs. Consequently, the application of 25<sup>th</sup> May, 2015 was deemed *res judicata* and dismissed as well. It is the advocates' argument therefore, that having not appealed against the dismissal of the application dated 4<sup>th</sup> December, 2014, the former clients cannot now purport to appeal against the latter *res judicata* application. Though the advocates submitted at length on the issue of *res judicata*, it was unnecessary to capture those arguments for reasons that shall become apparent shortly. Lastly, the notice of appeal is also impugned for having purported to include one **Zahra Langer** as a party in the appeal, a defect fatal to the appeal as she was a stranger to the proceedings in the trial court.

Opposing this application, the former clients filed a replying affidavit sworn by one **Hans Jurgen Langer** on 15<sup>th</sup> February, 2016 in which they contend that the advocates' application is time barred. Citing **Rule 84** of the Court of Appeal Rules, the clients argue that an application to strike out a notice of appeal must be brought within thirty (30) days of service of the said notice upon a respondent. Secondly, that on their part, the failure to extract the order in accordance with the provisions of **Order 21 Rule 8** was not fatal to the appeal, as the said provisions are not couched in mandatory terms. In any event they say, the said provision does not take away this Court's inherent power to extract the order on its own motion. Additionally, that though the notice of appeal may not have the court's certification or receipt, this is a defect cured by the fact that upon receipt of the pleadings as filed, the Deputy Registrar of the Court of Appeal confirmed that the documents were indeed the same ones filed in the High Court. With regard to the inclusion of new parties, namely Zahra Langer, the former clients assert that this was merely a typographical error on their part.

Given that the advocates' application seeks to strike out the former clients' application and or appeal, it is imperative that it is determined first. Only one issue arises in this application and the same has in turn, a domino effect on the fate of the former clients' application and the appeal. The issue is whether the advocates' application is time barred and if so, the consequences thereof.

In answer to this, the proviso to **Rule 84** requires that an application to strike out a notice of appeal or an appeal be brought within 30 days of service of the notice of appeal or appeal (as the case may be) upon an affected party. The rule 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.**(Emphasis added)

This Court has in the past had occasion to decide the fate of applications made under **Rule 84**, but which had been filed out of time. In **Joyce Bochere Nyamweya v Jemima Nyabokeye Nyamweya & another [2016] eKLR**, this Court held that parties are bound by the mandatory nature of the proviso to **Rule 84** of this Court's Rules. An application seeking to strike out a notice of appeal or an appeal must be made within thirty (30) days of service of the notice of appeal or the appeal sought to be struck out. That failure to do so renders such an application fatally defective and liable to be struck out. As was held in the **Joyce Bochere case (supra)**, stipulations on time frames within which acts should be done in law are of essence and must be strictly observed. In the event that a party finds itself caught up by the lapse of time as was in this case, the proper thing to do is to file an application for extension of time under **Rule 4** of this Court's Rules. Similarly, in **William Mwangi Nguruki v. Barclays Bank of Kenya Ltd [2014] eKLR**, the Court held that an application to strike out a notice of appeal that is brought after 30 days from the date of service of the notice of appeal is incompetent unless leave is sought and obtained to file the application out of time. See also **Michael Mwalo v. Board of Trustees of National Social Security Fund [2014] eKLR**.

It would thus appear that both the court and the litigants are strictly bound by the timelines set by the

proviso to **Rule 84**. In this case, it is common ground that service of the purported notice of appeal was effected on 2<sup>nd</sup> July, 2015 while this application, seeking to strike it out, was filed in November 2015; four months after service of the notice. No leave was sought to file it out of time. In view of the aforesaid provisions of law and the authorities, the inescapable result is that the advocates application fails and must be dismissed.

However, in light of the provisions of **Sections 3A** and **3B** of the Appellate Jurisdiction Act, this Court is emboldened to facilitate the just, expeditious, proportionate and affordable resolution of the appeals before it. In doing so, it cannot turn a blind eye to material omissions that *prima facie* are apparent on the record of appeal, but rather, shall facilitate their remedy by the parties where such omissions are curable.

In this case, two main omissions are readily noticeable. The first glaring defect is with regard to the memorandum of appeal which suggests that the appeal is ‘*against the Order of the High Court of Kenya at Malindi (Honourable Justice Chitembwe) dated 26<sup>th</sup> June 2015 in High Court Civil Case No. 20 of 2015*’.) However, a cursory perusal of the record of appeal shows that the order impugned in the memorandum of appeal is indeed missing in the record. The same appears not to have been extracted and included in the record. The consequences of this can be found in the decision of **Chege v Suleiman [1988] eKLR**, which echoed the traditional position that failure to extract an impugned order renders the appeal fatally defective, with the only remedy being to strike it out. Counsel for the respondents has invited this Court to exercise leniency and discretion and find that the documents were proper, having been perused and approved by this Court’s Deputy Registrar before they wound up before us. With respect, no legal provision allows for the exercise of this Court’s discretion in such a manner. Besides, the fate of an appeal anchored on a non extracted order has not changed, not even with the advent of the new liberal approach afforded by the overriding objective and the Constitution; which encourages dispensation of justice without undue regard to procedural technicalities. As held in **Floris Pierro & another v Giancarlo Falasconi (as the administrator of the estate of Santuzza Billioti alias Mei Santuzza) [2014] eKLR**; an appeal that fails to include the extracted order and or decree appealed from is incurable and the only recourse available is to strike it out, as the order or decree appealed from is a primary document in terms of **Rule 87(1)(h)** of this Court’s Rules and must form part and parcel of the record of appeal. In that case, the Court delivered itself thus:-

**“...The order embodies the Court's decision. If it is not included, the Court of Appeal will be at a loss in determining what the High Court determined. It cannot be the business of this Court to tooth-comb the judgment or ruling so as to decipher the decision of the court below. That decision must be embodied in the order and or decree. Accordingly failure to include the court order or decree would render the record of the appeal to be fatally defective and liable to be struck out. In any event an appeal can only be against a decree or an order and not against a judgment or ruling.”**

In addition, it should be noted that even as this Court endeavours to breathe life into an appeal notwithstanding technical lapses of procedure, it will only do so with regard to deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, (see. **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR**). The discretion of the court under **Sections 3A** and **3B** of the Appellate Jurisdiction Act cannot be invoked to cure lapses which place the court’s jurisdiction in uncertainty or unchartered waters.

The second glaring defect or omission is that the notice of appeal does not appear to have been lodged and or received by this Court’s Registry. While we pay homage to the aforesaid precedents on the issue of the timelines set by **Rule 84**, we should also hasten to add that in all those cases, whether or not the notice of appeal was lodged was never an issue. Such is not the case here. In all the aforesaid decisions, the notices of appeal sought to be struck out had been properly lodged and endorsed by the respective registries, with the only bone of contention between parties being the issue of service. In this case however, it is unclear when the notice of appeal was lodged. Of importance is **Rule 77(1)** of this Court’s Rules which demand that:-

**“(1) 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.”**

However, in this case, the notice on the face of it is incurably defective *ab initio*, having not been duly lodged as required. In other words, there is no evidence that it was ever lodged.

The procedure of instituting an appeal is laid out under **Rule 75** of this Court’s Rules, with the pertinent portion thereof being that;

**“(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.**

**(2) .....**”

The rule specifically requires that the notice not only be written, but formally lodged with the registrar. In this case, it is not in doubt that a written notice was given by the appellants. But was the same lodged within the meaning of **Rule 75(1)** aforesaid? **Rule 10** of this Court’s Rules provides some guidance in answering this question; as it provides for the endorsement of documents presented to the (Deputy) Registrar and requires that:

**“Whenever any document is lodged in the Registry or in a sub-registry or in the registry of a superior court under or in accordance with these Rules, the Registrar or deputy registrar or registrar of the superior court, as the case may be, shall forthwith cause to be endorsed showing the date and time when it was so lodged.”**

It is common ground that no endorsement was caused on the notice. Indeed, the notice of appeal included in the record of appeal does not bear such endorsement of the date and time that it was received by the Deputy Registrar. The respondents were of the view that this is not a fatal defect. It is however to be appreciated that the institution of appeals and the jurisdiction of this Court with regard to appeals is determined in part by timelines. Infact, the importance of proper and timely lodging of the notice of appeal cannot be gainsaid. It determines the running of time and the attendant accommodations to be given to the appellant in terms of compiling the record of appeal and securing of proceedings from the trial court. (See. **Rules 75 (2), 77(1), 82 & 83** of the **Court of Appeal Rules**). Indeed, the notice of appeal defines the starting point in the computation of timelines in relation to the appeal. The effect of a notice of appeal lodged without endorsement by the (Deputy) Registrar automatically impacts on the timelines of all the other steps to be taken in the appeal. How for example, would the court or a respondent know whether the notice of appeal was lodged within time (as required by **Rule 75(2)** of the Rules?). How will the court and the respondent know whether service of the notice of appeal was effected within 14 days of the lodging of the notice (as envisioned by rule **77(1)** of the Rules?) How are the court and the respondent to tell if the record of appeal has been lodged within sixty days of the lodging of the notice (as required under rule **82(1)** of the Rules?) or whether there has been a default in instituting appeal and when or whether steps ought to be taken under **Rule 83**?

In our view, the failure to properly lodge the notice of appeal is a fatal defect which throws the whole system into disarray and if allowed, is likely to occasion prejudice and injustice to a respondent.

In the premises, we take the view that it would serve the overriding objective to strike out the appeal *suo motu*. Indeed, as indicated by this Court in the case of **Mohamed Aden Abdi v. Abdi Nuru Omar & 2 others [2007] eKLR**; even in the face of a time barred application which is accordingly dismissed, the court nonetheless retains the inherent power to strike out the appeal where a record of appeal fails to contain one or more of the primary documents. In this case, no attempt was ever made under **Rule 88** of the rules to either file a supplementary record of appeal availing the missing impugned order or to seek leave to do so. In the premises, the client’s application and appeal are anchored on quicksand. They are accordingly struck out.

**Dated and delivered at Mombasa this 17<sup>th</sup> day of June 2016**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**