



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. NAI 260 OF 2011

CORAM: WAKI, G.B.M KARIUKI & J. MOHAMMED, J.J.A.

BETWEEN

MUNICIPAL COUNCIL OF MAVOKOAPPLICANT

AND

ARISTOCRATS CONCRETE COMPANY LIMITEDRESPONDENT

**(An application to strike out the Notice of Appeal from the ruling of the High Court of Kenya
(Nambuye, J) dated 18th September, 2009**

in

HCCS NO. 923 OF 2003)

RULING OF THE COURT

Background

1. Before us is a Notice of Motion dated 17th November, 2011, brought pursuant to **Rule 84 of the Court of Appeal Rules** (the Rules). The applicant seeks the following orders:

i) The Notice of Appeal herein dated 17th May, 2010 be struck out.

ii) The costs of this application be provided for.

2. The grounds upon which the applicant relies on in support of its application are that the respondent has violated the rules of this Honourable Court by failing to file and serve the record of appeal within the required period; the delay in filing and serving of the record of appeal is deliberate and inordinate and greatly prejudices the applicant and is tantamount to abandoning the appeal herein; that all litigation must come to an end and that it is in the interest of justice that the Notice of appeal herein be struck out.

3. The genesis of this application is that the respondent expended funds in the sum of KShs.65,375,600/=, to construct a 6.5 kilometre road to its quarry and other quarries. Further, that the road was beneficial to the respondent and its inhabitants. The applicant and the respondent entered into a

memorandum of agreement on or about 15th October, 2001 for the payment of the expended sum through payments of toll charges. The respondent was aggrieved that the applicant collected toll charges but failed to remit the same to the respondent. Consequently, the respondent filed a suit against the applicant.

4. The applicant in its defence averred that although a Memorandum of Understanding was signed between it and the respondent, it was a void agreement and did not form a binding contract as there was no approval by the Minister of Local Government as required by the Local Government Act. further, that the agreement was attested by an individual contrary to the mandatory requirements that such documents be sealed with the common seal of the applicant as provided for under **Section 46 of the 2nd Schedule of the Local Government Act**.

5. The applicant filed an application dated 29th June, 2007, seeking to strike out the respondent's suit on the grounds that the suit was incompetent as it had been brought against an unknown entity, Mavoko Municipal Council instead of Municipal Council of Mavoko, the applicant herein and that the claim was based on an illegal contract.

6. In opposition, the respondent, on 4th March, 2008 filed a replying affidavit and a further affidavit on 22nd May, 2008. It averred that the suit sought to be struck out had been in court for the last four [4] years and the issue of a misnomer in the description of the applicant had not previously been raised.

7. The High Court, Nambuye, J [as she then was] vide a ruling dated 18th September, 2009, struck out the respondent's suit with costs. The court further ordered that the respondent was at liberty to redraft the plaint, describe the applicant properly and seek leave to file the suit out of time.

8. Aggrieved by that decision, the respondent filed a Notice of Appeal on 17th May, 2010, after leave was granted to the respondent by the High Court (Muchelule, J) vide a ruling dated 13th May, 2010, to file the suit out of time.

Submissions by counsel

9. At the hearing, Mr P.M. Kahonge appeared for the applicant while Miss Elizabeth Ngonde appeared for the respondent. Miss Ngonde raised a preliminary objection on grounds that the applicant's application to strike out the notice of appeal dated 17th May, 2010, was filed out of time as it did not comply with the proviso to **Rule 84 of this Court's Rules**.

10. Mr Kahonge, opposed the preliminary objection and reiterated the grounds in support of the application to strike out the Notice of Appeal. He argued that the notice of appeal was filed on 17th May, 2010 and that the respondent was obliged to file the Memorandum and Record of appeal within 60 days, that is, by 16th July, 2010 which the respondent had failed to do. He submitted that the respondent cannot rely on the proviso to **Rule 82 (2) of the Rules** as it did not copy the letter bespeaking the proceedings to the applicant; that an essential step (as envisaged by **Rule 84**) of service of the appeal has not been taken within the prescribed time; that litigation must come to an end and that the failure by the respondent to take an essential step is deliberate and inordinate and greatly prejudices the applicant. Counsel urged us to strike out the Notice of Appeal.

11. In opposing the application, Miss Ngonde urged the Court to strike out the applicant's application as it was brought out of time as per **Rule 84** and was, therefore, incompetent.

12. Mr Kahonge in response, urged us to apply a purposive interpretation of **Rule 84 of the Rules**. Counsel argued that **Rule 1 (2)** is applicable herein as it gives this Court wide discretionary powers to dispense justice.

Analysis and determination

13. We have considered the application, the grounds in support of the application, the submissions by counsel and the law. **Rule 84 of the Rules** provides 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.” Emphasis added

14. Based on the foregoing provision, an applicant can seek an order striking out an appeal on the ground that either no appeal lies or that an essential step in the proceedings has not been taken or that the essential step has not been taken within the prescribed time.

15. It is common ground that the impugned Notice of Appeal herein was filed on 17th May, 2010 and served on the applicant on 19th May, 2010. By simple computation of time, the period within which an application to strike out the Notice of Appeal should have been filed expired on or about 20th June, 2010. The applicant filed the present application on 18th November, 2011, about one year and five months outside the stipulated time.

16. This court in the recent case of **GICHUKI KING’ARA & COMPANY ADVOCATES V AL JALAL ENTERPRISES LIMITED & 2 OTHERS, CIVIL APPLICATION NO. NAI 211 OF 2012 (UR 156/2012)** (Unreported) stated in reference to Rule 84:

“The applicant did not file its application within the stipulated period of thirty days. It did so on 9th August 2012 which was about five months outside the limit set by the Rules. It is clear to us that such an omission renders the application before us a non-starter given the logic and rationale of the time-bound provision. The rule is mandatory and an application brought outside the thirty-day period properly qualifies to be seen as an afterthought.”

17. We find that the filing of a **Rule 84** application outside the stipulated thirty [30] days renders the application incompetent. The rules serve the role of ensuring the just expeditious and efficient dispensation of justice and should be complied with.

18. Accordingly, in the circumstances of this application, we find that the motion before us that seeks to strike out the notice of appeal on account of default is itself incompetent. The preliminary objection is, therefore, upheld and we accordingly strike out the notice of motion dated 17th November, 2011, with costs to the respondent.

Dated and delivered at Nairobi this 8th day of May, 2015.

P. N. WAKI

JUDGE OF APPEAL

G. B. M. KARIUKI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR