**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: OKWENGU, MAKHANDIA, SICHALE, JJA)**

**CIVIL APPLICATION NO. 27 OF 2013**

**KENYA PORTS AUTHORITY……APPLICANT**

**AND**

**MAISON 425……...……RESPONDENT**

(An application for extension of time within which the Applicant ought to have filed the record of Appeal up to the 8th October, 2013 and for the record of appeal filed on the 8th October, 2013 be deemed properly filed within time so extended.)

in

Civil Appeal No. 37 of 2013)

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**BETWEEN**

**MAISON 425……...APPELLANT**

**AND**

**KENYA PORTS AUTHORITY……RESPONDENT**

(Being an appeal from the ruling and Order of the High Court of Kenya at Mombasa (*Mwongo J*) dated 15th June, 2012

in

HCCC No. 43 of 2009)

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**RULING OF THE COURT**

[1] **Kenya Ports Authority** (hereinafter referred to as the applicant) is the respondent in **Civil Appeal No 37 of 2013** in which the appellant **Maison 425** (hereinafter referred to as the respondent) has appealed against the ruling of the High Court (Mwongo J) delivered on 15th June 2012.

[2] What is before us is a notice of motion dated 1st November 2013, in which the applicant seeks to have the record of appeal filed by the respondent in Civil Appeal No 37 of 2013, struck out and the appeal dismissed with costs. The application is based on the ground that the record of appeal which, was filed on 8th October 2013, was filed outside the period stipulated by the Court of Appeal Rules without any orders for extension of time or leave of the Court being granted.

[3] In an affidavit sworn by ***Stephen Kyandih*** a senior legal officer employed by the applicant, it is deponed that the ruling sought to be impugned in the appeal was delivered on 15th June 2012, and that the notice of appeal was lodged on 25th June 2012; that although the respondent applied for certified copies of the typed proceedings, a copy of the application was not served on the applicant. The applicant therefore maintains that the record of appeal filed on the 8th October 2013, was filed outside the requisite sixty (60) days period; that the time taken by the Court for preparation and delivery of the certified copies of the proceedings to the applicant cannot be excluded from the computation of time within which the appeal ought to have been instituted because the appellant's letter applying for proceedings was not served upon the applicant as required under ***Rule 82(2)*** of the Court of Appeal Rules.

[4] The motion is opposed through a replying affidavit sworn by ***Karen Mate*** an advocate in the firm of Iseme Kamau & Maema, the Advocates for the respondents. She concedes that the appeal was filed fourteen days after the statutory time for filing the record of appeal, but contends that this was due to inadvertence on the part of the advocates. She further maintains that the applicant has not suffered any prejudice as it was served with a record of appeal. She urges the Court to disallow the application in the interest of justice.

[5] Both parties filed written submissions that were highlighted before us. For the applicant, it was reiterated that **Rule 84** of the Court of Appeal Rules empowers this Court to strike out the notice of appeal where some essential steps in the proceedings has either not been taken or not taken within the prescribed time. Relying on **Mariamu Abubakar Ireri & Another v National Cereals & Produce Board [2009] eKLR**, it was submitted that the respondent could not rely on the proviso to **Rule 82(1)** of the Court of Appeal Rules, as a copy of the letter from the respondent seeking copies of proceedings and judgment from the High Court was not served on the applicant. It was further submitted that the respondent could not find refuge under the overriding objectives as it has not established a proper basis for the exercise of the Court's discretion against striking out the appeal, having not given any explanation for its failure to serve a copy of the letter applying for the proceedings on the applicant. The case of ***Linda Watiri Muriuki v Neville Patrick Gibson and 3 others Civil Appeal No 327 of 2010***, was cited for that proposition. It was argued that the question of time within which the appeal had to be instituted was not a mere procedural technicality, but goes to the root of the judicial process and therefore ***Article 159 (2) (d)*** could similarly not be applied.

[6] For the respondent, it was submitted that the application was untenable as it was only anchored on the failure to serve the applicant with a copy of the letter bespeaking copies of the typed proceedings. It was noted that the letter bespeaking the proceedings was only to notify the applicant of the steps taken towards advancing the appeal, and this purpose was achieved when the applicant was served with the record of appeal. The delay in filing the record of appeal within time was attributed to inadvertence on the part of a former law clerk of the respondent's advocates' who failed to prepare the record of appeal within time; that the applicant had failed to establish that the delay was inordinate or that the applicant suffered prejudice which cannot be compensated by an award of costs; and that the respondent had taken steps to ameliorate the situation by filing an application for extension of time for lodging the record of appeal.

[7] The respondent urged the Court to exercise its discretion in its favour, citing the following authorities in which time was extended:

- **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others, Civil Appeal No (Application) 228 of 2013;**
- **Niazsons (K) Limited v China Road & Bridge Corporation (Kenya), Civil Application No. Nai 109 of 2000.**

[8] The Court was further urged to promote substantial justice as advocated by **Article 159(2)(d)** of the Constitution as read together with **sections 3A and 3B** of the Appellate Jurisdiction Act. In this regard it was posited that the draconian approach of striking out pleadings, that is inimical to justice should be avoided. The respondent concluded its submissions by reiterating that the overriding objective of the Appellate Jurisdiction Act and Rules made thereunder could only be achieved by sustaining the appeal so that the appeal is determined on merit. In support of this position the following authorities were cited:

- **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others (supra);**
- **Joseph Kiangoi v Waruru Wachira & 2 Others, Civil (Application) No. 130 of 2008;**
- **Kenya Commercial Bank Limited v Kenya Planters Co-operative Union, Civil Application No 85 of 2010;**
- **The Board of Trustees & 6 Others v Meshack Owino Onyango & Another, Civil Appeal (Application) No 87 of 2007.**

[9] The above is the background against which we are called upon to determine the motion. We note that the motion is for striking out the record of appeal. This remedy has its roots under **Rule 84** of the Court of Appeal Rules that 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"**

[10] We are alive to the caution that has been given time and again that striking out pleadings is a draconian remedy that should only be resorted to in very clear circumstances, and where the pleadings are not capable of resuscitation. We also take cognizance of our obligation under the overriding objective of the Appellate Jurisdiction Act, as set out under Sections 3A & 3B of the Appellate Jurisdiction Act, to facilitate the just, affordable proportionate and expeditious disposal of appeals. Above all we are mindful of the fact that in the exercise of our judicial authority, we must be guided by the principles set out under Article 159(2) of the Constitution which includes ensuring justice to all, administering justice without delay and administering justice without undue regard to technicalities.

[11] Although in this case what is sought is the striking out of the record of appeal, the net effect of granting the application is a deathblow to the appeal, as the appeal would not be able to stand without the record of appeal. It is not disputed that the record of appeal was filed outside the requisite time. In the replying affidavit the respondent's counsel admits that there was a delay of 14 days, which, she attributes to inadvertence on the part of "the firm." An attempt has been made in the written submissions filed by the respondent's advocate to explain the inadvertence by laying the blame on an unidentified former clerk who allegedly failed to prepare the record of appeal within the required time.

[12] In our view the explanation given for the delay is a lame excuse. It does not provide a good explanation, but simply passes the buck to a shadowy clerk. Moreover no explanation has been given for the failure by the respondents to serve a copy of the letter bespeaking the proceedings. This failure aggravated the situation by extending the period of delay beyond one year from the time of filing the notice of appeal, as time for preparation of the proceedings and judgment could not be excluded under Rule 82(2) of the Court of Appeal Rules.

[13] It is evident from Rule 82(1) of the Court of Appeal Rules that an appeal is instituted effectively by the filing of primary documents that includes a record of appeal, and this should be done within 60 days from the date of filing of the notice of appeal. Thus the filing of the record of appeal is a key and critical

step in the appeal process. It is not a minor technical procedure, compliance of which this Court can relegate to observance of "undue procedural technicality" under Article 159(2)(d) of the Constitution. Indeed the requirement is neither unwarranted nor unjustified as without the record of appeal, there is no substantive appeal before the Court and therefore a lapse in the filing of a record of appeal goes to the root of the appeal. Nor can the failure to file the record of appeal in time be ameliorated by the fact that no prejudice is likely to be suffered.

[14] Taking cognizance of the fact that the consequences of granting this application would be grim, we have considered whether the respondent can find refuge under sections 3A &3B of the Appellate Jurisdiction Act. Nonetheless as was stated by the this Court in **Ramji Deva Vekaria v Joseph Oluya, CA (Application) No.154 of 2010:**

**This is an omission that goes to the root of the Rules, i.e. whether or not a party can file an appeal out of time and without leave of the Court. To invoke the provisions of section 3A and 3B would result in a serious precedent being set which will mean utter confusion in the court corridors as there will no longer be any reason for following the rules of the Court even when they have been violated with impunity"**

[15] Regrettably we come to the conclusion that the respondent goofed and must swallow the bitter pill. We allow the application, strike out the record of appeal in Civil Appeal No 37 of 2013 and dismiss the appeal with costs. Orders accordingly.

**Dated and delivered at Mombasa this 3rd day of April, 2014.**

**H. OKWENGU**

**….....**

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

**….....**

**JUDGE OF APPEAL**

**F. SICHALE**

**….....**

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**