



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Shah & 7 others v Mombasa Bricks & Tiles Ltd & 5 others (Petition
18 (E020) of 2022) [2023] KESC 28 (KLR) (21 April 2023) (Ruling)**

Neutral citation: [2023] KESC 28 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 18 (E020) OF 2022

PM MWILU, DCJ & VP, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ

APRIL 21, 2023

BETWEEN

ARVIND SHAH 1ST APPELLANT
HARHABEN SHAH 2ND APPELLANT
GOSHRANI HOLDINGS LTD 3RD APPELLANT
COAST PROPERTIES LTD 4TH APPELLANT
COAST CLAY WORKS LTD 5TH APPELLANT
COAST MAIZE MILLERS LTD 6TH APPELLANT
SPA MILLERS NAIROBI LTD 7TH APPELLANT
HIGHWAY CENTRE LTD 8TH APPELLANT

AND

MOMBASA BRICKS & TILES LTD 1ST RESPONDENT
DINESH KUMAR ZAVERCHAND JETHA 2ND RESPONDENT
ATEET DINESH JETHA 3RD RESPONDENT
ZAVERCHAND SOJPAL JETHA HOLDINGS LTD 4TH RESPONDENT
EXON INVESTMENTS LTD 5TH RESPONDENT
EXON PLASTICS LTD 6TH RESPONDENT

*(Being an application for striking out the Record of Appeal
dated April 19, 2022 and dismissing the appeal in its entirety)*



Failure to submit a notice of appeal that was stamped or endorsed by the Court of Appeal to the Supreme Court is not fatal

The instant application sought to have the record of appeal struck out and the appeal dismissed. The applicants contended that the appellants had omitted pleadings/documents from their record of appeal. The court held that it was not mandatory for the appellant to precede the application for review of certification by the filing a notice of appeal. The court pointed out that a notice of appeal was a jurisdictional pre-requisite whose filing signified the intention to appeal. The court further highlighted the contents of a record of appeal to the Supreme Court. The court further held that even though the respondents submitted a notice of appeal that was not stamped or endorsed by the Court of Appeal, the same was not fatal.

Reported by Kakai Toili

Civil Practice and Procedure - appeals - appeals to the Supreme Court - documents required when filing appeals - notice of appeal and record of appeal - purpose of notice of appeals - whether the failure to submit a notice of appeal that was stamped or endorsed by the Court of Appeal to the Supreme Court was fatal - whether it was mandatory for an appellant to precede an application for review of certification by the filing a notice of appeal - what were the contents of a record of appeal to the Supreme Court - of Kenya, 2010, article 159(2)(d); Supreme Court Rules, 2020, rules 36 and 40(1).

Brief facts

The instant application sought to have the record of appeal dated April 19, 2022 and lodged on July 29, 2022 be struck out and the appeal dismissed. The applicants contended that the appellants had omitted pleadings/documents from their record of appeal that the court required to determine the appeal in the unlikely event the court went beyond the two certified questions of law and interrogates the factual findings by the Court of Appeal. The applicants further contended that they would have no legal avenue to introduce the omitted documents into the record, denying them a right to a fair trial, necessitating striking out of the record of appeal as the appropriate remedy.

The respondents argued that the notice of appeal was not one of the documents required to be included in the record of appeal; that the judgment of the Court of Appeal having been rendered on April 4, 2019, the respondents duly filed their notice of appeal as acknowledged by the Deputy Registrar on April 18, 2019; that the same was transmitted to the court on the same day;

Issues

- i. Whether it was mandatory for an appellant to precede an application for review of certification by the filing of a notice of appeal.
- ii. What was the purpose of a notice of appeal?
- iii. What were the contents of a record of appeal to the Supreme Court?
- iv. Whether failure to submit a notice of appeal that was stamped or endorsed by the Court of Appeal to the Supreme Court was fatal.

Held

1. Rule 36 of the Supreme Court Rules mandated the appellant to file a notice of appeal within fourteen (14) days from the date of judgment and transmit a copy to the Registrar of the court. It was not mandatory for the appellant to precede the application for review of certification by the filing a notice of appeal. Rule 36(4) provided that in lodging an appeal on a matter of general public importance, it was not mandatory to obtain such certification before filing the notice of appeal.

2. A notice of appeal was a jurisdictional pre-requisite whose filing signified the intention to appeal. From the record, the intention to appeal was signified vide the notice of appeal filed on July 29, 2022 as submitted alongside the petition of appeal. The notice of appeal was filed before the Court of Appeal within the timelines stipulated.



3. Even though the title of the notice of appeal filed indicated that it was filed in regard to an application for grant of certification and leave to appeal to the Supreme Court, its contents specified the appellants' intent to appeal against the decision of the Court of Appeal rendered on April 4, 2019. The parties having engaged in the certification and leave to appeal proceedings both at the Court of Appeal and before the court, there was little doubt left as to the appellants' intention to appeal against the judgment of the Court of Appeal. There was no need to entangle the court in the filing and administrative processes by the Court of Appeal, as to the stamping and signing by the Registrar of that court as the notice of appeal was duly lodged before the Court of Appeal.

4. Rule 40(1) of the Supreme Court Rules listed the contents of the record of appeal as;

1. a certificate, if any, certifying the matter as of general public importance;
2. the judgment or ruling of the Court of Appeal being appealed from;
3. a judgment or ruling of the High Court or a court of equal status; and
4. the relevant pleadings required to determine the appeal. As per the applicants, the documents stated to be excluded thereby making the record of appeal incomplete were the consent order of the agreed issues in the High Court which was quoted in verbatim in the High Court judgment, notification of sale by Dolphin Auctioneers, valuation report by Tysons Ltd, copies of cheques, banking slips and bank statements. Being a matter of general public importance that raised specific questions as framed, those documents were only useful in interrogation of findings of facts which did not fall within the purview of the court. They were not relevant or necessary in determination of the appeal.

5. Article 159(2)(d) of the Constitution obliged the court to administer justice without undue regard to procedural technicalities. Therefore, even though the respondents submitted a notice of appeal not stamped or endorsed by the Court of Appeal, the same was not fatal. The notice of appeal fulfilled its purpose of conferring the appellants' intention to appeal. The matter was to be determined on the framed issues.

Application dismissed.

Orders

Costs to abide the outcome of the appeal.

Citations

Cases

1. Bookpoint Limited v Guardian Bank Limited & another ([2021] eKLR) — Mentioned
2. Lemanken Aramat v Harun Meitamei Lempaka & 2 others (SC Petition No 5 of 2014 [2014] eKLR) — Mentioned
3. Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission, Wilfred Rotich Lesan, Robert Siolei County Returning Officer Bomet County, Kennedy Ochayo, Wilfred Wainaina, Patrick Wanyama, Mark Manzo & Abdikadir Sheikh (Application 16 of 2014; [2014] KESC 12 (KLR)) — Mentioned
4. Salama Beach Hotel Ltd v Kenyariri & Associates ([2017] eKLR) — Mentioned
5. University of Eldoret & another v Hosea Sitienei & 3 other (SC Application No 8 of 2020 [2020] eKLR) — Mentioned

Statutes

1. Supreme Court Rules, 2020 (Act No 7 of 2007 (Sub leg) — Rule 3(5), 31, 36 (3), 40(1)(i)(d) — Interpreted

Advocates

Mr Amol (ALP Kenya Advocates) for the 1st to 8th appellants

Mr Ndegwa b/b for Ms Wambui Advocate (Mohammed Muigai Advocates LLP) for the 1st and 2nd respondents

Mr Ndegwa (Ndegwa & Sitonik Advocates) for the 3rd & 4th respondents

Mr Ambrose Weda (Weda & Co Advocates) for the 5th & 6th respondents



RULING

Representation:

Mr Amol for the 1st to 8th appellants

(ALP Kenya Advocates)

Mr Ndegwa h/b for Ms Wambui Advocate for the 1st and 2nd respondents

(Mohammed Muigai Advocates LLP)

Mr Ndegwa for 3rd & 4th respondents

(Ndegwa & Sitonik Advocates)

Mr Ambrose Weda for the 5th & 6th respondents

(Weda & Co Advocates)

1. Upon perusing the notice of motion by the 3rd and 4th respondents dated December 2, 2022 and filed on December 5, 2022, pursuant to rules 3(5), 31, 36 (3), and 40(1)(i)(d) of the [Supreme Court Rules, 2020](#) seeking to have the Record of Appeal dated April 19, 2022 and lodged on July 29, 2022 be struck out and the appeal dismissed; and
2. Upon considering the grounds in support of the application; the supporting affidavit sworn on December 2, 2022 by Ateet Dinesh Jetha, written submissions dated December 5, 2022 and filed on even date; and rejoinder submissions dated December 19, 2022 and filed on even date; wherein the applicants contend that contrary to rule 40(1) of the [Supreme Court Rules, 2020](#) the appellants have omitted pleadings/documents from their record of appeal that this court requires to determine the appeal in the unlikely event the court goes beyond the two certified questions of law and interrogates the factual findings by the Court of Appeal; that the appellants chose not to file the said documents despite this omission having been brought to their attention; that the respondents will have no legal avenue to introduce the omitted documents into the record, denying them a right to a fair trial, necessitating striking out of the record of appeal as the appropriate remedy;
3. Upon considering the applicants' further argument that this court lacks jurisdiction to determine the appeal as the notice of appeal filed by the appellants is fatally defective as it was neither stamped as received/filed by the Court of Appeal, endorsed by the Deputy Registrar of the said court nor transmitted to the Registrar of this court as required under rule 36 (3) of the Supreme Court Rules; that in any event since the title of the notice of appeal is indicated as relating to the application for certification and leave to appeal to this court, the same does not relate to the judgment delivered on April 4, 2019. The applicants rely on the Court of Appeal decision in [Salama Beach Hotel Ltd v Kenyariri & Associates](#) [2016] eKLR and this court's decision in [Bookpoint Limited v Guardian Bank Limited & another](#) [2021] eKLR;
4. Cognisant that the applicants had filed a notice of preliminary objection dated November 24, 2022 and filed on November 25, 2022 based on the same grounds and the 1st and 2nd respondents did not respond to the application though they had filed a replying affidavit to the main appeal;
5. Upon considering the 5th and 6th respondents' written submissions dated December 14, 2022 and filed on December 16, 2022 in support of the application, where they reiterate the averments by the applicants and affirm that the exclusion of the documents would be highly prejudicial to the



respondents taking into account that the appellants failed to take advantage of rule 40(4) of the Supreme Court Rules to file the documents;

6. Upon considering the appellants' replying affidavits of Arvind Shah, Grace Odhiambo Odongo and Fredrick Kinyua Kamundi sworn on December 9, 2022 and filed on December 13, 2022 and the written submissions dated December 9, 2022 and filed on December 13, 2022 where they contend that the Record of Appeal presented in this matter contains all the documents as stipulated under rule 40 (1) of the Supreme Court Rules, 2020; that they are required to annex all documents relevant to determine the appeal and not to annex every document that has ever been filed since the dispute started; that in any case, exclusion ought not to warrant striking out of the entire appeal; in the alternative, if this court desires to obtain information that was part of the superior court's record it may on its own motion call upon such files for its perusal; that the respondents having filed their responses by November 17, 2022 neither one of them raised any allegation that there are material documents that were missing which would be prejudicial upon them for it was an afterthought; and
7. Upon further consideration of the appellants' argument that the notice of appeal is not one of the documents required to be included in the record of appeal; that the judgment of the Court of Appeal having been rendered on April 4, 2019, the appellants duly filed their Notice of Appeal as acknowledged by the Deputy Registrar on April 18, 2019; that the same was transmitted to this court on the same day through this court's sub-registry in Mombasa; that the impugned notice of appeal in comparison with the one they have now produced is similar despite the former missing the Deputy Registrar's stamp; that the impugned notice mistakenly refers to it being filed in respect to an application for leave to appeal to this court but it is clear in the body that the appeal is against the judgment of the Court of Appeal. The appellants cite Lemanken Aramat v Harun Meitamei Lempaka & 2 others SC Petition No 5 of 2014 [2014] eKLR to assert that the allegations raised by the applicants are unmeritorious since the imperfections in the impugned Notice do not prejudice the parties;
8. Taking into account the ruling made on July 8, 2022 by this court, reviewing the ruling of the Court of Appeal and certifying this matter as one of general public importance and framing two issues the basis upon which leave was granted; and the fact that the respondents had raised objections to our jurisdiction, *inter alia*, on the very ground of defective Notice of Appeal.
9. Having carefully considered the application, responses, submissions put forth and the record, we now opine as follows:
 - a. Rule 36 of the Supreme Court Rules mandates the appellant to file a notice of appeal within fourteen (14) days from the date of judgement and transmit a copy to the registrar of this court. In our ruling of July 8, 2022, we noted that it was not mandatory for the appellant to precede the application for review of certification by the filing a notice of appeal. Rule 36(4) provides that in lodging an appeal on a matter of general public importance, it shall not be mandatory to obtain such certification before filing the notice of appeal.
 - b. We have previously held that a notice of appeal is a jurisdictional pre- requisite whose filing signifies the intention to appeal (see Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others; SC Application No 16 of 2014, [2014] and University of Eldoret & another v Hosea Sitienei & 3 others SC Application No 8 of 2020 [2020] eKLR, respectively). From the record, we are satisfied that the intention to appeal was signified vide the notice of appeal filed on July 29, 2022 as submitted alongside the petition of appeal filed in this matter. We are also satisfied that the notice of appeal was filed before the Court of Appeal within the timelines stipulated.



- c. Even though the title of the notice of appeal filed herein indicates that it is filed in regard to an application for grant of certification and leave to appeal to the Supreme Court, its contents specify the appellants' intent to appeal against the decision of the Court of Appeal rendered on April 4, 2019. The parties having engaged in the certification and leave to appeal proceedings both at the Court of Appeal and before this court, there was little doubt left as to the appellants' intention to appeal against the judgment of the Court of Appeal. We do not see the need to entangle ourselves in the filing and administrative processes by the Court of Appeal, as to the stamping and signing by the registrar of that court as we are satisfied that the notice of appeal was duly lodged before the Court of Appeal.
 - d. Rule 40 (1) of the Supreme Court Rules lists the contents of the record of appeal as: (i) a certificate, if any, certifying the matter as of general public importance; (ii) the judgment or ruling of the Court of Appeal being appealed from; (iii) a judgment or ruling of the High Court or a court of equal status; and (iv) the relevant pleadings required to determine the appeal. As per the applicants, the documents stated to be excluded thereby making the record of appeal incomplete are the consent order of the agreed issues in the High Court which is quoted in verbatim in the High Court judgment, notification of sale by Dolphin Auctioneers, valuation report by Tysons Ltd, copies of cheques, banking slips and bank statements. This being a matter of general public importance that raises specific questions as framed, we think these documents are only useful in interrogation of findings of facts which does not fall within the purview of this court. We do not find them relevant or necessary in determination of this appeal.
 - e. Article 159 (2) (d) of the Constitution obliges this court to administer justice without undue regard to procedural technicalities. Therefore, even though the respondents submitted a notice of appeal not stamped or endorsed by the Court of Appeal, the same is not fatal. The notice of appeal did fulfil its purpose of conferring the appellants' intention to appeal.
 - f. Let this matter be determined on the framed issues. Costs to abide the outcome of the appeal.
9. Consequently, we make the following orders:
- i. The notice of motion dated December 2, 2022 and filed on December 5, 2022 by the 3rd and 4th respondents be and is hereby dismissed.
 - ii. Costs shall abide the outcome of the appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL, 2023.

.....

P M MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

.....

S C WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU



JUSTICE OF THE SUPREME COURT

.....

I LENAOLA

JUSTICE OF THE SUPREME COURT

.....

W OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

