



Sub-County Co-operative Officer, Turbo & Soy v Raiplywoods (K) Limited & 2 others (Civil Appeal 81 of 2020) [2024] KECA 303 (KLR) (22 March 2024) (Ruling)

Neutral citation: [2024] KECA 303 (KLR)

Republic of Kenya

In the Court of Appeal at Eldoret

Civil Appeal 81 of 2020

F Sichale, FA Ochieng & WK Korir, JJA

March 22, 2024

Between

Sub-County Co-operative Officer, Turbo & Soy

Applicant

and

Raiplywoods (K) Limited

1<sup>st</sup> Respondent

Commissioner for Co-operative Development

2<sup>nd</sup> Respondent

Attorney General

3<sup>rd</sup> Respondent

(An application to strike out the record of appeal arising from the Ruling of the High Court of Kenya at Eldoret (O. Sewe, J.) dated 12th March 2019 in Petition No. 25 of 2016)

### Ruling

1. Before us is a notice of motion dated 19<sup>th</sup> May 2021, brought under Rules 82, 84 and 90 of the Court of Appeal Rules, 2022. The applicants pray for orders that: “a) The 1<sup>st</sup> respondent’s appeal be struck out for being filed out of time. b. The applicant’s record of appeal dated 18<sup>th</sup> March 2020 be struck out for being served out of time. c. Costs be borne by the 1<sup>st</sup> respondent.”

2. The application is based on the following grounds: “a) The 1<sup>st</sup> respondent filed a notice of appeal dated 12<sup>th</sup> March 2019. b. The record of appeal was filed on 18<sup>th</sup> March 2020, one (1) year six (6) days later. c. The 1<sup>st</sup> respondent applied for a copy of proceedings on 17<sup>th</sup> January 2020, 10 months after the judgment had been delivered. d. The record of appeal is incompetent for being lodged out of time contrary to Rule 82. e. The record of appeal was served upon the applicant on 5<sup>th</sup> May 2021, almost one (1) year two (2) months contrary to Rule 90. f. It is in the interest of justice that the appeal is struck out with costs.”

3. In her supporting affidavit sworn on 19<sup>th</sup> May 2021, Roselyn Rae, the County Co-operatives Officer in charge of Uasin Gishu County reiterated the grounds on the face of the application.

4. In response to the application, the 1<sup>st</sup> respondent through the affidavit of their Director, Philip Varghese, sworn on 18<sup>th</sup> August 2021 stated that: “a) The application has been brought in bad faith with the intention of making sure the appeal is not heard on merit. b. The application offends the provisions of Rule 84. c. The orders sought by the applicant have no legal basis. d. The letter bespeaking proceedings were filed together with the notice of appeal on 12<sup>th</sup> March 2019 and served upon the applicant on the same date. e. Due to the delay in the typing of proceedings, the 1<sup>st</sup> respondent wrote to the Deputy Registrar a follow-up letter dated 9<sup>th</sup> January 2020. f. The Deputy Registrar responded vide the letter dated 17<sup>th</sup> February 2020 notifying the 1<sup>st</sup> respondent’s advocates that the proceedings were ready for collection. g. The computation and time for filing the record of appeal started running upon the collection

of the said proceedings.h.The Deputy Registrar issued a certificate of delay to that effect.”

5.When the application came up for hearing on 14<sup>th</sup> November 2023, Mr. Yego, learned counsel appeared for the applicants whereas Ms. Odwa, learned counsel appeared for the 1<sup>st</sup> respondent. Counsel relied on their respective written submissions which they briefly highlighted.

6.Mr. Yego submitted that the notice of appeal was filed within the stipulated timelines but the letter bespeaking proceedings was not filed or served upon the applicants. The applicant seeks to have the record struck out as an essential step was not taken in compliance with Rule 86, and the non-compliance cannot be cured by the certificate of delay.

7.The applicant submitted that under Rule 82, an appeal shall be instituted within 60 days of the date of the notice of appeal, and under Rule 90, service upon the 1st respondents shall be within seven (7) days of lodging the record of appeal. In this instance, the record of appeal was lodged on 18<sup>th</sup> March 2020 but service was effected on 5<sup>th</sup> May 2021; after 1 year, 2 months.

8.The applicant was of the view that the averment in the replying affidavit that they had refused to stamp on the record of appeal was hearsay and therefore inadmissible. They relied on the case of Kinyatti v Republic [1984] eKLR to buttress this submission. In any event, they stated that 1<sup>st</sup> respondent did not controvert the averment that the applicant was not served with the record of appeal.

9.While relying on the case of Mabel Kibore v National Oil Corporation of Kenya Limited [2019] eKLR, the applicant submitted that the certificate of delay relied upon by the 1<sup>st</sup> respondent was of no consequence as the 1<sup>st</sup> respondent failed to serve the letter dated 12<sup>th</sup> March 2019 bespeaking proceedings upon the applicants, as provided for under Rule 83(2).

10.In rebuttal of the 1<sup>st</sup> respondent's claim that the application offends Rule 84, the applicant submitted that the application is for striking out the record of appeal. That being the case, they were served with the record of appeal on 5<sup>th</sup> May 2021, and the application is dated 19<sup>th</sup> May 2021 which is within 14 days of service. The applicant relied on the case of Tropicana Hotels Limited v SBM Bank (Kenya) Limited [2020] eKLR in submitting that the application was filed timeously.

11.The applicant concluded by stating that since no application for an extension of time had been filed, the application ought to be allowed.

12.Opposing the application, Ms. Odwa informed the court that they had filed an application for an extension of time on 2<sup>nd</sup> December 2023. We find that if the application before us succeeds, and the 1<sup>st</sup> respondent's application for an extension of time is allowed, nothing prevents the 1<sup>st</sup> respondent from filing a fresh appeal.

13.Counsel was of the view that the certificate of delay validated the record of appeal. To buttress this submission, counsel relied on the case of C. B. Gor Advocates v Oriental Commercial Bank [2022] KECA 634 KLR.

14.The 1<sup>st</sup> respondent submitted that upon filing the notice of appeal and the letter bespeaking proceedings on 12<sup>th</sup> March 2019, they effected service within the required statutory timelines of 7 days, upon the applicant's advocates and the office of the Attorney General for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents on the same day as per annexure “PV 2(a) & (b)” of the 1<sup>st</sup> respondent's replying affidavit.

15.The 1<sup>st</sup> respondent pointed out that the time taken to prepare and deliver copies of proceedings duly

certified by the Registrar shall be excluded in the computation of the statutory 60 days as provided for under the proviso to Rule 82(1).

16. The 1<sup>st</sup> respondent submitted that the certificate of delay was issued certifying that the period between 12<sup>th</sup> March 2019 and 19<sup>th</sup> February 2020 was necessary for the preparation of proceedings hence the record of appeal was filed within the prescribed time, and it is properly before the court.

17. The 1<sup>st</sup> respondent submitted that they served the applicant with the record of appeal on 19<sup>th</sup> March 2020, which was within the 7 days prescribed by law, but the applicant refused to stamp on the 1<sup>st</sup> respondent's service copy. They later served the applicant again on 4<sup>th</sup> May 2021 after an exchange of several letters, including protests over the applicant's refusal to stamp the record.

18. The 1<sup>st</sup> respondent urged the court to allow the appeal to proceed to a hearing, as that is in the interest of justice.

19. The 1<sup>st</sup> respondent concluded by submitting that the application is an afterthought, and lacks merit as it was filed after the lapse of the 30 days, as provided for under Rule 84.

20. We have carefully considered the application, the affidavit in support thereof, the replying affidavit, submissions by the parties, the authorities cited, and the law. The issue for determination is whether the 1<sup>st</sup> respondent's record of appeal ought to be struck out for being filed out of time, and for being served out of time.

21. Rule 85 provides that: "(1) If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, that party shall be deemed to have withdrawn the notice of appeal and the Court may, on its own motion or on application by any other party, make such order. (2) The party in default under sub-rule (1) shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served."

22. It is common ground that the notice of appeal herein was filed on 18<sup>th</sup> March 2019, well within the timelines provided. However, the applicant contends that they were not served with the letter bespeaking proceedings and that the record of appeal was served upon them after the statutory timelines hence the said record of appeal ought to be struck out.

23. It is common ground that the record of appeal was filed and served out of time. The applicant submitted that the 1<sup>st</sup> respondent had missed an essential step in the proceedings when they failed to serve them with the letter bespeaking proceedings. It is based on this fact that the applicant seeks to have the record of appeal struck out. Rule 86 of the Court of Appeal Rules provides that:

24. The 1<sup>st</sup> respondent submitted that the delay in filing the record of appeal was occasioned by the court in typing the proceedings as was explained in the certificate of delay. The applicant submitted that they were never served with the letter bespeaking proceedings. However, they were served with the notice of appeal. Upon perusal of the application, we note that the letter bespeaking proceedings as per the certificate of delay, is dated 12<sup>th</sup> March 2019. The letter appears to have been copied to the applicant's advocates and the Attorney General. The letter together with the notice of appeal were lodged in court on 18<sup>th</sup> March 2019, well within the stipulated timelines. The 1<sup>st</sup> respondent wrote a further letter dated 9<sup>th</sup> January 2020 to the Registrar, requesting for information about the status of the typed proceedings.

The Registrar responded to the 1<sup>st</sup> respondent's advocates' letter by informing them that the proceedings were ready for collection on 19<sup>th</sup> February 2020.

25. Upon collection of the proceedings, the 1<sup>st</sup> respondent was issued with a certificate of delay dated 20<sup>th</sup> February 2020. The certificate showed that the 1<sup>st</sup> respondent applied for the proceedings on 12<sup>th</sup> March 2019 and paid for them on 18<sup>th</sup> March 2019.

26. To our minds, the applicant has not disputed the service of the notice of appeal, just the letter bespeaking proceedings. The notice of appeal and the letter bespeaking proceedings were both dated 12<sup>th</sup> March 2019 and filed on 18<sup>th</sup> March 2019. After a careful analysis of the facts presented by the parties, we are of the considered opinion that, in all probability, the letter bespeaking proceedings was served on the applicant; and so we find.

27. The applicant was of the view that the record of appeal had been filed out of time and also served upon them out of time. Rule 84 of the Court of Appeal Rules provides that: a. a memorandum of appeal, in quadruplicate; b. the record of appeal, in quadruplicate; c. the prescribed fee; and d. security for the costs of the appeal: Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy. (2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the 1<sup>st</sup> respondent."

28. It follows therefore that the 1<sup>st</sup> respondent having properly obtained a certificate of delay from the Registrar, they were entitled to rely on the proviso to Rule 84(1) as a copy of the application of proceedings was served upon the applicant. Furthermore, the 1<sup>st</sup> respondent's application for proceedings was done within 30 days of the impugned judgment, and as such, the period which lapsed before the 1<sup>st</sup> respondent could lodge their record of appeal was excluded in computing the time within which the appeal was to be instituted.

29. The applicant contended that the record of appeal was served upon them after the lapse of over 1 year. The 1<sup>st</sup> respondent submitted that they served the applicant on 19<sup>th</sup> March 2020. However, the applicant's advocates refused to acknowledge service and the parties thereafter engaged in a war of words through correspondence until 4<sup>th</sup> May 2021 when the 1<sup>st</sup> respondent's advocates served the applicant's advocates with another copy of the record of appeal. While acknowledging receipt of the record, the applicant's advocates acknowledged receipt of the original record on 5<sup>th</sup> May 2021.

30. Rule 90 of the Court of Appeal Rules provides that: "(1) The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies thereof on each respondent who has complied with the requirements of rule 79. (2) The appellant shall also serve copies of the memorandum of appeal and the record of appeal on such other parties to the original proceedings as the Court may at any time on application or of its own motion direct and within such time as the Court may appoint."

31. The 1<sup>st</sup> respondent did not annex an affidavit of service to indicate that they had served the applicant with the record of appeal on 19<sup>th</sup> March 2020 and that the applicant had refused service. However, we note that the applicant acknowledged receipt of the "original copy" of the record on 5<sup>th</sup> May 2021; that was after the exchange of several correspondences between the parties concerning the said record. This leaves us with the question of whether or not the applicant had been served with "a copy" of the record, but it was not the "original copy". The correspondence between the parties also leads us to the conclusion that the applicant must have been aware of the record, whether served or not.

32. This Court in the case of *Tome & Another v Attorney General & 2 Others* [2021] KECA 150 (KLR) stated that: "It is now a settled principle that striking out a pleading is a draconian act, which may only be resorted to in plain and outright instances. The power of this court to strike out an appeal is discretionary and is exercised based on the peculiar circumstances of each case."

33. The 1<sup>st</sup> respondent contended that the application herein was not filed within 30 days of service of the record of appeal. The proviso to Rule 86 is instructive on the basis upon which an application for striking out a notice or record of appeal shall be made; and it provides thus: "Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days after the date of service of the notice of appeal or record of appeal, as the case may be."

34. It is trite that parties are bound by the mandatory proviso to Rule 86, and the failure to comply with the same renders an application filed thereunder defective. In the case of *Tome & Another v Attorney General & 2 Others* (supra), the court held that: "This Court in *Esther Onyango Ochieng v Transmara Sugar Company* [2020] eKLR quoting this Court's decision in the case of *Salama Beach Hotel Limited & 4 Others v Kenyariri & Associates Advocates & 4 Others* [2016] eKLR stated 'in *Joyce Bochere Nyamweya v Jemima Nyaboke Nyamweya & Another* [2016] eKLR this Court held that parties are bound by the mandatory nature of the proviso to Rule 84 of the Court of Appeal Rules (currently Rule 86). An application seeking to strike out a notice of appeal must be filed within thirty (30) days of service of the notice of appeal, or the filing of the appeal ought to be struck off. The failure to do so renders such an application fatally defective and liable to be struck out. Similarly, in *William Mwangi Ngaruki v Barclays Bank of Kenya Ltd* [2014] eKLR, this 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."

35. We therefore find the application herein not only without merit but also fatally defective. The same is struck out with costs to the 1<sup>st</sup> respondent. Orders accordingly.

**DATED AND DELIVERED AT NAKURU THIS 22<sup>ND</sup> DAY OF MARCH, 2024.F.**

**SICHALE.....JUDGE OF APPEALF.**

**OCHIENG.....JUDGE OF APPEALW. KORIR.....JUDGE OF APPEAL**  
I certify that this is a true copy of the original. Signed **DEPUTY REGISTRAR**



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