



NCBA Bank Kenya PLC v Jampen Enterprises Limited (Civil Application E011 of 2020) [2022] KECA 1239 (KLR) (4 November 2022) (Ruling)

Neutral citation: [2022] KECA 1239 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E011 OF 2020
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
NOVEMBER 4, 2022**

BETWEEN

NCBA BANK KENYA PLC APPLICANT

AND

JAMPEN ENTERPRISES LIMITED RESPONDENT

(An application to strike out the Notice of Appeal dated 10th December 2019 against the Ruling and Orders of the High Court at Mombasa (P. J. O. Otieno J.) made on 29th November 2019 in Mombasa HCC No 49 of 2018)

RULING

1. NCBA Bank Kenya PLC, the Applicant herein seeks to have the Notice of Appeal dated 10th December 2019 and filed on 13th December 2019 in Mombasa HCC No 48 of 2019 struck out with costs. This prayer is in its Notice of Motion application dated 31st January 2020 principally brought under Rule 84 of the Court of Appeal Rules, 2010. The application is supported by an affidavit sworn on even date by Stephen Atinya, the Applicant's Senior Legal Counsel, and among the exhibits attached are a copy of the impugned ruling delivered on 29th November 2019 in Mombasa HCC No 48 of 2019, and of the Notice of Appeal filed dated 10th December 2019.
2. The Applicant's case is that the Respondent, being dissatisfied with the impugned ruling by the High Court at Mombasa (P.J. Otieno J.) dated 29th November 2019, filed a Notice of Appeal dated 10th December 2019 on 13th December 2019, and served it on the Applicant on 16th January 2020. However, that Rule 77 of the Court of Appeal Rules, 2010 required the service to be made within seven (7) days of the filing on or before 20th December 2019, and the Respondent therefore served the Notice of Appeal four (4) days out of time without leave, after taking into account the provisions of section 26 (1) (c) of the *Court of Appeal (Organization and Administration) Act*, 2015 and Rule 3 (e) of the Court of Appeal Rules, 2010.



3. The Respondent opposed the application in a replying affidavit sworn on 9th March 2021 by Ousa Okello, its legal counsel on record. The counsel conceded that the Notice of Appeal was filed on 13th December 2019 and served on 16th January 2020, and attributed the late service to a mistake made by the Respondent Counsel's clerk who assumed that because most law firms had proceeded for the Christmas holiday, service would be effected immediately upon resumption from the Christmas break. Therefore, that the late service was inadvertent and not intentional, and that the Respondent had filed an application for leave to deem the Notice of Appeal as having been served within time and/or enlargement of the time to serve the Notice of Appeal. The counsel attached a copy of the said application.
4. The instant application came up for virtual hearing on 6th July 2022. Learned Counsel, Ms. Kiptum holding brief for learned counsel Mr. Kongere appeared for the Applicant. There was no appearance for the Respondent, though service of the hearing notice was effected on its counsel. Ms. Kiptum on her part relied on the written submissions dated 30th June 2022, filed by the Applicant's counsel, in which the afore-stated averments by the Applicant were reiterated. Reliance placed on the decisions in *Reliance Bank Limited (In Liquidation) vs Grandways Ventures Ltd & 2 others* [2019] that any delay must be explained to the satisfaction of the Court; in *Kenya Ports Authority vs Maison 425* [2014] eKLR that blame could not be placed on an unidentified former clerk for a pay's inadvertence; in *County Government of Mombasa vs Kooba Kenya Limited* [2019] eKLR that no explanation had been proffered why it took the Respondent's time to apply for extension of time; and in *Daniel Nkirimpa Monirei vs Saiyalel Ole Koilel & 4 others* [2016] eKLR that failure to serve a party with a Notice of Appeal within the time prescribed by law gives a party false belief that the matter has been concluded.
5. Rule 75 of the Court of Appeal Rules of 2010 which were then applicable, specified the period within which the notice of appeal should be filed as 14 days, while Rule 77(1) provided that 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. The impugned notice of appeal was lodged on 13th December 2019 and was therefore lodged within the requisite fourteen days of the ruling delivered on 29th November 2019. The Respondent does concede that it was however served on 16th January 2020 outside the seven days of its lodging prescribed by the rules.
6. The Respondent has attempted to explain the delay in service of the Notice of Appeal on the Applicant, on account of a misunderstanding on the applicable timelines on the part of its clerk. The Respondent has also annexed a copy of an application for extension of time to demonstrate the steps it took to remedy the situation. A perusal of the said application however reveals two facts. Firstly, the application is dated 3rd March 2021, and when the said application, being Mombasa Civil Application E009 of 2021, came up for hearing before a single judge of this Court on 19th September 2022, it was adjourned to await the outcome of the ruling in the instant application. Secondly, it is evident that the said application was filed after more than one year from the date of service of the Notice of Appeal on the Applicant, and more than one year after the Applicant had filed and served the Respondent with the instant application. This delay puts to doubt the explanation given by the Respondent for the delay.
7. It has in this regard been emphasised by this Court that the timelines for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals that come before us, and that the Rules are expressed in clear and unambiguous terms and command obedience. See the decisions in *Salama Beach Hotel Limited & 4 Others vs Kenyariri & Associated Advocates & 4 Others* (2016) eKLR and *Joyce Bochere Nyamweya vs Jemima Nyaboke Nyamweya & another* [2016] eKLR. Specifically on Rule 77(1) of the Court of Appeal Rules of 2010, this Court (Karanja, Okwengu &



Azangalala JJ.A) in the case of Daniel Nkirimpa Monirei v Sayialel Ole Koilel & 4 others [supra] held as follows:

“The purpose of service of a Notice of Appeal is to alert the parties being served that the case in question has not been concluded yet as the same has been escalated to another level. This enables the party to prepare and get ready for another fight, be it by way of gathering resources or just getting mentally prepared for defending the intended appeal. Failure to serve a party with a Notice of Appeal within the time prescribed by law gives a party false belief that the matter has been concluded, only to be ambushed later with the record of appeal in which the said notice is tucked away somewhere in the record. That occasion prejudice to the ambushed party and it is in our view a habit that should not be countenanced in any fair and just process. That would explain why Rule 77(1) of the Court of Appeal Rules is couched in mandatory terms.”

8. Lastly, this application is brought pursuant to then applicable provisions for striking out of a Notice of Appeal under Rule 84 of the Court of Appeal Rules of 2010, and the proviso to the said Rule required an application to strike out a notice of appeal or appeal to be brought before the expiry of thirty days from the date of service of the notice of appeal or record of appeal, as the case may be. It is not disputed that the Respondent’s Notice of Appeal was served on the Applicant’s advocates on 16th January 2020, and the instant application which is dated 31st January 2020 and was filed on 7th February 2020 is therefore competently filed, having been lodged within the required thirty days’ timeline.
9. In the circumstances, it is our finding that the Respondent’s Notice of Appeal was served on the Applicant out of time, and the delay in effecting service has not been satisfactorily explained. For this reason, the Applicant’s Notice of Motion application dated 31st January 2020 is found to be merited, and the Notice of Appeal dated 10th December 2019 lodged herein on 13th December 2019 is hereby struck out with costs to the Applicant.
10. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 4TH DAY OF NOVEMBER 2022

S. GATEMBU KAIRU (FCIArb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

