



**Absa Bank Mauritius Limited v Pabari Investments Limited (Civil Appeal
(Application) E116 of 2021) [2023] KECA 486 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 486 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E116 OF 2021
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MAY 12, 2023**

BETWEEN

ABSA BANK MAURITIUS LIMITED APPELLANT

AND

PABARI INVESTMENTS LIMITED RESPONDENT

*(Being an application to strike out the record of appeal in Civil Appeal No.
E116 of 2021 being an appeal from the ruling and order of Chepkwony,
J. delivered on 30th July 2021 in Mombasa HCCC No. E001 of 2021)*

RULING

1. The respondent/applicant, Pabari Investments Limited, by its application dated 20th December 2021 seeks orders that the Record of Appeal filed herein by the appellant/respondent Absa Bank Mauritius Limited, be struck out for failure to take essential steps. In the alternative, an order is sought for grounds 1 & 2 of the Memorandum of Appeal dated 16th December 2021 be struck out. The application is made under Section 3A & 3B of the [Appellate Jurisdiction Act](#) and Rule 84 of the [Court of Appeal Rules](#), 2010.
2. Urging the application before us, learned counsel for the applicant Mr. B. Kongere in highlighting his written submissions dated 4th November 2022 referred to the supporting affidavit sworn by Benson Musili, Group Head of Legal Department of the applicant in which it is deponed that the record of appeal was served on 17th December 2021; that the appeal, which challenges a ruling of the High Court delivered on 30th July 2021, ought to have been filed within 60 days from 20th September 2021 when the Certificate of Delay was collected but was filed on 20th November 2021, some 26 days late, without leave of court. It was also urged that the record does not contain a certified copy of the order appealed from and should be struck out.
3. It was submitted, on the strength of the decision of this Court in [NCBA Bank Kenya PLC vs. Jampen Enterprises Ltd](#), Mbsa C.Applic No. 11 of 2020 that the timelines stipulated in the rules are



indispensable for the proper adjudication of appeals and command obedience; that it is admitted that the record of appeal is filed out of time and the explanation that the advocate for the appellant held an erroneous view of the law is not supported; and that the existence of an application for extension of time cannot save the record of appeal from being struck out.

4. Opposing the application, Mr. Ndungu, learned counsel for the appellant referred to a replying affidavit sworn by Koomen Robin Veeren Chetty, the Business Support and Corporate Recoveries Manager of the appellant in which he deposes that the appellant's advocates "erroneously projected the deadline for the filing of the record of appeal; that in realization of that mistake, the appellant has accordingly applied, by application dated 29th December 2021 for extension of time, which application is pending hearing and determination before the Court."
5. As for the missing court order, it was urged that a supplementary record of appeal has since been filed. In relation to the alternative prayer for the striking out of grounds 1&2 of the Memorandum of Appeal, it was submitted that those grounds simply challenge the factual findings by the Judge in paragraph 38 of the impugned ruling and not the resultant orders.
6. We have considered the application, the affidavits and the submissions. There are many decisions of this Court that stress that rules of court exist for the purpose of the proper administration of justice and that timelines prescribed for doing or taking certain actions are indispensable for the proper adjudication of appeals. See for instance *Mae Properties Limited vs Joseph Kibe & another* [2017] eKLR. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, expressed that where a law provides for the time within which something should be done, and that time lapses, one must seek extension of time.
7. It is conceded in the present case, that the record of appeal was filed out of time. There is therefore noncompliance with the rules by the appellant and in that regard, it was stated that there is a pending application seeking extension of time. There is accordingly, merit in the application for striking out the record of appeal. The order that commends itself to us in the circumstances is to allow the application and order that the record of appeal filed herein be struck out but suspend the order pending the hearing and determination of the pending application for extension of time dated 29th December 2021.
8. As for the alternative prayer for striking out grounds 1 & 2 of the memorandum of appeal, we think that is a substantive and contentious matter that does not lie within the purview of Rule 84. As this Court stated in *Nakumatt Holding Limited and another vs. Ideal Locations Limited* [2018] eKLR:

"Rule 84 is a summary procedure rule. A party invoking Rule 84 must demonstrate the facts, and the law, relied upon in support of the application. The facts relied upon in an application under Rule 84 must be clear, uncontroverted and uncontestable. For instance, generally, an appeal does not lie if there is no right of appeal. Another example is the general principle, subject to limited exceptions, that no appeal lies from a consent order. In such cases, an applicant under Rule 84 must clearly demonstrate that no appeal lies as a matter of law. Circumstances under which an appeal can be struck out were outlined by this Court in *Luther Peter Muia & Another vs. Zuena Ngando Kababu* [2015] eKLR, as hereunder:-

"In our view, rule 84 cannot apply to the circumstances of this case as it is intended to apply to situations where, for instance, it is contended that the notice of appeal has been lodged or served out of time or, where leave to appeal is required and has not been sought and obtained or where no appeal lies or where a step precedent to lodging the notice of appeal or appeal has not been taken." [Emphasis added]



(See also this Court’s decision in *Christopher Orina Kenyariri vs. Salama Beach Hotel Limited & 3 others*) Malindi Civil Application No. 9 of 2018). It follows that whether an appeal lies is both a jurisdictional and substantive question - it is not a procedural question.

22. In the instant application, whether the main appeal lies or has been overtaken by events is a substantive and contentious matter.”

9. In conclusion, therefore, we allow prayer 1 of the application dated 20th December 2021 and order that the record of appeal filed herein be struck out. We however suspend that order pending the hearing and determination of the pending application for extension of time dated 29th December 2021. For the avoidance of doubt, the record of appeal will stand struck out in the event that the appellant’s application for extension of time dated 29th December 2021 is disallowed.

10. We award the costs of this application to the applicant in any event.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF MAY 2023.

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

