



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mwilu; DCJ & VP, Wanjala, Njoki, Lenaola & Ouko SCJJ)

PETITION NO. 18 (E020) OF 2022

-BETWEEN-

- 1. ARVIND SHAH**
- 2. HARHABEN SHAH**
- 3. GOSHRANI HOLDINGS LTD**
- 4. COAST PROPERTIES LTD**
- 5. COAST CLAY WORKS LTD**
- 6. COAST MAIZE MILLERS LTD**
- 7. SPA MILLERS NAIROBI LTD**
- 8. HIGHWAY CENTRE LTD APPELLANT**

-AND-

- 1. MOMBASA BRICKS & TILES LTD**
- 2. DINESH KUMAR ZAVERCHAND JETHA**
- 3. ATEET DINESH JETHA**
- 4. ZAVERCHAND SOJPAL JETHA HOLDINGS LTD**
- 5. EXON INVESTMENTS LTD**
- 6. EXON PLASTICS LTD RESPONDENTS**

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

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)

RULING OF THE COURT

[1] UPON perusing the Notice of Motion by the 3rd and 4th respondents dated 2nd December, 2022 and filed on 5th December, 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 19th April, 2022 and lodged on 29th July, 2022 be struck out and the appeal dismissed; and

[2] UPON considering the grounds in support of the application; the supporting affidavit sworn on 2nd December, 2022 by Ateet Dinesh Jetha, written submissions dated 5th December, 2022 and filed on even date; and rejoinder submissions dated 19th December, 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 4th April, 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 24th November, 2022 and filed on 25th November, 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 14th December, 2022 and filed on 16th December 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 9th December, 2022 and filed on 13th December, 2022 and the written submissions dated 9th December 2022 and filed on 13th December, 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 17th November, 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 4th April, 2019, the appellants duly filed their Notice of Appeal as acknowledged by the Deputy Registrar on 18th April, 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 8th July 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 8th July 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 prerequisite 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 other*** 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 29th July 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 4th April 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 2nd December, 2022 and filed on 5th December, 2022 by the 3rd and 4th respondents be and is hereby dismissed.*

