



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

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

PETITION (APPLICATION) NO. E013 OF 2023

– BETWEEN –

ERDEMANN PROPERTY LIMITED.....APPELLANT

-AND-

SAFARICOM STAFF PENSION SCHEME

REGISTERED TRUSTEES.....1ST RESPONDENT

KENYA URBAN ROADS AUTHORITY.....2ND RESPONDENT

MAVOKO WATER & SEWERAGE

COMPANY LIMITED.....3RD RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....4TH RESPONDENT

-AND-

EVEREST LIMITED.....1ST INTERESTED PARTY

SUNSET HOUSING LIMITED.....2ND INTERESTED PARTY

(Being an application to strike out the Notice of Appeal dated 23rd March 2023 and lodged at the Registry on 27th April 2023 and the Record of Appeal dated 28th April 2023 and lodged in court on 2nd May 2023)

Representation:

CM Advocates, LLP for the appellant

Muthaura Mugambi Ayugi & Njonjo Advocates for the 1st respondent

RULING OF THE COURT

[1] UPON perusing the Notice of Motion dated 23rd June 2023 and filed on even date by the 1st respondent, pursuant to Section 3A, 21(1) and (2) of the Supreme Court Act but erroneously expressed as Rules 31(6), (37(1), 40(1)(d), 65(1) and (2) of the Court of Appeal Rules instead of the Supreme Court Rules, seeking the striking out the Notice of Appeal dated 23rd March 2023 and the Record of Appeal dated 28th April 2023; and

[2] UPON perusing the supporting affidavit sworn on 21st June 2023 by Richard Gitahi, the trust Secretary of the Safaricom Staff Pension Scheme Registered Trustees, the 1st respondent in support of the Motion and a further affidavit sworn by Bernard Nderitu on 25th July 2023; and

[3] UPON considering the written submissions by the 1st respondent filed on 23rd June 2023, wherein they argue the notice of appeal was not served upon them contrary to the mandatory requirement of Rule 37(1) of the Supreme Court Rules; that this Court, in determining this application may be guided by the principles set out in *Hamida Yaroi Shek Nuri v Faith Tumaini Kombe & 2 others*, SC PT (Application) No. 38 of 2018; (2019) eKLR; *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others*, SC Application No. 7 of 2014; (2014) eKLR and *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others*, CA No. (Application) 228 of 2013; (2013) eKLR, where this Court and the Court of Appeal emphasized it is a jurisdictional prerequisite to file and serve the notice of appeal; that the record of appeal is incomplete in contravention of Rule 40(1)(d) and (4) of the Supreme Court Rules since it does not include the supplementary record of appeal dated 19th November 2019 which was part of the record in the Court of Appeal, and the appellant has failed to apply for leave for their inclusion out of time; and that this omission is not only deliberate but also meant to deny the Court the opportunity to have all the necessary relevant documents for a just and informed decision; and

[4] NOTING that the appellant in its replying affidavit sworn by Otieno John Kenneth Rajwayi, their Planning Manager on 10th July 2023 and the written submissions of even date are opposed to the application on grounds that the underlying dispute herein was presented by the 1st respondent as a public interest litigation which fact was noted in the judgment of the trial court; that in compliance with Rule 36(1) of the Supreme Court Rules, they filed a notice of appeal on 30th March 2023 but the Registrar of the Court of Appeal only endorsed his signature on the filed notice on 27th April 2023; that only then did the appellant transmit the endorsed notice of appeal together with the petition and record of appeal to this Court on 28th April 2023 and thereafter service of the notice of appeal, petition of appeal and record of appeal was effected on 4th May 2023;

[5] FURTHER, the appellant has pleaded that in the interest of justice, this Court exercises its discretion to admit the notice of appeal, petition, and the record of appeal, since no probable prejudice will be occasioned to the respondents; that the inadvertent omission of the supplementary record of appeal in CA No. 185 of 2017 was not deliberate; and that the truth of the matter is that the two grounds of appeal before this Court are not dependent upon the omitted record since they do not centre on a factual dispute but rather on the interpretation.

[6] UPON considering the appellant's reliance on the holding of this Court in *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others* (*supra*), and his argument that where no prejudice has been occasioned, the Court ought to excuse noncompliance with a procedural rule; that equally, as this Court held in following the holding of this Court in *Hamida Yaro Shek Nuri v Faith Tumaini Kombe & 2 others* (*supra*), failure to include the supplementary record of appeal from the Court of Appeal as part of the record does not automatically render the appeal fatal; and

[7] NOTING that the 2nd to 4th respondents as well as the 1st and 2nd interested parties did not file any pleadings with respect to this application;

WE NOW THEREFORE OPINE as follows:

[8] UPON examining Rule 36 of the Supreme Court Rules 2020, upon which this application rests, and which demands that;

“(1) A person who intends to make an appeal to the Court shall file a notice of appeal within fourteen days from the date of judgment or ruling which is the subject of appeal.

(2) The notice of appeal shall be—

(a)

(b) filed at the first instance with the Registrar of the court, or with the tribunal from which an appeal originates.

(3) Upon filing of the notice of appeal, the petitioner shall transmit a copy of the notice to the Registrar”. (Our emphasis).

The Registrar in the highlighted section above is according to Rule 2, the Registrar of the Supreme Court; and

[9] UPON examination of Rule 37(1) which provides that;

“A petitioner shall, within seven days of lodging a notice of appeal, serve transmitted copies of the notice upon all persons directly affected by the appeal”. (Our emphasis).

It is the copies of the notice that the petitioner is required to transmit to the Registrar of this Court that are to be served upon all persons directly affected by the appeal; and

[10] RESTATING the principles enunciated by this Court in ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries***

Commission & 7 others, SC Application No. 16 of 2014; (2014) eKLR and **University of Eldoret & another v Hosea Sitienei & 3 other**, SC Application No. 8 of 2020; (2020) eKLR, both of which underscored the vital nature of a notice of appeal as a jurisdictional pre-requisite whose filing signifies the intention to appeal; and further state that where the law provides for the time within which something ought to be done and that time lapses, one needs to first seek an extension of time before one can proceed to do that which the law requires; and

[11] **UPON** applying these strictures to the rival submissions in this application, we note that the notice of appeal dated 23rd March 2023 was filed on the e-filing portal of the Court of Appeal on 30th March 2023 and on 28th April 2023 in this Court and service of the same was effected on 4th May 2023, exactly thirty-five days from filing before the Court of Appeal; and

[12] **IN TERMS** of Rule 37, the appellant was required, within seven days of lodging a notice of appeal, to serve transmitted copies of the notice upon the respondents with or without the endorsement from the Registrar of the Court of Appeal as is the practice before this Court; and

[13] **EMPHASISING** this Court's consistent pronouncement that rules of the Court must be observed and the prescribed time limits are requirements to be met, we find that the appellant having failed to serve the notice within seven days as prescribed by the Rules missed a very crucial preliminary step in instituting the appeal. Rules of procedure must be applied and followed at all times by the parties, counsel, and even the courts to ensure there is fairness of proceedings and to afford parties the equality of arms. Because the object of judicial proceedings is to arrive at the truth by using the best available procedure and process, the infringement of the rules may have serious consequences; and

[14] **UPON FURTHER EXAMINING** Rule 40 which stipulates what the contents of a record of appeal from the Court of Appeal must include, one of which is "*relevant pleadings required to determine the appeal*"; and looking at the nine

documents which were introduced in the Court of Appeal by a Supplementary Record of Appeal, there cannot be any doubt that they were presented before that court because the appellant believed they were important for the just determination of the first appeal. That being the case, by necessary implication, they would equally be relevant for the determination of this appeal; and

[15] NOTING that the nine documents contained in the Supplementary Record are minutes, sketches, drawings, approvals, affidavits, and other pleadings from the Environment and Land Court, we find that the same ought to have been included in the record before this Court; and ultimately the inevitable conclusion we must draw is that the notice of appeal dated 23rd March 2023 is defective for failing to comply with Section 37(1) of the Supreme Court Rules; and further that the Record of Appeal lodged in this Court is incomplete.

[16] BEARING IN MIND our finding above that there is no subsisting appeal having found the notice of appeal defective, we make the following Orders:

- i) The Notice of Motion dated 21st June 2023 and filed on even date is hereby allowed.***
- ii) Consequently, the notice of appeal dated 23rd March 2023 and the Record of Appeal dated 28th of April 2023 are hereby struck out.***
- iii) The 1st respondent shall have costs of this application noting that the other respondents did not file any pleadings in respect of the application.***

DATED and DELIVERED at NAIROBI this 22nd Day of September, 2023.

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P.M MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT
OF THE SUPREME COURT

.....
M. K IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S.C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
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

