



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Ibrahim, Wanjala, & Lenaola, SCJJ)

APPLICATION NOS. E030, E034 & E038 OF 2023

– BETWEEN –

NAIROBI BOTTLERS LIMITED APPLICANT

– AND –

MARK NDUMIA NDUNG’U 1ST RESPONDENT

**COCA COLA CENTRAL, EAST &
WEST AFRICA LTD. 2ND RESPONDENT**

(Being applications for stay of execution of the Judgment of the Court of Appeal (Okwengu, Laibuta & Mativo, JJ. A.) dated 7th July, 2023 in Civil Appeal No. 99 of 2018, striking out the appeal, SC Petition No. E024 of 2023, and extension of time within which to file and serve the appeal)

Representation:

Mr. Kiragu Wathuta & Ms. Radhika Arora for the applicant
(Kiragu Wathuta & Company Advocates)

Mr. Eric Thige for the 1st respondent
(Mawira & Ndung’u LLP)

Mr. Amos Odhiambo h/b Mr. Kamau Karori, SC for the 2nd respondent
(Iseme Kamau & Maema Advocates)

RULING OF THE COURT

[1] Before this Court are three Motions, two of which have been filed by Nairobi Bottlers Limited (the applicant) and the third by Mark Ndumia Ndungu (the 1st respondent). The Motions, though brought separately by the parties, are intertwined and therefore it behoves us to dispose of them in this ruling so as to put to good use valuable judicial time.

[2] To put the Motions in perspective, the 1st respondent filed a petition in the High Court, being; **HC Petition No. 325 of 2015**, against the applicant and Coca Cola Central, East & West Africa Ltd. (the 2nd respondent). The gist of which was that there is variance in the information on the labels of plastic bottles containing Coca Cola, Krest, Fanta, Sprite and Stoney soft drinks brands from the Coca Cola company and glass bottles of the same soft drinks. In the 1st respondent's view, omission of information relating to the nutritional content, the customer service contacts as well as storage directions on the glass bottles violated Article 46 of the Constitution and amounted to discrimination. The High Court vide a judgment dated 30th January, 2018 allowed the petition and issued the following order amongst others:

“ ...

- iii. *A mandatory injunction be and is hereby issued directing the respondents (the applicant and 2nd respondent herein) to provide nutritional information, storage directions and customer care mobile number and email address on all of their Coca Cola, Fanta, Krest, Stoney and Sprite brands glass bottles within six (6) months of the date of delivery of this judgment.”*

Aggrieved by the aforementioned decision, the applicant filed an appeal in the Court of Appeal, **Civil Appeal No. 99 of 2018**, which was dismissed by a judgment dated 7th July, 2023.

[3] Unrelenting, the applicant has filed **SC Petition No. E024 of 2023** (the appeal) before this Court challenging the Court of Appeal's judgment (impugned judgment). Contemporaneously, the applicant also filed a Notice of Motion dated 16th August 2023, **SC Applic. No. E030 of 2023**, seeking *inter alia* orders that-

“ ...

3. *Pending the hearing and determination of the appeal against the judgment and decree of the Court of Appeal delivered on 7th July, 2023 in Civil Appeal No. 99 of 2018, this Honourable Court be pleased to stay execution of the said judgment and decree which upheld the judgment and decree delivered by the High Court on 30th January, 2018 in Petition No. 325 of 2015 together with any other consequential orders arising therefrom.”*

[4] The applicant relied on an affidavit sworn by its Finance Director, Joe Mutisya, on 16th August, 2023 and written submissions of even date. The applicant submitted that the appeal raises weighty constitutional issues which require consideration by this Court. In that regard, the applicant contended that the Court of Appeal erred by misconstruing Article 46 of the Constitution and the Consumer Protection Act; the judgments of the two superior courts below tended to formulate additional labelling requirements not provided by statute thereby infringing the doctrine of separation of powers; and the said judgments violated the applicant's right to equal benefit and protection of law under Article 27 of the Constitution by imposing additional labelling requirements only on the applicant to the exclusion of other distributors/suppliers of similar soft drinks.

[5] The applicant further argued that, compliance with the impugned judgment would entail incurring astronomical costs approximated at Kshs. 8 billion. This is because, as per the applicant, a new glass bottle design would have to be produced. The applicant, in addition, stated that the prohibitive costs coupled with the 6months' time frame for compliance with the impugned judgment would impede its competitive advantage; it would also permanently cripple its business and affect its ability to meet wages for its workforce of over 3000 people. Besides, the applicant urged that approval of a new bottle design/mould by the Coca Cola company is a rigorous and lengthy process. All in all, the applicant maintained that it had met the principles set out in *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*, SC Applic. No. 5 of 2014; [2014] eKLR.

[6] The 2nd respondent through its written submissions dated 1st September, 2023 supported the Motion on more or less similar grounds as the applicant and implored this Court to allow the same.

[7] In opposition, the 1st respondent relied on his replying affidavit sworn on 4th September, 2023 and written submissions of even date. He argued that the appeal does not raise any constitutional issues. It was also his position that the applicant's approximated costs of implementing the court orders are misleading. According to him, the applicant could opt to affix recyclable paper labels in the current glass bottles which is cost effective. In point of fact, the 1st respondent gave an example of several countries like Germany, South Africa and Sri Lanka which use recyclable paper labels on glass bottles containing the same soft drinks. In conclusion, the 1st respondent submitted that the applicant should have acted diligently in obtaining the necessary approval from the Coca Cola company following the High Court's decision.

[8] In its rejoinder, the applicant's Finance Director, Mr. Joe Mutisya, swore a supplementary affidavit on 13th September, 2023. In it, he urged that the 1st

respondent has not provided any figures or commercial rationale to dispute the applicant's approximated costs for complying with the impugned court orders. In the applicant's opinion, it is misleading for the 1st respondent to purport to draw comparison between other countries and Kenya as they operate in vastly different economic as well as legislative landscapes.

[9] Subsequently, the 1st respondent filed a Notice of Motion dated 18th September 2023, **SC Applic. No. E034 of 2023**, seeking the following orders:

“ ...

2. *The appeal dated 16th August 2023, **SC Petition No. E024 of 2023**, be struck out for having been filed out of time without leave.*
3. *Costs of the application and appeal be awarded to the 1st respondent.”*

[10] The Motion was supported by the 1st respondent's affidavit sworn on 18th September, 2023 and written submissions of even date. The 1st respondent averred that the applicant filed a notice of appeal on 14th July, 2023 intimating its intention to challenge the impugned judgment. Thereafter, that the applicant filed the appeal on 21st August 2023, 38 days after the notice of appeal contrary to Rule 38(1)(a) of the Supreme Court Rules, 2020. He argued that the appeal ought to have been filed on or before 14th August, 2023 and therefore, to him, the appeal is a nullity and ought to be struck out. To buttress his position, the 1st respondent made reference to this Court's decision in ***Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others***, SC Applic. No 16 of 2014; [2014] eKLR (***Nicholas Salat***).

[11] On its part, the applicant opposed the Motion by a replying affidavit sworn by its Finance Director, Joe Mutisya, on 2nd October, 2023 and written submissions of even date. The applicant averred that, while it filed the notice of appeal on 14th July

2023, the Registrar of the Court of Appeal only endorsed it on 21st July, 2023 as having been lodged on the said date. Thereafter, that on the same date the applicant transmitted the notice to this Court and applied for certified copies of the impugned judgment as well as proceedings from the Court of Appeal. However, according to the applicant, despite following up vide an email dated 15th August 2023, the certified documents were only issued on 17th August, 2023. The applicant submitted that it filed the appeal on this Court's e-filing platform on 18th August, 2023 and made the necessary payment. Nevertheless, payment for security for costs failed to reflect on the e-filing platform forcing the applicant to make a second payment for the same on 20th August, 2023. Thereafter, the applicant stated that it availed printed copies of the appeal at this Court's registry on 21st August, 2023. The applicant thus attributes the delay in filing the appeal to the Court of Appeal's tardiness in issuing certified copies of the impugned judgment and proceedings. Consequently, the applicant urged that it should be given an opportunity to ventilate its arguable appeal before this Court.

[12] The 2nd respondent, by a replying affidavit sworn by its Legal Counsel, Angela T. Ambetsa, on 5th October, 2023 and written submissions of even date opposed the Motion for striking out the appeal on two fronts. Firstly, that the appeal was filed within the requisite time frame. Citing Rule 12(1) of the Supreme Court Rules and this Court's decision in ***Kenya Hotel Properties Limited v. Attorney General & 5 Others***, SC Applic. No. 2 of 2021 (E004 of 2021); [2021] eKLR, the 2nd respondent submitted that filing before this Court is completed when both the printed and electronic version of a pleading/document are availed to the Court. It therefore follows, in the 2nd respondent's view, that filing of the notice of appeal was complete when the printed version thereof was transmitted to this Court on 21st July, 2023. The 2nd respondent thus posited that time for filing the appeal began running on 21st July, 2023 and ought to have lapsed on 20th August, 2023. However, since 20th August, 2023 fell on a Sunday, by dint of Section 57 of the Interpretation

and General Provisions Act, the deadline stood extended to 21st August, 2023. As such, the 2nd respondent maintained that the printed version of the appeal availed to this Court's registry on 21st August, 2023 was within the requisite time frame.

[13] Secondly and without prejudice to the foregoing, the 2nd respondent urged that in the event this Court finds that the appeal was filed out of time, it should invoke its inherent powers under Rule 3(5) and 15(2) of the Supreme Court Rules and deem the same as properly before it. More so, since the appeal raises weighty constitutional issues and the delay, which the 2nd respondent computed as four days, is not inordinate.

[14] In response, the 1st respondent filed a supplementary affidavit sworn on 12th October, 2023 and supplementary submissions of even date. The 1st respondent argued that Rule 12(1) of the Supreme Court Rules does not apply to a notice of appeal. According to him, a notice of appeal, such as the one in issue, is filed in the Court of Appeal and not in this Court. In point of fact, that pursuant to Rule 36(2) and (3) the notice of appeal is only required to be transmitted to this Court. In the 1st respondent's opinion, transmission is merely service of the filed notice of appeal upon the Registrar of this Court. Therefore, the 1st respondent insisted that time for filing the appeal began running on 14th July, 2023 when the notice of appeal was filed in the Court of Appeal. Moreover, the 1st respondent alleged that to date he has never been served with the notice of appeal and that the omission renders the appeal incompetent.

[15] In spite of the position taken by the applicant in the preceding paragraphs, it filed another Notice of Motion dated 29th September 2023, **SC Applic. No. E038 of 2023**, seeking orders that—

“ ...

2. *This Honourable Court be pleased to extend time within which the applicant ought to have filed and served the appeal.*

3. *This Honourable Court be pleased to direct that the appeal dated 16th August, 2023 be deemed as duly filed within the time so extended.”*

[16] The applicant relied on the affidavit sworn by its Finance Director, Joe Mutisya, on 29th September, 2023 and written submissions of even date. In a nutshell, the applicant echoed its position relating to the delay in filing the appeal. The applicant asserted that it had diligently followed up on the provision of certified copies but had no control over issuance of the same by the Court of Appeal. In particular, the applicant argued that it could not file its appeal without the certified impugned judgment. As such, the applicant contended that the delay, which it also computed as four days, is not inordinate. The applicant also implored this Court to exercise its discretion in its favour because there is no other forum where the issues in dispute can be resolved.

[17] In opposition, the 1st respondent claimed that the alleged follow up on the provision of certified copies of the proceedings and judgment made on 15th August, 2023 had no relevance since time for filing the appeal had lapsed on 14th August, 2023. Further, that neither the applicant nor its advocate on record had demonstrated that they had previously followed up on the certified documents prior to 15th August, 2023. Even so, the 1st respondent urged that certified proceedings are not essential in filing an appeal and the applicant was at liberty to file a supplementary record of appeal once the proceedings were available. To buttress that point, the 1st respondent made reference to Rule 40 (4) of the Supreme Court Rules. More importantly, the 1st respondent submitted that the applicant should have first sought leave to file the appeal out of time before filing the same.

[18] In addition, according to the 1st respondent, the Motion for extension of time was a mere afterthought and for the sole objective of defeating the Motion to strike out the appeal. In any event, the 1st respondent claimed that the Motion had been

brought with undue delay taking into account that time for filing the appeal lapsed on 14th August, 2023. The 1st respondent further submitted that the applicant's conduct of first filing the Motion for stay of execution without disclosing its intention of seeking extension of time to file the appeal amounted to abuse of the court process.

[19] By way of rejoinder, the applicant filed two sets of further supplementary affidavits' sworn on 13th and 16th October, 2023 by Sammy Munywoki, a process server, and its Finance Director, Joe Mutisya, respectively. The process server deposed that he served the respondents with the notice of appeal through their respective advocates' email addresses on 21st July, 2023. He also stated that he had made several efforts to follow up on the certified judgment and proceedings from 21st July, 2023 by constantly visiting the Court of Appeal registry and making calls. On his part, the applicant's Finance Director deposed that the appeal had been filed within time and the motion for extension of time was filed out of abundance of caution should this Court find otherwise.

[20] We have considered the Motions in issue as well as the rival submissions by the respective parties. To begin with, we would like to address the deposition that the applicant's Motion for extension of time was filed out of caution in the event this Court finds that the appeal was actually filed out of time. The said deposition is in the context of this matter strange and tantamount to trial and error on the part of the applicant. We would like to disabuse litigants from the notion that they can approach this Court or any other court for that matter, for purposes of engaging in a trial and error venture or at worse litigation by instalments. Such conduct will not only impede on prudent use of judicial time and resources but also amounts to abuse of the court process.

[21] Be that as it may, it is well settled that interlocutory applications can only be predicated on an appeal or reference filed before this Court. See Rule 31(2) of the

Supreme Court Rules. It follows therefore, that it is apt at this juncture to first consider the Motions seeking to strike out the appeal and extension of time to file the appeal as they touch on the competency of the appeal.

[22] Rule 38 (1) of the Supreme Court Rules provides that where an appeal to this Court is filed as of right, such as in this case, it should be filed within thirty (30) days of filing the notice of appeal. It is a matter in contention as to when the notice of appeal was filed in this matter and Rule 36 of the Supreme Court Rules is thus instrumental on the issue. It provides that a notice of appeal should be filed within fourteen (14) days from the date of the decision sought to be challenged and goes on to explicitly state where the notice should be filed in the following terms:

“36 (2) The notice of appeal shall be-

...

a) filed ... with the Registrar of the court, or with the tribunal from which an appeal originates.” [Emphasis added]

In this case, the appeal originates from the impugned judgment of the Court of Appeal. It is precisely for that reason that on 14th July, 2023 the notice in issue was first presented at the Court of Appeal, filing fees thereof paid at the said court and the court’s stamp affixed on its face signifying receipt. For all intents and purposes, the notice of appeal was filed in the Court of Appeal on 14th July, 2023.

[23] The purpose of the Registrar of the Court of Appeal endorsing a notice of appeal is to indicate the date it was lodged/filed as both words mean one and the same thing. Nevertheless, it is not in dispute that more often than not, a notice of appeal filed in the Court of Appeal is not endorsed on the same date it is filed, such as in this case. The reason being that either the same was not placed before the Registrar on the same date of filing or the Registrar failed to endorse it on the same day. Cognizant of the foregoing, the date on which the notice of appeal was endorsed

by the Registrar of the Court of Appeal, that is, 21st July, 2023 cannot be considered as the date of filing. See ***Erdemann Property Limited v. Safaricom Staff Pension Scheme Registered Trustees & 3 others; Everest Limited & Another (Interested Parties)***, SC Petition No. (Applic.) E013 of 2023; [2023] KESC 76 (KLR).

[24] Besides, Rule 36(3) stipulates that-

“Upon filing of the notice of appeal, the petitioner shall transmit a copy of the notice to the Registrar.”

It is clear from the foregoing that the rule distinguishes filing and transmission of a notice of appeal as two distinct actions. It is only upon filing of the notice that a petitioner/appellant is required to transmit a copy thereof to this Court. Therefore, contrary to the 2nd respondent’s contention filing of the notice of appeal was completed at the Court of Appeal and not upon transmission of the notice to this Court.

[25] Having found that the notice of appeal was filed on 14th July 2023, it follows that the appeal, which was filed on this Court’s online platform on 18th August, 2023 and the printed copies thereof availed on 21st August, 2023 were out of time. The appeal ought to have been filed thirty (30) days from filing the notice, that is, on or before 14th August, 2023. It is on this basis that the 1st respondent seeks the appeal to be struck out while the applicant seeks extension of time to file the same.

[26] It is common ground as set out in ***Nicholas Salat*** that a litigant seeking extension of time has to adduce plausible explanation for the delay. In that regard, we are satisfied that indeed the applicant had applied for copies of the impugned judgment and proceedings on 21st July, 2023. Equally, we are persuaded that the applicant had made numerous efforts to follow up on the certified copies from 21st July, 2023 to 15th August, 2023 as outlined in detail in the process server’s affidavit.

It is not in dispute that the certified copies were availed on 17th August, 2023 after the time frame for filing the appeal had lapsed. Furthermore, the impugned judgment is envisaged under Rule 40 (1) of the Supreme Court Rules as a primary document in the appeal. Consequently, we find that the applicant has proffered a reasonable explanation for the delay in filing the appeal up to 17th August, 2023. In that, the delay was caused by the Court of Appeal and cannot be visited upon the applicant as appreciated by this Court in **County Executive of Kisumu v County Government of Kisumu & 8 Others**, SC. Civil Appl. No. 3 of 2016; [2017] eKLR.

[27] Having so found, we also hold that the applicant has not offered any explanation for the delay between 17th August, 2023 and 2nd October 2023 when it filed its Motion for extension of time. In **Marvin Opiyo Ambala & another v. Oduor Hawi Ambala & Another**, SC Applic No. 1 of 2021; [2021] eKLR, this Court pronounced that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. In the circumstances, the Motion for extension of time lacks merit.

[28] Furthermore, even assuming that the applicant had offered satisfactory explanation for the entire period of delay, which it hasn't, its Motion for extension of time would still be subject to the same fate. This is because, the applicant has urged this Court that upon extending time to deem the appeal as being properly filed. Time and time again, we have reiterated that filing an appeal out of time without leave and then seeking this Court's discretion to extend time is presumptive and in-appropriate. As we stated in **Nicholas Salat** -

“No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence.”

We therefore decline to accede to the request to deem the appeal, which was filed out of time, as properly before us. To do so would be tantamount to sanctioning an illegality.

[29] Last but not least, the 1st respondent's allegation that he has not been served with the notice of appeal has been dislodged by the process server's affidavit of service on record. It clearly indicates that the notice was served upon his advocates on 21st July, 2023 and there is nothing before us to suggest the contrary.

[30] Based on the foregoing, the 1st respondent's Motion succeeds and the appeal is hereby struck out. Having struck out the appeal, the Motion seeking stay of execution is predicated on nothing and is hereby dismissed. See ***Wilfrida Arnodah Itolondo v. Attorney General & 9 Others***, SC Applic. No. 3 of 2021 (E005 of 2021); [2021] eKLR. Flowing from the general rule that costs shall follow the event, the 1st respondent shall have costs of the three Motions as well as the appeal.

[31] Accordingly, and for the reasons afore-stated, we make the following Orders:

- i. The applicant's Notice of Motion dated 16th August, 2023 and filed on 21st August, 2023 is hereby dismissed.***
- ii. The applicant's Notice of Motion dated 29th September, 2023 and filed on 2nd October, 2023 is hereby dismissed.***
- iii. The 1st respondent's Notice of Motion dated 18th September, 2023 and filed on 19th September, 2023 is hereby allowed.***
- iv. The applicant's appeal, SC Petition No. E024 of 2023 dated 16th August, 2023 and filed on 21st August, 2023 is hereby struck out.***

v. The 1st respondent shall have costs of the three Motions and the appeal.

It is so ordered

DATED and DELIVERED at NAIROBI this 10th day of November, 2023.

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**M. K. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT**

.....

**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**

.....

**I. LENAOLA
JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR
SUPREME COURT OF KENYA**