



**M'Mukaria & 2 others v Limbiro & 6 others (Environment and Land Appeal E005 of 2022) [2023] KEELC 17929 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17929 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E005 OF 2022**

**CK NZILI, J**

**MAY 31, 2023**

**BETWEEN**

**DANIEL LIMBIRO M'MUKARIA ..... 1<sup>ST</sup> APPELLANT**  
**SILAS KIUMIRU ..... 2<sup>ND</sup> APPELLANT**  
**MICHAEL NTONJA M'LIMBIRO ..... 3<sup>RD</sup> APPELLANT**

**AND**

**MONICA KAEMBE LIMBIRO ..... 1<sup>ST</sup> RESPONDENT**  
**SUSAN LICHORO M'LIMBIRO ..... 2<sup>ND</sup> RESPONDENT**  
**JOSHUA MUGAA DANIEL ..... 3<sup>RD</sup> RESPONDENT**  
**JOSEPH MURIUNGI LIMBIRO ..... 4<sup>TH</sup> RESPONDENT**  
**MARTIN KAARAU LIMBIRO ..... 5<sup>TH</sup> RESPONDENT**  
**JESSE MICHUBU LIMBIRO ..... 6<sup>TH</sup> RESPONDENT**  
**DAVID MUTHOMI LIMBIRO ..... 7<sup>TH</sup> RESPONDENT**

**RULING**

1. By an application dated March 22, 2023, the court is asked to set aside the order made on March 21, 2023 and reinstate the appeal for hearing on merits. The grounds of the application are contained on the face of the application and in a supporting affidavit sworn by Silas Kiamiru on the even date. He deposed that the appeal was dismissed for non-compliance; though a correct record of appeal had been filed on time, it had been put in the wrong file hence the reasons it was not in the court file at the time the order for dismissal was made.
2. The appellants urged that mistake of counsel should not be visited upon them.



3. Further, the applicant deposed that the appeal raises weighty issues and hence should be heard on merits.
4. The application is opposed by the replying affidavit sworn by Monica Kaembe Limbiro on April 27, 2023 on the basis that the affidavit is full of half-truths, the applicant is vexatious, frivolous, scandalous and irregular. It is averred that the 1<sup>st</sup> appellant is her lawful husband who is very old, frail and incapable of giving authority to the 2<sup>nd</sup> applicant to swear the affidavit on his behalf. The 1<sup>st</sup> respondent averred that the record of appeal was only served on April 3, 2023 after this appeal had been dismissed.
5. Therefore, the 1<sup>st</sup> respondent maintained that the record of appeal was filed on March 21, 2023, but unprocedurally and irregularly back-dated or stamped on February 28, 2023 by the registry personnel in collusion with the applicant. That it is not true that the appeal was filed on February 28, 2023, since there is no evidence backing that position, otherwise counsel for the applicant would have informed the court of the officer at the registry who had received the record of appeal misfiled it and which other file the record of appeal was filed in. That if at all the record of appeal had been filed on time, good practice would have required his counsel to be served before the mention date on March 21, 2023 and counsel to have his physical copy before the court. That to demonstrate that the record of appeal was hurriedly prepared after the dismissal the same omits a crucial document to the appeal. That if at all the record of appeal was filed, the same was done in utter disregard of the orders made on February 16, 2023, hence cannot be a proper record of appeal for purposes of this appeal and should not, therefore, be reinstated for hearing when it is still non-compliant with the court's directives. That his being a family dispute, which family the 2<sup>nd</sup> appellant is not part of, but had unlawfully induced her husband to claim to have sold the land to him without any proof of payment, the 3<sup>rd</sup> appellant in collusion of the 2<sup>nd</sup> appellant was pursuing the appeal hell-bent to disentitle other family members of the disputed land. Therefore, the respondents averred that the appeal has caused great prejudice to the family and the cowives who cannot effectively utilize the prime property of the household they toiled for 30 years to buy. That should the application be allowed, throw-away costs of Kshs 350,000/= and security for further costs should be paid.
6. With leave the 2<sup>nd</sup> applicant filed written submissions dated April 17, 2023, relying on section 3A of the *Civil Procedure Act* and *Ivita v Kyumbu* (1984) KLR 441, *Richard Leiyagu v IEBC & 2 others* (2013) eKLR, *Belinda Murai & others v Amoi Wainaina* (1978) KLR, *Chemwolo and another vs Kubende* (1982 – 1988) KLR 103, and article 50 of the *Constitution*.
7. It is not in dispute that the appellants filed a record of appeal on March 28, 2023 without leave of court and before the appeal was admitted for hearing on September 29, 2022.
8. The directives of September 29, 2022 required that the record of appeal be filed within 60 days from that date. By the mention date on December 8, 2022, no record of appeal had been filed.
9. On February 16, 2023, the matter was mentioned before the court and due to non-compliance leave was granted to file a proper record of appeal within 14 days. That time would have expired on March 1, 2023.
10. On mention date of March 21, 2023, no record of appeal had been filed in compliance with the court directives. Counsel for the appellants insisted that they had complied but could not produce evidence through a physical copy filed or served on the respondents. Counsel for the respondents told the court that he had not been served with any record of appeal alleged to have been filed as directed by the court. The court struck out the appeal for non-compliance. This resulted to the instant application.



11. Other than the records of appeal stamped on February 28, 2023 no other evidence exists to show that the record of appeal was filed and payment of requisite filing fees assessed and made on February 28, 2023.
12. Even assuming that there was compliance with the filing, the applicants have not explained why the record of appeal was not served upon the respondents on time or at all before the mention date. Counsel for the applicants has also not explained why the two original copies filed and received on February 28, 2023 were not in their custody at the time the matter was called out in court or so soon thereafter.
13. Counsel for the appellants has not sworn any affidavit to confirm who filed, received and misfiled the record of appeal since it was not in the court file at the time the matter was called out. If counsel had sworn the affidavit, this would have dispelled the fear of the respondents.
14. Further, it was not enough for the applicants to state that mistakes of counsel should not be visited upon them and that such counsel as an officer of the court owned up the mistake as held in *Belinda Murai supra* & *Chemwolo* (supra).
15. Court orders are not made in vain and it is the duty of parties and counsels to help the court to expeditiously dispose of matters under sections 1A, 1B and 3A of the *Civil Procedure Act* as read together with article 159 of the *Constitution*.
16. To this end, counsel for the applicants and the applicants have tried to paint a negative perception on court personnel and so are the respondents that there was complicity and interference of court records by the court personnel.
17. Counsels on record for the applicants would have clarified all these if they had sworn affidavits and cleared the air on whether the mistake was theirs or not. Between February 28, 2023 and March 21, 2023 was almost a whole month for one to fail to serve a record of appeal if at all it had been filed on time.
18. No explanation has been offered by the lawyers for the applicants. Two wrongs cannot make a right.
19. As regards the prejudice to the respondents if the appeal were to be reinstated as held in *Ivita v Kyumbu* (supra), the court has to consider the same. No offer to pay throw-away costs has been made as a good gesture and show of good faith if the mistake was on the counsel.
20. The applicants have also not addressed the complaint that the record of appeal does not comply with order 42 rule 4 *Civil Procedure Rules*. As much as the court has the discretion to set aside and reinstate a dismissed appeal that has been struck out the appellants must show good reasons and why it is just to reinstate it. The reasons for non-compliance and non-service are not convincing at all.
21. The upshot is I find the application lacking merits. The same is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 31<sup>ST</sup> DAY OF MAY 2023**

**In presence of**

C.A John Paul

Otieno for appellant

Mrs. Njindo for respondent

**HON. CK NZILI**



ELC JUDGE

