



**Kemei v Chebii & 3 others (Environment and Land Appeal
E016 of 2024) [2025] KEELC 3562 (KLR) (7 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3562 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E016 OF 2024**

MAO ODENY, J

MAY 7, 2025

BETWEEN

FRANCIS CHERUIYOT KEMEI APPELLANT

AND

MOSES K. CHEBII 1ST RESPONDENT

JONAH KIPROTICH KOMEN 2ND RESPONDENT

PHILIP CHEPKWONY 3RD RESPONDENT

CALEB KOTUT 4TH RESPONDENT

RULING

1. This ruling is in respect of a Notice of Motion application dated 25th November, 2024 by the Respondent/Applicant seeking the following orders:
 - a. That this Honourable court be pleased to strike out the Memorandum of Appeal dated the 2nd April, 2024 and to dismiss the Appeal.
 - b. That the cost of this Application be provided for and borne by the Appellant/ Respondent.
2. The application was supported by the annexed affidavit of Kisilah Daniel Gor, counsel for the Respondent/Applicant sworn on 25th November, 2024 where he deponed that on 28th February, 2024, Hon B. Ochieng delivered a ruling and the Appellant was granted 28 days within which to lodge an appeal. Counsel stated the Appellant failed to lodge the appeal within the prescribed timeline by the trial court.
3. It was his deposition that the Appellant served them with a Memorandum of Appeal dated 2nd April 2024, on 4th April, 2024, 7 days after the lapse of time within which the appeal was to be filed. Further



that the Appellant had not filed an application seeking leave to file the appeal out of time and urged the court to strike out the Memorandum of Appeal dated 2nd April, 2024 with costs.

4. Francis C. Kemei, the Appellant/Respondent filed a Replying Affidavit sworn on 27th January, 2025 and deponed that the ruling was delivered in the absence of parties on 28th February, 2024, and were supposed to file an appeal by 29th March 2024 but because they were not aware of the date of the ruling, they only managed to file the Memorandum of Appeal on 2nd April, 2024 through the Electronic filing system and the same was stamped on 4th April, 2024.
5. It was his deposition that the Electronic filing system was prone to delays and that the 30 days period for filing the appeal was to lapse on Friday 29th March, 2024 which happened to be a public holiday (Good Friday) and which holiday ended on 1st April, 2024 hence the only possible earliest day for filing the appeal was on 2nd April, 2024. The Respondent urged the court to dismiss the application as it has no merit.

Respondent/applicant's Submissions

6. Counsel for the Applicant filed submissions dated 13th January, 2025 and identified the issue for determination as: whether or not the application is merited. Counsel relied on Section 79G of the Civil Procedure Act and the following cases: Sultan Omar Hudhefa vs Ann Muthoni Ngugi [2022] eKLR, Ali vs Grain Industries Limited (Civil Application E066 of 2023) [2024] KECA 400 eKLR, Ouma vs Agwingi (Civil Appeal E054 of 2022) [2023] KE HC 19699 (KLR), and Kariuki vs Mirio (Miscellaneous Civil Application E002 of 2022) [2024] KEHC 11319 (KLR).
7. Counsel submitted that any appeal filed out of time and without leave of the court is liable to be struck out. Counsel submitted that the Appellant, by failing to make a formal application for extension of time, even after knowing that he is time barred is prima facie that he has come to court with unclean hands which equity abhors. Counsel relied on the case of Achweya vs Onyansi (Civil Appeal E090 of 2024) [2025] KEHC 14 (KLR) where the court held that however short or long the period of delay, the period must be explained.
8. Counsel therefore urged the court to strike out the Memorandum of Appeal filed on 4th April, 2024 with costs to the Respondent/Applicant.

Appellant/respondent's Submissions

9. Counsel for the Respondent filed submissions dated 27th January, 2025 and submitted that the application is filed in bad faith as the Applicant does not want the court to determine this matter on merit. Counsel submitted that the Applicant is well aware that the Respondent does not have access to the lower court file in order to prepare proceedings and the Record of Appeal, as the file is in the lower court awaiting a ruling on an application for stay pending appeal.
10. Counsel submitted that the said ruling was scheduled to be delivered on 18th December 2024, but it is now to be delivered on notice. It was counsel's further submission that the Applicant will not suffer any prejudice if the matter is heard on merit unlike, the Respondent who stands to suffer for being driven out of the seat of justice unheard. Counsel urged the court to dismiss the application.

Analysis And Determination

11. The issue for determination is whether the application to strike out this appeal has merit. It is the Respondent/Applicant's case that the Appellant/Respondent failed to lodge the Memorandum of



- appeal within the stipulated time hence should be struck out for failure to seek for leave to file the Appeal out of time.
12. It was the Respondent's case that the 30 days period within which the Appeal was to be filed was to lapse on Friday 29th March, 2024 which was a public holiday (Good Friday) and which holiday ended on 1st April, 2024 hence the only possible earliest day for filing the appeal was on 2nd April, 2024.
 13. The Appellant/Respondent submitted that he did not have access to the lower court file in order to prepare proceedings and the Record of Appeal as the file is in the lower court awaiting a ruling on an application for stay pending appeal.
 14. In the case of *Kitonyo v Mwanja* [2025] KEELC 1124 (KLR) the court held as follows at paragraph 35:

“The Applicant attributed his failure to file a memorandum of appeal and record of appeal within the statutory period as the delay in receipt of typed certified court proceedings as per his letter of request dated 22nd August, 2024. It is the finding of this court that the Applicant has demonstrated sufficient cause for not filing his appeal in time.
 15. In the case of *Tome & Another v Attorney General & 2 Others* [2021] KECA 150 (KLR) the court stated that:

“It is now a settled principle that striking out a pleading is a draconian act, which may only be resorted to in plain and outright instances. The power of this court to strike out an appeal is discretionary and is exercised based on the peculiar circumstances of each case.”
 16. The Appellant/Respondent has given sufficient reason why he filed an appeal on 2nd April 2024 as the time lapsed on 29th which fell on Good Friday which was a holiday. The Appellant cannot be penalized for the delay which was occasioned by the date falling on a public holiday.
 17. I have considered the application, the submission by counsel and find that the application lacks merit and is therefore dismissed with costs in the cause. The Appellant is to Fast Track the filing of the Record of appeal within 30 days failure to which the Appeal stands dismissed.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 7TH DAY OF MAY 2025.

M. A. ODENY

JUDGE

