



REPUBLIC OF KENYA



KENYA LAW
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**Masha v Kenga & 3 others (Civil Appeal 36 of 2022)
[2024] KEELC 3616 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3616 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CIVIL APPEAL 36 OF 2022**

EK MAKORI, J

MAY 2, 2024

BETWEEN

EMANUEL KAZUNGU MASHA APPLICANT

AND

CHARO MAITHA KENGA 1ST DEFENDANT

JUMAA MAITHA KENGA 2ND DEFENDANT

JOHN MAITHA KENGA 3RD DEFENDANT

DUNCAN KAHINDI KAZUNGU 4TH DEFENDANT

(Being an appeal from the ruling of the Senior Principal Magistrate J.M Kituku dated and delivered at Mombasa on 30th August 2022 in Kilifi SPMC ELC Case No. 63 of 2020)

RULING

1. Notice of Motion dated 20th July 2023 seeks:
 - i. The appeal be dismissed for want of prosecution.
 - ii. In the alternative, the appeal be struck out for failure by the appellant to file a record of appeal.
2. The single issue to determine is whether to strike out the current appeal because the record of appeal is incomplete, and there has been an inordinate delay in setting it down for direction on its disposal.
3. The applicant admittedly expresses the genuine concern that the current appeal is to impugn interlocutory orders issued by the Lower Court, and its pendency is unfair to the applicant as the primary suit still pends.
4. The respondent has expressed the hardships encountered in obtaining the proper record from the Lower Court to prepare an appropriate appeal.



5. I have considered the parties' submissions. The respondents contend that the failure to file the record of appeal was occasioned by the missing Lower Court file and typed proceedings.
6. The Court usually aims to sustain a suit rather than strike it out. For appeals, as proposed by the respondent, it means striking out an appeal without hearing the parties on merit. In County Government of *Narok v British Pharmaceuticals Limited* [2021] eKLR, Gikonyo J. was of the view that:

“ [22]. Although the case by the Court of Appeal dealt with the striking out of the notice of appeal on the basis that it was served on the respondent out of time and without leave of the court, the jurisprudence coming through is that, in exercise of discretion to strike out a pleading or document, in this case, record of appeal, the court has to weigh the prejudice that is likely to be suffered by the innocent party against the prejudice to be suffered by the offending party if his pleading or document is struck down. A perfect exposition of the core of the overriding objective of the court in section 1A and 1B of the Civil Procedure Rules as well as the principle of justice in article 159(2)(d) of *the Constitution* towards serving substantive justice.”

7. I am persuaded by the reasoning adopted by Gikonyo J. I can see we now have a complete record of appeal. After hearing the parties herein, I should not be swayed to dismiss the current appeal summarily but on merit. To avoid injustice, the application dated 20 July 2023 is hereby dismissed with no order to costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 2ND DAY OF MAY 2024.

E. K. MAKORI

JUDGE

In the Presence of: -

Mr. Kinaro, for the Respondent/Applicant

Ms. Gitari, for the Appellant/Respondents

Court Assistant: Happy

