



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nation Media Group v Nyagaya (Civil Appeal E686 of 2021)  
[2023] KEHC 899 (KLR) (Civ) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 899 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL APPEAL E686 OF 2021**

**JN MULWA, J**

**FEBRUARY 16, 2023**

**BETWEEN**

**NATION MEDIA GROUP ..... APPELLANT**

**AND**

**LYDIA ADHIAMBO NYAGAYA ..... RESPONDENT**

*(Originating from the judgement in Milimani SCCOM No. E261 of 2021)*

**RULING**

1. By a notice of motion dated April 11, 2022, the respondent seeks the following orders against the appellant:
  1. This honorable court be pleased to strike out the appellant's record of appeal dated March 22, 2022;
  2. This honorable court be pleased to find that there is no appeal pending before the court;
  3. This honorable court be pleased to dismiss the appeal herein;
  4. The costs of this application be provided for.
2. The application was brought pursuant to section 1A, 3A of the *Civil Procedure Act*, 2010; order 51 of the *Civil Procedure Rules*, 2010, section 38 of the *Small Claims Court Act*; rule 30 of the *Small Claims Court Rules*.
3. It is based on the grounds set out on the face of the motion and the supporting affidavit of the respondent's advocate Kokebe Kevin. He avers that the appellant's record of appeal is not properly



before this court as it was filed out of time and without prior leave of court. He stated that the record of appeal ought to have been filed within 60 days of the filing of the memorandum of appeal, that is, by January 24, 2022 latest. However, the same was filed on March 22, 2022 and the appellant has not tendered any explanation for the delay. Counsel also faulted the appellant for failing to cause the appeal to be mentioned for directions before the judge in chambers within 21 days of service of the memorandum of appeal. In his view, the appellant has been indolent in prosecuting the appeal.

4. Further, the respondent contends that the appeal was filed contrary to the provisions of section 38 of the *Small Claims Court Act*. In this regard, it was argued that the appeal challenges the quantum of nominal damages awarded to the respondent in Milimani SCCOM No E261 of 2021, which is purely a matter of fact and not law.
5. In response, the appellant filed grounds of opposition dated June 20, 2022, contending that the application is premature as the appeal has never been admitted pursuant to section 79B of the *Civil Procedure Act*. The appellant also filed a replying affidavit sworn on June 21, 2022 by Mayiah Juma Advocate highlighting various steps that have been taken on behalf of the appellant towards facilitating the filing of the record of appeal and prosecuting the appeal in general. Annexed to the replying affidavit are: copies of letters addressed to the Executive Officer of the Small Claims Court, an email sent to the deputy registrar of this court and a notice from this court requiring the appellant to file its record of appeal. As regards compliance with section 38 of the *Small Claims Act*, counsel deposed that the grounds contained in the memorandum of appeal are purely matters of law.
6. The application was canvassed through oral arguments before this court on July 21, 2022 whereupon the appellant was represented by Ms Olung'a advocate while the respondent was represented by Mr Kokebe advocate. The court has considered the submissions which are a replica of the averments in the affidavits. The issues that arise for determination are:
  - a. Whether the record of appeal should be struck out for being filed out of time.
  - b. Whether the appeal should be dismissed for being filed contrary to section 38 of the *Small Claims Act*.
  - c. Who should bear the costs of the application.

#### **Whether the Record Of Appeal Should Be Struck Out For Being Filed Out Of Time**

7. To begin with, there is no legal requirement that the record of appeal in an appeal from a subordinate court to the High Court must be filed within sixty days from the date of filing of the memorandum of appeal. This requirement only applies to appeals from the High Court to the Court Appeal where an appellant is obliged to file the record of appeal strictly within sixty days of filing the notice of appeal. In the present scenario, the court will only be concerned with whether the same has been filed within a reasonable period or within the period ordered by the court. In this case, it has not been shown that there was a court order which required the appellant to file the said document within 60 days of filing the memorandum of appeal.
8. Further, in the record before the court, it is clear that upon lodging its memorandum of appeal on October 22, 2021, the appellant's advocates wrote two letters dated 22/11/21 and 20/1/2022 to the Executive officer of the Small Claims Court requesting for certified copies of the proceedings, judgment and decree for purposes of appeal. On March 2, 2022, the appellant's advocates were belatedly served with a notice dated February 8, 2022 from this court requiring the appellant to file the record of appeal within 21 days failure to which the appeal would be listed for dismissal. The appellant filed the record of appeal on March 22, 2022 before any action had been taken towards dismissal of the appeal.



Subsequently, on March 28, 2022, its advocates sent an email to the Deputy Registrar of this court requesting that the appeal be listed for directions. What followed was a notice under order 42 rule 13 of the *Civil Procedure Rules* from the court to the advocates informing them that the appeal had been listed for directions in chambers on May 24, 2022.

9. From the chronology of events highlighted hereinabove, the court finds that the record of appeal was filed within a reasonable time and is therefore competently before the court. The slight delay has been sufficiently explained to the court's satisfaction. The upshot is that prayers 1 and 2 of the application lack merit and are dismissed.

**Whether the Appeal Should Be Dismissed For Being Filed Contrary To Section 38 Of The Small Claims Act.**

10. Section 38 of the *Small Claims Court Act* confines appeals to the High Court from the decisions of the Small Claims Court to matters of law only. It states thus:

“(1) A person aggrieved by the decision or an order of the court may appeal against that decision or order to the High Court on matters of law.

(2) An appeal from any decision or order referred to in subsection (1) shall be final.”

11. The court has perused the grounds set out in the appellant's memorandum of appeal dated October 22, 2021. The same revolve around the question as to whether nominal damages not specifically pleaded for can be awarded for breach of contract. In the court's considered view, this is indeed a question of law. The appeal is therefore properly before this court.
12. The upshot is that the respondent's application is lacking in merit. The same is dismissed with no orders as to costs.

Orders Accordingly.

**DATED, DELIVERED AND SIGNED IN NAIROBI THIS 16<sup>TH</sup> DAY OF FEBRUARY 2023.**

**J. N. MULWA**

**JUDGE.**

