

**IN THE COURT OF APPEAL  
AT MALINDI  
(CORAM: NYAMWEYA, LAIBUTA & NGENYE,  
JJ.A.) CIVIL APPEAL (APPLICATION) NO. E013  
OF 2024**

**BETWEEN**

**TABU TUVA KHONDE..... 1<sup>ST</sup>  
APPLICANT KAHINDI KAINGU NGONDA.....2<sup>ND</sup>  
APPLICANT**

**AND**

**NGOMENI SWIMMERS LTD.....RESPONDENT**  
*(Being an application to strike out the Memorandum and Record  
of Appeal against the Ruling and Orders of the Environment and  
Land Court of Kenya at Malindi (E. K. Makori, J.) dated 15<sup>th</sup>  
February 2024*

*in*

***E.L.C Case No. 15 of 2010)***

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**RULING OF THE COURT**

1. By a Notice of Motion dated 26<sup>th</sup> July 2024 filed under rules 77(1) and (2), 79(1), 84, 85, 86 and 89(1) (h) and (i) of the Court of Appeal Rules,2022, the applicants, Tabu Tuva Khonde and Kahindi Kaingu Ngonda, sought orders to strike out: the

respondent's memorandum of appeal dated 15<sup>th</sup> May 2024  
together with the entire

record of appeal filed therewith on the same date; and their notice of appeal dated 15<sup>th</sup> February 2024 and lodged on 5<sup>th</sup> March 2024. In addition, the applicant's prayed for costs of their Motion.

2. The applicants' Motion was supported by the 1<sup>st</sup> applicant's affidavit sworn on 26<sup>th</sup> July 2024 essentially deposing to the six (6) grounds on which the application was made, namely: that the impugned ruling was delivered on 15<sup>th</sup> February 2024; that the respondent's notice of appeal ought to have been lodged on or before 29<sup>th</sup> February 2024, but that it was lodged 6 days later without leave of the Court; that the notice of appeal was not served within the required period of 7 days after it had been lodged; and that the record of appeal ought to have been filed on or before 28<sup>th</sup> April 2024, but was filed on 15<sup>th</sup> May 2024.

3. In a further affidavit sworn on 2<sup>nd</sup> April 2025 in reply to the respondent's replying affidavit to which we will shortly return, learned counsel for the applicants, Mr. Nicholas Odera Sumba, averred that the respondent's notice of appeal on record was not

accompanied by a receipt in acknowledgment of payment of court filing fees to show when it was lodged; that the Court's Case Tracking System (CTS) shows that the record of appeal was filed on 16<sup>th</sup> May 2024 and not on 15<sup>th</sup> May 2024 as alleged; that they were belatedly served with the record of appeal via email on 19<sup>th</sup> July 2024 (47 days after the period allowed for service under the Rules); and that there was no evidence on record to show that the respondent sought and obtained leave to appeal out of time.

4. Counsel for the applicants, M/s. N. O. Sumba & Company, filed written submissions dated 2<sup>nd</sup> April 2022 citing a host of 15 judicial authorities, which we have duly considered.

5. In response to the applicants' Motion, the respondent filed a replying affidavit sworn by its Director, Mario Nuzzo, on 4<sup>th</sup> March 2024 stating: that the applicants' Motion was fatally defective, misconceived, and an abuse of the Court process; that the application was filed out of time; that the respondent's notice of appeal was filed on 15<sup>th</sup> February 2024 and served on even date; that the applicants' Motion was filed on 26<sup>th</sup> July 2024, approximately

162 days after service of the notice of appeal, and well beyond the prescribed timelines; that the record of appeal was filed on 15<sup>th</sup> May 2024 and served on 19<sup>th</sup> June 2024; that the application seeking orders to strike out the record of appeal was filed out of time; that the applicants have not sought leave to file their Motion out of time; that the delay in obtaining typed proceedings, and the pending issuance of the certificate of delay, was beyond their control; that leave to appeal was sought informally and granted orally on 15<sup>th</sup> February 2024 when the impugned ruling was delivered; and that striking out an appeal is a draconian measure that should only be resorted to in plain and outright instances.

6. In rebuttal, learned counsel for the respondent, M/s. Murgor & Murgor, filed written submissions and a digest of authorities dated 26<sup>th</sup> March 2024 citing 2 judicial authorities, which we have considered. Counsel urged us to dismiss the applicants' Motion with costs.

7. The 3 issues before us are: (i) whether the applicants' Motion was filed within the timelines prescribed in the proviso to rule 86 of the Rules of this Court; and (ii) whether the respondent's notice of appeal was lodged and served upon the applicants within the period prescribed under rules 77(1) and 79(1) respectively; (iii) whether the record of appeal was filed and served within the period prescribed in rules 84(1) and 92(1) of the Court's Rules.

8. On the 1<sup>st</sup> issue as to the competence of the applicants' Motion in light of the proviso to rule 86, counsel for the respondent contended that the Motion to strike out the notice and record of appeal was filed out of time in that it was not brought within 30 days of service of the notice and record of appeal. According to counsel, they served the notice of appeal on 15<sup>th</sup> February 2024 and the record of appeal on 19<sup>th</sup> June 2024. In their view, the applicants' Motion filed on 26<sup>th</sup> July 2024 offended the proviso to rule 86 and should therefore be struck out as being incompetent.

9. In rebuttal, counsel for the applicants stated that they were served with the record of appeal *via* email on 19<sup>th</sup> July 2024 after which they filed the instant Motion within 7 days on 26<sup>th</sup> July 2024.

10. The record as put to us appears to have two identical email messages from counsel for the respondent purporting to forward to counsel for the applicant a copy of the record of appeal on 19<sup>th</sup> June and 19<sup>th</sup> July 2024. We find nothing on record to suggest that in the supervening period, counsel for the applicants had made a request that the record be re-forwarded. It is noteworthy that the email of 19<sup>th</sup> July 2024 makes no reference to the one of 19<sup>th</sup> June 2024, and neither is it a forwarding email in relation to the earlier one. But for the dates, the two emails are identical in every respect, except that the earlier email of 19<sup>th</sup> June 2024 does not disclose the name of the signatory to the mail. On the other hand, the email of 19<sup>th</sup> July discloses the signatory as Kelvin Kyalo Philip, which lends authenticity to service as having been effected on 19<sup>th</sup> July 2024 as admitted by counsel for the applicant. On the same day, counsel requested for a hard copy of the record, but were compelled to

download and print it at their cost after counsel for the respondent failed to respond to their request.

11. Rule 86 of the Court of Appeal Rules reads:

***86. Application to strike out notice of appeal or appeal.***

*A person affected by an appeal may at any time, either before or after the institution of an appeal, apply to the court to strike out the notice of appeal, as the case may be, on the ground that no appeal lies or some essential step in the proceedings has not been take or that has not been taken within the prescribed time: Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days after the date of service of the notice of appeal or record of appeal, as the case may be.*

12. We are satisfied that the record of appeal was served on counsel for the applicants on 19<sup>th</sup> July 2024. Accordingly, the notice of Motion filed on 26<sup>th</sup> July 2024 was in good time and within the period prescribed by the proviso to rule 86 of the Court's Rules. It is by no means incompetent as contended by counsel for the respondent.

13. Turning to the 2<sup>nd</sup> issue as to the validity of the respondent's notice of appeal dated 15<sup>th</sup> February 2024, we take to mind the

fact

that, from the record as put to us, counsel for the respondent purported to serve on counsel for the applicants a notice of appeal dated 15<sup>th</sup> February 2024 via email, which notice had not been lodged in Court. It is not lost on us that a Notice of Appeal does not take effect solely upon service if it has not been lodged with the Court. To our mind, lodging the Notice of Appeal with the Court registry is a crucial step in initiating the appeal process. Rule 77(2) of the Court's Rules requires the notice of appeal to be lodged within 14 days of the impugned decision. Rule 77(1) and (2) reads:

***Notice of Appeal***

*77. (1) A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.*

*(2) Each notice under sub-rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.*

14. In view of the foregoing, the respondent's notice of appeal dated 15<sup>th</sup> February 2024 and purportedly served on counsel for the applicants on the same day was of no legal or procedural effect, and does not hold with regard to the appeal by reason of

non-compliance

with rule 77(2). The only notice worth of our scrutiny with regard to the date on which it was lodged and served is the one lodged on 5<sup>th</sup> March 2024, 5 days out of time and without leave of the Court.

**15.** This Court addressed itself to the pressing need to lodge and serve a notice of appeal in **Daniel Nkirimpa Monirei vs**

**Sayialel**

**Ole Koilel & 4 Others** [2016] eKLR where it stated as follows:

***“... The purpose of service of a Notice of Appeal is to alert the parties being served that the case in question has not been concluded yet as the same has been escalated to another level. This enables the party to prepare and get ready for another fight, be it by way of gathering resources or just getting mentally prepared for defending the intended appeal. Failure to serve a party with a Notice of Appeal within the time prescribed by law gives a party false belief that the matter has been concluded, only to be ambushed later with the record of appeal in which the said notice is tucked away somewhere in the record. That occasions prejudice to the ambushed party, and it is in our view a habit that should not be countenanced in any fair and just process. That would explain why Rule 77(1) of the Court of Appeal Rules is couched in mandatory terms.”***

**16.** The respondent’s notice of appeal having been lodged five

(5) days out of time without leave of the Court, and the applicants' Notice of Motion to strike it out having been filed within time in compliance

with the proviso to rule 86, we are left with no alternative but to hold that the notice of appeal is incompetent, which settles the 2<sup>nd</sup> issue.

17. While we could have stopped here, it would be remiss of us not to share our finding on the 3<sup>rd</sup> issue as to whether the record of appeal was filed and served within the period specified in the Rules. Rule 84(1) of the Court of Appeal Rules requires an appeal to be instituted “... *by lodging the record of appeal within sixty days after the date when the notice of appeal was lodged*”. The respondent’s notice of appeal having been lodged on 5<sup>th</sup> March 2024, and the record of appeal having been filed on 15<sup>th</sup> May 2024, we find that the record was lodged 10 days out of time and without leave of the court or any certificate of delay to justify the belated action. Be that as it may, the very fact that the notice of appeal is liable to striking out, the substantive appeal is in itself bereft of the requisite foundation and is equally incompetent.

**18.** Addressing itself to the mandatory requirement to file and serve a notice of appeal, the Supreme Court in **University of**

**Eldoret and**

**another v Hosea Sitienei and three others** [2020] eKLR observed:

***“36. The filing of a notice of appeal is not premised on any occurrence or condition to be fulfilled by the appellant. The filing of a notice of appeal signifies the intention to appeal.”***

**19.** On the authority of the University of Eldoret and Sitienei case (ibid), it is true to say that, in the absence of a notice of appeal properly on record, the applicant herein is yet to express her intention to appeal. Citing the Supreme Court decision in

**Nicholas**

**Kiptoo Arap Korir Salat v Independent Electoral and**

**Boundaries Commission and 7 others** [2014] eKLR, this Court had

this to say in **Apungu Arthur Kibira v Independent Electoral and**

**Boundaries Commission and 2 others** [2018] eKLR:

***“A notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite.”***

20. Having considered the applicants' Motion, the affidavits in support and in reply, the respective submissions, the cited authorities and the law, we reach the inescapable conclusion that the

applicants' Notice of Motion dated 26<sup>th</sup> July 2024 succeeds and is hereby allowed as prayed and, consequently:

(a) the respondent's notice of appeal and record of appeal are hereby struck out; and

(b) the costs of the application shall be borne by the respondent.

Orders accordingly.

**Dated and delivered at Mombasa this 24<sup>th</sup> day of October 2025.**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CARb, FCIArb.**

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**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

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

*Signed*  
**DEPUTY REGISTRAR**