

**REPUBLIC OF KENYA**

**IN THE COURT OF  
APPEAL AT NAIROBI**

**(CORAM: W. KARANJA, M'INOTI & JOEL NGUGI,**

**JJ.A.) CIVIL APPEAL (APPLICATION) NO. E216 OF**

**2025 BETWEEN**

**MAGNATE VENTURES LTD.....APPLICANT**

**AND**

**MAJESTIC SECURITY SERVICES LTD ..... 1<sup>ST</sup>**

**RESPONDENT RAHAB KAREI MUKIAMA.....2<sup>ND</sup>**

**RESPONDENT**

**TITUS KURAUKA MUKIAMA ..... 3<sup>RD</sup>**

**RESPONDENT REGISTRAR OF TITLES, NAIROBI 4<sup>TH</sup>**

**RESPONDENT**

**REGISTRAR OF COMPANIES.....5<sup>TH</sup> RESPONDENT**

*(Application to strike out the Notice of Appeal dated 26<sup>th</sup> February 2024, the Record of Appeal dated 10<sup>th</sup> March 2025, and rescission of the order made 29<sup>th</sup> January 2025 in CA No. E692 of 2024 from the judgment and decree of the Environment and Court at Nairobi (Angote, J.) dated 8<sup>th</sup> February 2024*

**in**

**ELCC No. 212 of 2018)**

**\*\*\*\*\***

**RULING OF THE**

**COURT**

1. The motion on notice before the Court is dated 7<sup>th</sup> April 2025 and

is taken out by **the applicant, Magnate Venture Ltd.** The applicant seeks to strike out the notice of appeal by **the 1<sup>st</sup> respondent, Majestic Security Services Ltd.** dated 26<sup>th</sup>

February 2024 and its record of appeal dated 10<sup>th</sup> March 2025.  
The third prayer in the motion is a consequential one seeking  
rescission of

an order of injunction granted in favour of the 1<sup>st</sup> respondent by this Court on 29<sup>th</sup> January 2025.

2. The brief background to the application is as follows. The 1<sup>st</sup> respondent filed a suit in the **Environment and Land Court** at **Nairobi** against the applicant and the other respondents in this application, seeking, among others, declarations that it was the lawful owner of the property known as **LR No. 21069** in Loresho, Nairobi and that the sale of the suit property to the applicant by **Rahab Karei Mukiama** and **Titus Kurauka Mukiama** (the 2<sup>nd</sup> and 3<sup>rd</sup> respondent, respectively) was unlawful and fraudulent. The 1<sup>st</sup> respondent further prayed for cancellation of the applicant's title and registration of the suit property in its own name; an order for eviction of the applicant and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from the suit property; general damages; and costs.
3. In its defence and counterclaim, the applicant pleaded that it was the lawful owner of the suit property, having purchase the same from the 1<sup>st</sup> respondent before the latter's directors were unlawfully changed so as to impeach the transaction. The applicant prayed for an order for removal of a caveat that the 1<sup>st</sup> respondent had placed on the title to the suit property.
4. The suit was heard by **Angote, J.**, who, by a judgment dated

8<sup>th</sup>

February 2024, dismissed the 1<sup>st</sup> respondent's suit and allowed the

applicant's counter-claim. The 1<sup>st</sup> respondent was aggrieved and lodged a notice of appeal on 28<sup>th</sup> February 2024. The notice of appeal was served upon the applicant on 6<sup>th</sup> March 2024.

5. On 13<sup>th</sup> December 2024 the 1<sup>st</sup> respondent applied in this Court for an order of injunction to stop the applicant from dealing with or transferring the suit property pending the hearing and determination of its appeal. The 1<sup>st</sup> respondent also applied for an order directing the Chief Land Registrar to issue an inhibition on the suit property to stop any dealing therewith pending the hearing and determination of the appeal.
6. On 29<sup>th</sup> January 2025, the Court issued the following orders:
  - i. The 1<sup>st</sup> respondent shall remain in possession of the suit property, but is hereby restrained from developing or disposing of the suit property pending the hearing and disposal of the intended appeal;***
  - ii. The applicant shall file and serve the intended appeal within 45 days (from the date) hereof failing which the restraining orders issued in order (i) above shall automatically lapse; and***
  - iii. Costs of the Motion shall be in the intended appeal."***
7. The 1<sup>st</sup> respondent filed the record of appeal on 25<sup>th</sup> March 2025 and served the same upon the applicant on 31<sup>st</sup> March 2025.
8. On 7<sup>th</sup> April 2025, the applicant filed the motion now before the

Court, seeking the three reliefs we have already adverted to. In

support of the application, Mr. Havi, learned counsel for the applicant, relied on the supporting affidavit sworn by Stanley Kinyanjui, a director of the applicant, on 7<sup>th</sup> April 2025 and written submissions dated 18<sup>th</sup> April 2025.

9. The substance of the applicant's succinct submissions is that the 1<sup>st</sup> respondent filed the record of appeal on 25<sup>th</sup> March 2025, which was contrary to the order of the Court dated 29<sup>th</sup> January 2025 directing the 1<sup>st</sup> respondent to file the record of appeal within 45 days. According to the applicant's computation of time, the record of appeal was filed 10 days out of time, without leave of the Court. It was submitted that in terms of the self-executing order of the Court, the order of injunction automatically lapsed once the 1<sup>st</sup> respondent failed to file the record of appeal within the prescribed 45 days.
10. It was also the applicant's submission that the 1<sup>st</sup> respondent's notice of appeal should be deemed to have been withdrawn because the 1<sup>st</sup> respondent did not serve on the applicant a copy of the letter bespeaking proceedings, if any, as and within the time prescribed by the proviso to **rule 84** of the **Court of Appeal Rules**. Further, that having failed to comply with the proviso, the 1<sup>st</sup> respondent was required to file the record of appeal within 60

days from the date of the lodgement of the notice of appeal, which is 27<sup>th</sup> April 2024.

11. The applicant also impeached the competence of the record of appeal on the basis that, though filed out of time, it did not contain a certificate of delay, which would have explained the failure to file the appeal within the 60 days prescribed by the Rules.
12. Lastly, it was the applicant's contention that having applied for review of the judgment of the ELC, the 1<sup>st</sup> respondent could not appeal against the same judgment. In support the application, the applicant relied on the following authorities, namely: **John Mutai Mwangi & 26 Others v. Mwenja Ngure & 4 Others** [2016] eKLR; **Mae Properties Ltd v. Joseph Kibe & Another** [2017] eKLR; **Muzaffer Musafee Essagee & another v. Ann Njeri Mwangi** [2021] eKLR; and **Tharaka Nithi County Government & Another v. David Kithara Gaichu & 129 Others** [2022] eKLR.
13. The 1<sup>st</sup> respondent, represented by Mr. Kandie, learned counsel, opposed the application vide a replying affidavit sworn by its director, Esther Jeanet Ngenyi, on 30<sup>th</sup> April 2025 and written submissions and authorities dated 13<sup>th</sup> June 2025. As far is relevant to the application before the Court, the 1<sup>st</sup>

respondent

contended that its notice of appeal is competent and that it

applied for certified copies of proceedings and judgment in writing on 12<sup>th</sup> February 2024 and followed up the proceedings and certificate of delay with the registrar vide letters dated 22<sup>nd</sup> May 2024, 4<sup>th</sup> November 2024 and 22<sup>nd</sup> November 2024. The court issued the certificate of delay late, on 22<sup>nd</sup> April 2025 after the 1<sup>st</sup> respondent had been pursuing the issue since February 2024.

14. As regards the failure to file the appeal within the 45 days as ordered by the Court, the 1<sup>st</sup> respondent explained that the parties were not informed when the order of the Court was made and that it only received the order on 22<sup>nd</sup> February 2025.
15. The 1<sup>st</sup> respondent submitted that the application to strike out the notice of appeal was *res judicata* because the issue had been raised in a previous application for interlocutory relief (CA No. E. 692 of 2024). It was also contended that in directing the 1<sup>st</sup> respondent to file the record of appeal within 45 days, the Court must be deemed to have considered and upheld the validity of the notice of appeal, and therefore, the applicant cannot raise the issue again.
16. As regards the prayer for rescission of the orders of the Court issued on 29<sup>th</sup> January 2025, the 1<sup>st</sup> respondent submitted that

it was a disguised application for review of those orders and  
that

there was no basis for exercising the review jurisdiction of the Court.

17. Lastly, the 1<sup>st</sup> respondent urged the Court not to pay regard to procedural technicalities and not to visit mistake of counsel upon it.
18. The other respondents did not respond to the application. At the hearing, Mr Kamau, learned counsel for the 4th respondent appeared and informed the Court that he was supporting the application to strike out the record of appeal.
19. We have carefully considered this application and the submissions by learned counsel. As earlier pointed out, the impugned judgment was rendered on 8<sup>th</sup> February 2024 and the 1<sup>st</sup> respondent lodged the notice of appeal 28<sup>th</sup> February 2024. Clearly, the notice of appeal was lodged out of the 14 days from the date of the impugned judgment prescribed by **rule 77(2)** of the **Court of Appeal Rules**.
20. To sustain an application to strike out the notice of appeal, the applicant was required by rule 86 to present the application within 30 days from the date of service of the notice of appeal. The proviso to that rule provided as follows in mandatory terms:

***“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 car may be.”***

21. The 1<sup>st</sup> respondent served the notice of appeal on the applicant on 6<sup>th</sup> March 2024 and the applicant filed the application to strike out on 7<sup>th</sup> April 2025, which was far beyond the prescribed 30 days. Accordingly, the applicant has no basis for challenging the competence of the notice of appeal.
22. It's a different matter as regards the record of appeal, which we shall revert to shortly.
23. We do not think there is substance in the applicant's contention that having applied for review, the 1<sup>st</sup> respondent could not prefer an appeal, for the simple reason that the application for review was withdrawn before it was heard. Nor is there any substance in the 1<sup>st</sup> respondent's contention that when this Court directed it to file the record of appeal within 45 days, it must be deemed to have found the notice of appeal valid. First, the Court did not address itself to the issue of competence of the notice of appeal, simply because what was before it was an application for an order of injunction, not an application to strike out the notice of appeal. This Court has held time without number that a party who alleges that a

notice of appeal or a record of appeal is incompetent must resort to the provisions of rule 86 of the Court's Rules.  
(See

**National Industrial Credit Bank Ltd v. Aquinas Francis Wasike & Another** [2006] KECA 333 (KLR).

24. Turning back to the record of appeal, the same was filed on 25<sup>th</sup> March 2025 and served upon the applicant on 31<sup>st</sup> March 2025. As regards the appeal, the applicant was within the 30 days prescribed by rule 86 of the Court of Appeal Rules when it made the application to strike out the appeal.
25. The applicant challenges the competence of the record of appeal on various grounds, but as far as we are concerned, the most valid ground and which we need to focus on is that the record of appeal was filed outside the 45 days directed by Court. The order was made on 29<sup>th</sup> January 2025 and the 1<sup>st</sup> respondent filed the record of appeal on 25<sup>th</sup> March, 2025, which was after a period of 55 days. Clearly the record of appeal was filed out of time, contrary to the express orders of the Court.
26. The 1<sup>st</sup> respondent submits that it did not get to know of the orders of the Court until 22<sup>nd</sup> February 2025; that the Court should not pay under regard to technicalities; and that mistake of its counsel should not be visited upon it. Those are reasons that ought to be presented in an application for extension of time, not in an application for striking out a record of appeal.

Once the 1st

respondent found that it could not comply with the 45 days

prescribed by the Court for whatever reason, the applicant was obliged to apply for extension of time, which it did not do. Clearly, therefore, the record of appeal is incompetent because it was filed out of time without leave of the Court.

27. In **Ramji Devi Vekaria v Joseph Oyula** [2011] KECA 327 (KLR); **Patrick Kithinji v Victor Mugira Marete** [2015] KECA 872 (KLR); **Daniel Nkirimpa Monirei v. Sayiael Ole Koilel & 4 Others** [2016] KECA 148 (KLR), this Court held that failure to file an appeal within the prescribed time is not a mere technicality amenable to cure under the overriding objective.
28. As regards the applicant's prayer for rescission of the orders of this Court dated 29<sup>th</sup> January 2025, we do not think we need to add anything, for two reasons. First, the order was self-executing, in the following terms:
- "The applicant shall file and serve the intended appeal within 45 days (from the date) hereof failing which the restraining orders issued in order (i) above shall automatically lapse"** (Emphasis added).
29. Secondly, having found that the record of appeal is incompetent, because it was filed out of time, there is no appeal in existence which can continue to underpin the orders of the Court dated 29<sup>th</sup> January 2025.

30. Ultimately, the application dated 7<sup>th</sup> April 2025 succeeds to the extent that the record of appeal filed on 25<sup>th</sup> March 2025 is hereby struck out with costs to the applicant. It is so ordered.

**Dated and delivered at Nairobi this 28<sup>th</sup> day of November 2025.**

**W. KARANJA**

.....  
**JUDGE OF APPEAL**

**K. M'INOTI**

.....  
**JUDGE OF APPEAL**

**JOEL NGUGI**

.....  
**JUDGE OF APPEAL**

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

***Signed***

**DEPUTY REGISTRAR.**