

IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MURGOR, LAIBUTA & NGENYE, JJ.A.)

CIVIL APPLICATION NO. E124 OF 2024

BETWEEN

**JOSEPH MWAMBAJI MWANZAKA &
CHIRINDO MWANZA TINDI (suing on behalf of the Estate of
MWANZAKA TINDI DZENGO (DECEASED)**

.....
APPLICANTS

AND

JUNGO VINDI DANDASI

.....
RESPONDENT

*(An application to strike out the Record of appeal filed
on 9th October, 2024 against the ruling of the
Environment and
Land Court at Mombasa (Naikuni, J.) dated 27th September*

2022 in

*Mombasa Environment and
Land Court Case No. 40 of
2014)*

RULING OF THE COURT

By a Notice of Motion dated 9th November 2024 brought
pursuant to **Rules 23, 44, 45, 84, 86** and **89** of the **Court of**

Appeal Rules, 2022 the Applicants, Joseph Mwambaji Mwanzaka and ***Chirindo Mwanza Tindi***, seek orders that this Court strikes out the Respondent's Record of Appeal filed on 9th October 2024, for the reason that it was filed out of time; that the Record of Appeal filed on 9th October

2024 be deemed to be fatally defective, as it failed to comply with the requirements stipulated in the Court of Appeal Rules, 2022; and that costs of the application be awarded.

The Notice is brought pursuant to the grounds on its face, and on the supporting affidavit sworn by the Applicants, in which they reiterate the grounds on which it is made, and further depose that, on 27th September 2022, the court delivered judgment in their favour in *Mombasa Environment and Land Court Case No. 40 of 2014, Joseph Mwambaji Mwanzaka and Chirido Mwanzaka Tindi, suing on behalf of the Estate of Mwanzaka Tindi Dzenzo (deceased), versus Jungo Vindi Dandasi*; that the Respondent, was dissatisfied with that Judgment, and in a letter to the Deputy Registrar of the Environment and Land Court dated 27th September 2022 requested for certified typed proceedings and thereafter lodged a Notice of appeal dated 3rd October 2022.

The Applicants deposed that they filed *Mombasa Court of Appeal Civil Application No. E080 of 2023* dated 6th September 2023 seeking orders that the Notice of appeal dated 3rd October 2022 be deemed as withdrawn on the grounds that the sixty days for the institution of the appeal as required by **Rule 84** of the

rules had since lapsed. They further state that, in its ruling in *Mombasa Court of Appeal Civil Application No. E080 of 2023* delivered on 12th July 2024, this Court granted the Respondent forty-five (45) days from the date of delivery of the

ruling to file and serve a compliant Record of Appeal, failing which the Notice of appeal dated 3rd October 2022 would be deemed to have been withdrawn under **Rule 85(1)** of the Rules; that the 45 days granted lapsed on 13th September 2024; and that the Respondent filed his Record of Appeal on 9th October 2024.

The Applicants further deponed that the Record of Appeal dated 9th September 2024 does not comply with the requirements stipulated under **Rule 89** of the Court's Rules as the documents in the Record are not arranged in the prescribed manner; that there is no certified copy of the decree or order granting leave to appeal; that there is no statement as to the correctness of the pleadings filed in the Record of Appeal; and that the Record is therefore defective and a suitable candidate for striking out.

They further depose that that the Respondent has failed to comply with **Rule 23** as he has not lodged a notice to act in person; and, further, that the Respondent's failure to institute the appeal within the appointed time has resulted in undue delay, showing a lack of commitment to the legal principle that litigation should be conducted fairly and expeditiously, and with the result that they have been and continue to be restrained from realizing

the fruits of a lawfully obtained judgment.

They conclude by deposing that it is only fair and in the interest of justice that the Record of Appeal filed on 9th October 2024 be struck out as it was filed out of the prescribed time and is fatally defective.

An examination of the record does not show that the Respondent filed a Replying Affidavit in response to the Motion.

When the motion came up for hearing, learned counsel appeared for the Applicants while the Respondent appeared in person. Both the Applicant and the Respondent filed written submissions which they briefly highlighted during the hearing.

In their submissions, counsel for the Applicants reiterated the grounds and averments in the Motion, save to add that, in response to the Respondent's Replying Affidavit, counsel pointed out that it is undated and that, in it, the Respondent concedes that the Record of Appeal does not meet the requirements of **Rule 89**, merely stating that he is a layman. Counsel argued that ignorance of the law is not a defence, and added that the Respondent's invocation of **Article 50(1)** of the **Constitution** is misplaced as the right to be heard does not override mandatory procedural rules.

Counsel submitted further that extension of time is a discretionary equitable remedy that must be sought by a party through a formal application, and that the Respondent has neither sought an extension of time nor offered a

reasonable explanation for the delay in filing the Record; that more than two years and eight months after the trial court's Judgment, the Respondent is yet to properly institute an appeal.

The Applicants relied on the case of **Maina vs Macharia & 5 Others**

(Application No. E035 of 2023) [2023] KESC 97 in support of the proposition that

a Notice of Appeal may be deemed withdrawn if an appellant fails to file an appeal within the prescribed timeline.

Counsel therefore urged us to strike out the Record of Appeal filed on 9th October 2024, and to deem the Notice of Appeal dated 3rd October 2022 as having been withdrawn and award costs to the Applicants.

In response, the Respondent, through his written submissions, contended that this Court retains the discretion to grant or deny the striking out orders, sought and instead exercise its discretion in his favour; that, although the Court had delineated the time within which the Record of Appeal was to be filed, it was important to appreciate that an appellant cannot proceed without certified copies of the proceedings from the lower court; that, despite all his efforts to obtain the typed

proceedings, the Environment and Land Court only supplied the certified copies on 29th August 2024; that, without the certified proceedings, he was not in a position to prepare or file a competent Record of Appeal, and that, therefore, the delay in meeting the timelines specified by the Court was not

intentional but arose from circumstances beyond his control. The Respondent further submitted that the Applicants would not suffer any prejudice if the Court declined to grant the orders sought and deemed the Record of Appeal as properly filed.

As a brief background to this Motion, the Applicants filed a suit against the Respondent seeking a declaration that the parcel of land known as Title No. KILIFI/CHANGOMBE/24 (the suit land) belonged to Mwanzaka Tindi Dzengo (deceased), together with an eviction order against the Respondent and costs of the suit. Their case was that, at all material times, they were the duly appointed Legal Administrators and Representatives of the Estate of the late Mwanzaka Tindi Dzengo (hereinafter “the Deceased”), and were the beneficial owners of the suit land measuring approximately 3.09 hectares. They asserted that the Respondent had trespassed onto the land since 1997, denying them access and quiet enjoyment of the property. They further stated that, despite issuing warnings through the area chief and the District Land Adjudication and Settlement Officer, Kilifi, the Respondent persistently refused to vacate the land.

In response, the Respondent filed a Defence and

Counterclaim where he denied the Applicants' claim and asserted that the suit land was the subject of *Land Appeal No. 170 of 2001 (later Misc. ELC No. 2 of 2013 - Dandasi Mwere v Mwanzaka Tindi Dzengo)*, initially filed before the Provincial Land Appeal

Tribunal in Mombasa and transferred to the Environment and Land Court on 15th August 2013 for determination. He claimed that the land was ancestral land on which he was born, raised, and married; that he had built homes for himself and his children, all of whom resided and developed the land, which he regarded as his home. He further alleged that the Applicants had never lived on or entered the suit land, nor had they built any structures or planted trees.

In his Counterclaim, the Respondent sought a declaration that the transfer of the land from its original owner to the Applicants was illegal and fraudulent, and that the transfer should be cancelled and the land registered in his name as the rightful owner.

Upon hearing the parties, the trial Judge in a Judgment delivered on 27th September 2022 allowed the Applicants' suit, and dismissed the Respondent's Counterclaim. The court declared that the suit land was owned by Mwanzaka Tindi Dzengo and directed the Land Registrar, Kilifi, to register the land in the names of the duly appointed Legal Administrators of the deceased's estate for purposes of administration under **section**

82(1) of the **Law of Succession Act**. The Court also ordered the eviction of the Respondent from the land within ninety (90) days pursuant to **section 152E (1)** and **(2)(a)(d)** of the **Land Act**, hence the Respondent's intention to lodge the appeal.

Having considered the Motion and the parties' oral and written submissions, the issues for determination are whether the Respondent's late filing of the Record of Appeal warrants striking it out under **Rule 86**, and whether the Record is defective and incompetent.

Rule 86 stipulates that:

"A person affected by an appeal may, at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice of appeal or the appeal, as the case may be, on the ground—

- (a) that no appeal lies; or***
- (b) that some essential step in the proceedings has not been taken, or 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 from the date of service of the notice of appeal or the record of appeal, as the case may be."

Rule 86 is therefore patently clear on the basis upon which an application for striking out a Notice or Record of Appeal may be brought. The Rule provides that a person affected by an appeal may, at any time before or after the institution of the appeal,

apply to the Court to strike out the notice or the appeal on the grounds that no appeal lies, or that some essential step in the proceedings has not been taken, or has not been taken within the prescribed time. Additionally, the proviso to the Rule, imposes a strict time limitation by stipulating that an application to strike out a notice of appeal or record of appeal shall not be

brought after the expiry of thirty (30) days from the date of service of the impugned notice or record of appeal.

The mandatory nature of this thirty-day limitation has been the subject of consistent interpretation by the Court. In the case of

Salama Beach Hotel Limited

& 4 others vs Kenyariri & Associates Advocates & 4 others [2016] eKLR, the Court

underscored the necessity of strict compliance with the proviso.

Citing its earlier decision in **Joyce Bochere Nyamweya vs**

Jemima Nyaboke Nyamweya & another [2016] eKLR, the

Court reiterated that parties are bound by the timelines

prescribed in the Rule and, particularly, that an application to

strike out a notice of appeal or an appeal must be brought within

thirty days of service of the notice of appeal or the record of

appeal. Failure to comply would render such an application fatally

defective and liable to be struck out.

In view of the above, what we must first ascertain is whether the application has been brought within the 30 days' timeframe

specified by **Rule 86** so as to warrant the striking out of the

Record. It is not in doubt that the Record of appeal was filed on 9th

October 2024. This application was brought on the 9th November 2024. A computation of the intervening period reveals that the Applicants' application was brought 31 days after the Record of Appeal was filed. This would mean that it was filed outside the 30 days' period specified by

Rule 86, with the effect that the application, in so far as it related to the striking out of the Record was incompetent and liable to dismissal.

On the issue of the defects in the Record of Appeal, the Applicants submitted that the Respondent's Record of Appeal filed on 9th October 2024 is fatally and incurably defective. They argue that the Record violates the mandatory requirements of **Rule 89** of the Court's Rules, in several fundamental respects. First, that the Record did not contain a certified copy of the decree or order granting leave to Appeal, which is a core and indispensable component of a competent record. Second, the documents included in the Record were not arranged in the prescribed chronological and thematic order required under **Rule 89(3)**, thereby rendering the Record disorganized, incomplete and incompetent. Third, the Record was not accompanied by a statement of correctness of the pleadings as required, which omission leaves the Court without assurance that the documents included are complete and accurate.

So as to interrogate whether indeed the Applicants' claims are valid, we have reviewed the Motion and the attachments, and

find that the Applicants did not specifically identify the particular defects alleged to exist in the Record. Besides alluding them in general, they did not point to the pages where the documents were improperly arranged, or to the other irregularities. More importantly, instead attaching the entire Record for the benefit, of the Court, the

Applicants only attached the cover page of the Record. Without the Record, we were unable to verify whether or not it contained a certified copy of the decree or order appealed from, or whether or not it was not accompanied by a statement of correctness of the pleadings amongst other issues. Without the presence of the Record, or a substantiation of the existence of the alleged defects, we are in no position to reach a finding that the Record was incompetent and defective for failing to comply with the requirements of **Rule 89**.

Having so found as we have, the Notice of Motion dated 9th November 2024 lacks merit and fails, and is hereby dismissed. Costs in the appeal.

It is so ordered.

Dated and delivered at Mombasa this 19th day of December, 2025.

A. K. MURGOR

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

DR. K. I. LAIBUTA CARb, FCIArb.

.....
JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

**G. W. NGENYE-
MACHARIA**

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

DEPUTY REGISTRAR