

**IN THE COURT OF  
APPEAL AT NAIROBI**

**(CORAM: KIAGE, KORIR & ODUNGA,**

**JJ.A.) CIVIL APPEAL NO. 406 OF 2019**

**BETWEEN**

**EDWARD MUNGAI ..... 1<sup>st</sup>**  
**APPLICANT RABOY SIMON MWANGI .....**  
**2<sup>ND</sup> APPLICANT JOSEPH MWANGI KIMANI .....**  
**....3<sup>RD</sup> APPLICANT**  
**TERESIA KINYUA ..... 4<sup>TH</sup>**  
**APPLICANT**  
(Suing in their capacity as officials of the Alfajiri self-help group)

**AND**

**SAUTI SACCO LTD .....1<sup>ST</sup>**  
**RESPONDENT DISTRICT COMMISSIONER .....**  
**2<sup>ND</sup> RESPONDENT DISTRICT OFFICER EMBAKASI .....**  
**..... 3<sup>RD</sup> RESPONDENT CITY COUNCIL OF NAIROBI**  
**.....4<sup>TH</sup> RESPONDENT AMOS NGATA KAMAU**  
**.....5<sup>TH</sup> RESPONDENT**  
**SAMMY KARIUKI ..... 6<sup>TH</sup>**  
**RESPONDENT FRANCIS LAPANDO .....**  
**.....7<sup>TH</sup> RESPONDENT**  
**STEVEN KISAVI ..... 8<sup>TH</sup>**  
**RESPONDENT STANSILUS WAMBUA .....**  
**9<sup>TH</sup> RESPONDENT**

*(An appeal against the judgment of the Environment and Land  
Court at Nairobi, Milimani (K. Bor, J.) dated 6<sup>th</sup> December  
2018*

*in*

***ELC Case No. 313 of  
2008)***

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**\* RULING OF THE COURT**

By the motion dated 2<sup>nd</sup> September 2019, but which for reasons not clear to us remained unheard until the last term of the Court, the applicant Sauti Sacco, which is the 1<sup>st</sup> respondent in

the appeal herein, seeks an order that the record of appeal dated

22<sup>nd</sup> August 2019 be struck out. The grounds in which the motion is founded appear on its face thus:

- (a) That judgment in ELC No. 313 of 2008, Edward Mungai & 3 Others Vs. Sauti Sacco Ltd & 7 Others was delivered on 6<sup>th</sup> December 2018.
- (b) That the firm of Kwanga Mboya & Co. Advocates filed a notice of appeal in respect of the aforesaid decision on behalf of the appellants on 13<sup>th</sup> December 2018.
- (c) That on 26<sup>th</sup> August 2019, the firm of Henry Oduor John & Co. Advocates lodged the appeal herein on behalf of the appellants. Prior to lodging the appeal the aforesaid firm did not file a notice of change of advocates. As the appeal has been lodged by a law firm that is irregularly on record, the appeal is incompetent and ought to be struck out with costs.
- (d) That upon perusal of the record of appeal, it has come to our knowledge that by letter dated 7<sup>th</sup> December 2018 addressed to the deputy registrar, the appellants applied for typed proceedings. However, the aforesaid letter was neither copied to the respondents nor served upon respondents.
- (e) That in the absence of the service of the letter requesting for typed proceedings upon the respondents, the appellants are not entitled to rely on the proviso to Rule 82 of the Court of Appeal Rules.
- (f) That as the appellants are not entitled to rely on the proviso to Rule 82 (1) of the Court of Appeal Rules, the record of appeal ought to have been lodged on or before 8<sup>th</sup> March 2019.
- (g) That the record of appeal was lodged on 26<sup>th</sup> August 2019 which was completely out of time.

Those grounds are given evidentiary character as averments under oath in the affidavit of Fredrick Ngatia, Advocate for the applicant, sworn on the same 2<sup>nd</sup> September 2019.

The appellants responded to the motion by way of a replying affidavit of **Henry Oduor John**, their advocate sworn on 1<sup>st</sup> November 2019. He first averred that the law firm of Ngatia & Co. Advocates did not itself have capacity of bringing the application because it had not provided a full and sufficient address of service and threatened to “raise a preliminary objection on that ground alone”. He went on to swear at paragraphs 7 to 9 as follows:

***“7. That I know of my own personal knowledge that in spite of being served with the notice of appeal and application requesting for the typed proceedings, all the respondents including the applicant herein failed, declined or neglected to lodge and serve their respective notice of full and sufficient address for service.*”**

***8. That I am aware that in spite of the fact that the applicant herein had not failed, declined or neglected to lodge and serve its notice of full and sufficient addresses for service they proceeded to serve the letter upon Ngatia & Associates on the 18<sup>th</sup> January, 2019 which they declined to acknowledge on the ground that the same ought to have been served together with the notice of appeal filed and served earlier. Annexed and marked hereto as “HJ01” is the*”**

***true copy of the said letter requesting for proceedings duly filed in court.***

***9. That be that as it may the firm of Kwanga Mboya & Co. Advocates was not obligated to serve the***

***contentious letter requesting for proceedings upon the applicants in the absence of lodging and serving of it's of mandatory full and sufficient addresses for service, rendering the applicant's applicant herein in bad in law, incompetence and abuse of the court's process."***

The deponent then swore that his law firm did subsequently enter into a consent with the firm of Kwanga Mboya & Advocates (sic), previously on record for the appellants, allowing the former to come on record. That consent, dated 12<sup>th</sup> August 2019, was addressed to the deputy registrar of the court below. He swore that "the failure to include the said consent and notice of change of advocates in the record of appeal was inadvertent and does not render the notice of appeal incompetent in so far as there is still a window for the respondent to file further record of appeal with the leave of the court to incorporate the said consent."

In written submissions supporting the motion, the applicant maintains that in so far as the notice of appeal was filed by the firm of Kwanga Mboya & Co. Advocates, the jurisdiction of this Court was invoked by the appellants, and the subsequent filing of 26<sup>th</sup> August 2019 of the record of appeal by a different law firm, to wit Henry Oduor John & Co. Advocates, without filing a notice of change of advocates under Rule 23 of the Court of Appeal Rules

was irregular and the record should thus be struck out.

**NICHOLAS OMONDI Vs. ROCHA LIMITED [2016]eKLR**, a ruling of

a single Judge of this Court, was cited in aid.

It was next submitted that the record of appeal lodged on 22<sup>nd</sup> August 2019 was out of time by 5 months and 9 days since the 60 days within which it should have been lodged after the filing of the notice of appeal on 13<sup>th</sup> December 2018 expired on 6<sup>th</sup> March 2019. The appellants could not benefit from any delay there may have been in the preparation of proceedings as they did not serve the letter bespeaking proceedings upon the applicant. Rule 84(2) of the Rules is relied on for that contention as are decisions of this Court on the point of including **MINISTRY PREMJI GANJI (INVESTMENTS) LTD Vs. KENYA NATIONAL HIGHWAYS AUTHORITY [2019]eKLR**; **PATRICK KIRUJA KITHINJI Vs. VICTOR MURIGAR MARETE [2015]eKLR** and **MAE PROPERTIES LIMITED Vs. JOSEPH KIBE & ANOTHER [2017]eKLR**, which last

case was cited with approval by the Supreme Court in

**DIRECTOR OF PUBLIC PROSECUTIONS Vs. CHRYSANTHUS BARNABAS**

**OKEMO & 5 OTHERS** S. C. Application No. 289 of 2019.  
They

urged that a failure to file an appeal within the prescribed time

goes to the jurisdiction of the Court, is incurable and must invite a striking out of the appeal.

To those submissions on the motion, we are unable to find the appellants' corresponding submissions. What we do see on record are submissions by their learned counsel dated 20<sup>th</sup> July 2020. Those submissions make no mention of the motion seeking to strike out the appeal. Instead, they speak and relate to the substantive appeal and expound on the grounds of appeal contained in the memorandum of appeal dated 22<sup>nd</sup> August 2018.

We therefore do not have the benefit of the appellants' response as far as submissions go. Nor did their advocate appear at the virtual hearing of the motion in which we proceeded to hear Mr. Ngatia alone, upon being satisfied that the firm of Henry Oduor John & Co. Advocates on record for them, had on 4<sup>th</sup> July 2025 been served with notice of hearing slated for 28<sup>th</sup> July 2015. Mr. Ngatia's submissions were an elucidation of the grounds, his own affidavit and the submissions filed for the applicant. We need not rehash them.

Having considered all the material before us, we think that the conclusion is easy to arrive at, and is indeed inevitable, that

the motion is for granting. We base our decision on the

indisputable fact, patent from the record, that the record of appeal herein, which was lodged on 22<sup>nd</sup> September 2019 as a follow up to the notice of appeal which had been filed timeously on 13<sup>th</sup> December 2018, should have been filed by 6<sup>th</sup> March 2019 at the latest, regard being had to the excluded days being the Christmas break. It was, therefore, indisputably belated by some 5 months and 9 days, a fact that the appellants do not deny or controvert.

Now, had the reason for the delay been the time taken to type the proceedings, all that would have been required under our Rules would have been a certificate of delay stating the time that was required to type them, which time would have been excluded in the reckoning of time. For an appellant to benefit from that exemption as provided for in the proviso to the rule, he needs to have served a copy of the letter requesting proceedings upon the respondents. In the present case, the appellants' counsel swore that his predecessors on record had served the applicant's advocates with a copy of the letter requesting for proceedings on 18<sup>th</sup> February 2019, but that the latter refused to accept the same "as it was a not accompanied by the notice of appeal."

The appellants attached to the replying affidavit a letter dated 7<sup>th</sup> December 2018 requesting proceedings. The letter is addressed

to the Deputy Registrar of the ‘ELC Division” (sic) but there is no indication on its face that it was intended to be served on the respondents as required by sub-rule 2 of the current Rule 84, then

82. As there is no other indication of intention to effect, or actual service of that request upon the respondents, including the applicant herein, the logical conclusion is that the time exclusion for preparation of proceedings is not available to the appellants, and their record stands filed hopelessly out of time and without leave, and must accordingly be struck out. In the cases cited by the applicants, the rationale for this consequence has been well articulated and we need not restate it save to say that the Rules of Court serve a signal purpose of ensuring orderly and fair determination of appeals properly filed and an appeal filed out of time is not one that has properly invoked the Court’s jurisdiction. It is incompetent and for striking out.

Having arrived at that conclusion, we need not decide whether or not the firm of Henry Oduor & Co. Advocates are properly on record the question having been rendered moot by the striking out of the record of appeal they filed.

The upshot is that the application is allowed with costs to

the applicants.

Order accordingly.

**Dated and delivered at Nairobi this 23<sup>rd</sup> day of January, 2026.**

**P. O. KIAGE**

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

**W. KORIR**

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

**G. V. ODUNGA**

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

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

***Signed***

**DEPUTY**  
**REGISTRAR**

