



**Mutinga v Joreth Limited & 3 others (Civil Appeal (Application)  
E136 of 2021) [2026] KECA 145 (KLR) (30 January 2026) (Ruling)**

Neutral citation: [2026] KECA 145 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E136 OF 2021  
SG KAIRU, J MOHAMMED & WK KORIR, JJA  
JANUARY 30, 2026**

**BETWEEN**

**MUTUKU MUTINGA ..... APPELLANT**

**AND**

**JORETH LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**PETER WAMBUGU-MWANGI ..... 2<sup>ND</sup> RESPONDENT**

**JUSTIN MIANO KABAIKU ..... 3<sup>RD</sup> RESPONDENT**

**REBECCA NJERI MIANO ..... 4<sup>TH</sup> RESPONDENT**

*(Being an application for striking out the Memorandum of Appeal and Record of Appeal in an appeal from the judgment of the Environment and Land Court of Kenya at Milimani (P. M. Mwilu J. – as she then was) dated 22nd November, 2013 in ELC Case No. 164 of 2010 consolidated with Case No. 193 of 2009)*

**RULING**

**Background**

1. Before the Court is a Notice of Motion dated 22<sup>nd</sup> June 2021, brought by Peter Wambugu Mwangi (the applicant (the 2<sup>nd</sup> respondent in the appeal)) expressed to be brought pursuant to Rule 84 of the Court of Appeal Rules, 2010 (now Rule 86 of this Court's Rules). The applicant seeks orders in the main:
  - a. That the memorandum of appeal and the record of appeal be struck out with costs; and
  - b. That the Court grants such further or other orders as it may deem just.

Mutuku Mutinga is the appellant/respondent herein while Joreth Limited, Justin Miano Kabaiku and Rebecca Njeri Miano are the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents respectively.



2. The application is premised inter alia on the grounds that the memorandum of appeal and the record of appeal were served on 10<sup>th</sup> June 2021 outside the period prescribed under Rule 90(1) of the Court of Appeal Rules, 2010 (Rule 92 of the Court of Appeal Rules, 2022); that the record of appeal was filed outside the time stipulated under Rule 82(1) (now Rule 84) without leave of the Court; and that the Certificate of Delay does not avail the appellant.
3. The application is supported by the applicant's affidavit where he depones inter alia that the appellant/respondent applied for certified copies of proceedings; that the memorandum and record of appeal were served on counsel for the applicant outside time; and that accordingly, the memorandum and record of appeal should be struck out with costs. Despite service of the hearing notice, the respondent did not respond to the instant application or file written submissions.

### **Submissions by Counsel**

4. At the hearing of the application, the application was disposed of by way of written submissions with brief oral highlighting.
5. The applicant was represented by learned counsel, Mr. Kaburu. There was no representation by or for the appellant/respondent despite service. Mr. Kaburu had filed written submissions dated 23<sup>rd</sup> May 2025 and relied on Rules 82, 84, and 90(1) of this Court's Rules, 2010, now Rules 84, 86, and 92(1) of this Court's Rules, 2022 as well as relevant authorities.
6. Counsel submitted that the memorandum and record of appeal were served on 10<sup>th</sup> June 2021 which was outside the time set by Rule 82(1) (now Rule 84(1) without leave. Counsel further submitted that the record of appeal is dated 18<sup>th</sup> March 2021 and is an appeal against a decision delivered on 22<sup>nd</sup> November 2013. Further, that the record of appeal was served on 10<sup>th</sup> June 2021 without leave and was therefore served out of time.

### **Determination**

7. We have considered the application, the submissions, the authorities cited, and the law. The application before us seeks to strike out the record of appeal. Rule 86 of this Court's Rules provides as follows:

“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 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 after the date of service of the notice of appeal or record of appeal, as the case may be.” \_\_ [Emphasis supplied].

8. From the wording of the provision in Rule 86 of this Court's Rules, an application seeking to strike a record of appeal, such as the one before us, must be filed within thirty (30) days from the date of service of the notice of appeal or the record of appeal that it seeks to strike out. Time starts to run from the date of service of the notice of appeal or the record of appeal as the case may be. From the record, the record of appeal was filed on 18<sup>th</sup> March 2021 and served on 10<sup>th</sup> June 2021. The instant application was filed on 22<sup>nd</sup> June 2021 and was therefore filed within the thirty (30) day time frame prescribed by Rule 86. The instant application is thus properly before this Court.



9. Having found that the instant application is competent, Rule 77 of this Court’s Rules provides as follows:

“(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 subrule (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.

3. Each notice of appeal under subrule (1) shall state whether it is intended to appeal against the whole or part only of the decision and, where it is intended to appeal against a part only of the decision, shall—

- a. specify the part complained of;
- b. the address for service of the appellant; and
- c. the names and addresses of the persons intended to be served with copies of the notice.

4. When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.

5. Where it is intended to appeal against a decree or order, it shall not be necessary that the decree or order be extracted before lodging the notice of appeal.

6. A notice of appeal shall be substantially in Form D as set out in the First Schedule and signed by or on behalf of the appellant.”

10. From the record, the impugned judgment was delivered on 22<sup>nd</sup> November 2013 while the notice of appeal dated 27<sup>th</sup> November 2013 was lodged on the same date. The stamp showing receipt of the notice of appeal by the applicant through his advocates on record, Messrs. Kaburu & Co Advocates indicates that it was received on 3<sup>rd</sup> February 2014. The certificate of delay dated 24<sup>th</sup> February 2021 indicates that the proceedings were collected on 24<sup>th</sup> February 2021. The record of appeal is dated 18<sup>th</sup> March 2021 and was served on counsel for the applicant on 10<sup>th</sup> June 2021. There is no evidence that leave was obtained to serve the record of appeal outside the seven (7) days prescribed by Rule 77 of this Court’s Rules.

11. This Court in Pradeep Harish Hindocha V Catherine Matei Chena (2024) KECA 819 (KLR) stated as follows:

“It is clear that rule 92(1) requires service of a record of appeal before it is lodged or within 7 days of being lodged. In this case, there is no doubt that the respondent did not comply with this provision. The question then is what becomes the fate of a record of appeal not served as per rule 92(1). In our view, and as has previously been held in several decisions of this Court, the rule is couched in mandatory terms. An appellant must comply with the provision lest the appeal is rendered incompetent and fall prey to being struck out pursuant to the provisions of rule 86(b). The respondent having not served the applicant with a record of appeal within the requisite period, it follows then that he does not have a competent appeal.” [Emphasis supplied].

We find this dictum directly applicable to the present circumstances.



12. Further, this Court in *Martin Kabaya V David Mungania Kiambi* [2015] eKLR pronounced itself as follows:

“The need for judicial proceedings to be concluded in a timely fashion is too plain for argument. It is a desideratum of a rational society. A justice that is long in coming, encumbered by sloth or inattention on the part of those who seek it, is a pain and bother. And expensive one at that. A justice that comes too late in the day is a tepid drop on perched lips that quenches no thirst. A justice delayed is a justice denied. Litigants, especially those summoned by complaints, petitions, applications or appeals are vexed when those who summoned them hence go to sleep yet the proceedings and processes they engendered remain alive but comatose, a burden to the mind and to the pocket. And they form part of the dead weight the Judiciary bears as backlog.”

13. By parity of reasoning, in the circumstances of this application, the notice of motion dated 22<sup>nd</sup> June 2021 is merited. The record of appeal dated 18<sup>th</sup> March 2021 is hereby struck out with costs to the applicant payable by the appellant/respondent.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JANUARY, 2026.**

**S. GATEMBU KAIRU, FCIArb, C.ARB**

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**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

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**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

