

**IN THE COURT OF
APPEAL AT NYERI**

(CORAM: KANTAI, LESIIT & ALI-ARONI, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. E230 OF

2024 BETWEEN

JOHN WANJOHI MATHINJI.....APPELLANT/RESPONDENT

AND

JOSEPH KING'ORI GATUNGU.....RESPONDENT/APPLICANT

CATHERINE MUTAHI THEURI.....INTERESTED PARTY

*(Being an application to strike out the appeal against the Judgment
and Decree of the Environment and Land Court at Nyeri (Olola, J.)
delivered on 19th October 2023*

in

ELCA No. E034 of 2021)

RULING OF THE COURT

1. Before the Court is an application by way of a notice of motion dated 14th January 2025, brought under **rule 86** of the Court of Appeal Rules 2022 (the Rules), seeking that the appeal be struck out with costs to the applicant.
2. The application is based on the grounds stated in the application and the supporting affidavit of the applicant, **Joseph King'ori Gatungu**, sworn on 14th January 2025. In the affidavit, the applicant deposes that the notice of appeal dated 24th October 2023, was filed in court on 25th October 2023; the appeal was lodged on the e-filing portal on 10th December 2024, which is outside the sixty (60) days prescribed under **rule 84(1)** of this

Court's Rules; the letter bespeaking certified copies of the proceedings and judgment in the High Court were not served on him and the respondent is not entitled to rely on the certificate of delay issued on 9th December 2024; the appeal having been filed late ought to be dismissed.

3. The respondent has filed a replying affidavit sworn on 15th May 2025, opposing the application and prays that it be dismissed with costs. He claims that the letter dated 7th November 2023 bespeaking certified copies of proceedings and judgment was not only copied to the applicant's advocates but also served on them on 9th November 2023; he is therefore entitled to rely on the certificate of delay and the proviso to **sub-rule (I) of rule 84** of the Court's Rules; the applicant has failed to disclose that he received a copy of the application for proceedings, rendering this application without merit and deserving of dismissal with costs.
4. Learned counsel for the applicant has filed submissions dated 18th May 2025. Counsel contends that even if one accepts that such a letter was served, it raises questions about why the affidavit of service by John M. Chere was not filed before the High Court. At that time, Nyeri Law Courts would date-stamp all filings at the registry. This is evident from the letter alleged to have been served, which bears a stamp dated 10th November 2023.
5. Counsel argues that the notice of appeal is dated 24th October 2023, and the letter is dated 7th November 2023, which ought not to be the case. In support, he relies on **Partel & 2 Others vs. Maccu Motors Ltd [2024] KECA 1135 (KLR)**, where the

court stated that delays in obtaining proceedings can occur for reasons beyond an

appellant's control. To address this, the rules provide that the appellant must serve the respondent with a letter requesting the proceedings within thirty (30) days of filing the notice of appeal. This requirement is essential and not merely a technicality. Once fulfilled, the appellant can await the proceedings, and the sixty (60) days for further action begin once the proceedings and a certificate of delay are provided.

6. In opposing the application, learned counsel for the respondent has filed submissions dated 14th May 2025. Counsel argues that under the proviso to **rule 84(1)** of the Court's Rules, the appellant is entitled to rely on the letter and certificate of delay issued by the deputy registrar of the High Court certifying the time required for preparation and delivery of proceedings and judgment. In support of his submissions, counsel relies on **Sub-County Co-operative Officer, Turbo & Soy vs. Raiplywoods (K) Limited & 2 Others [2024] KECA 303 (KLR)**, where the Court held that the applicant did not dispute the service of the notice of appeal; only the letter requesting proceedings. Both documents were dated 12th March 2019 and filed on 18th March 2019. The Court believed that the letter was likely served on the applicant. The Court found that the 1st respondent correctly obtained a certificate of delay from the registrar and could rely on the proviso to **rule 84(1)** of the Court's Rules since a copy of the proceedings request was served on the applicant. The application was made within 30 days of the judgment, thereby excluding the period before the 1st respondent filed their record of appeal.
7. We have carefully considered the application, the replying

affidavit and the submissions. It is imperative to examine the relevant

provisions upon which the application is anchored on. **Rule 86** of the Court's Rules is the basis upon which an application for striking out a notice or record of appeal can be made. It provides:

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 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.

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 record of appeal, as the case may be.

8. The issue for determination is whether the letter bespeaking the proceedings was served and whether to strike off the record of appeal, the same having been filed 60 days after the notice of appeal was lodged.
9. In his application, the applicant contends that the letter bespeaking proceedings was never served and, as such, the respondent could not rely on the proviso to **rule 84** of the Court's Rules, or the deputy registrar's certificate; the record was thus filed out of time and ought to be struck out. On the other hand, the respondent, relying on an affidavit of service, states that the said letter was served upon the office of the applicant's counsel. In an attempt to challenge the averments in the affidavit of service, counsel for the applicant wonders why the same was not filed in the High Court together with the letter bespeaking the proceedings.

10. To say that the letter bespeaking proceedings and the affidavit of service should have been filed together at the lower court is misleading. The letter was addressed to the registrar and copied to the applicant's counsel. There is no requirement to file the acknowledgement or proof of service. We trust that the filing affidavit of service was necessitated by this application, with a claim that the letter was not sent to the applicant. Indeed, there is no evidence on oath to counter the statement on oath made by the process server. We are therefore inclined to accept the process server's statement on oath as the correct position with respect to the letter bespeaking certified copies of the proceedings and judgment. In **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] KECA 113 (KLR)**, where there was a dispute as to whether a notice of appeal had been served, this Court stated; -

"The power to strike out pleadings, and in the process deprive a party of the opportunity to present his case has been held over the years to be a draconian measure which ought to be employed only as a last resort and even then only in the clearest of cases..."

Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling

to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a

procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.

The general trend, following the enactment of Sections 1A and 1B of the Civil Procedure Act, Sections 3A and 3B of the Appellate Jurisdiction Act and Article 159 of the Constitution, is that courts today strive to sustain rather than to strike out pleadings on purely technical grounds as will shortly be demonstrated. (Emphasis added)

11. With the two conflicting positions and having stated above that we are inclined to believe the statement of the process server, we find that striking out the appeal is harsh and unjust. In the end, we decline to strike out the record of appeal. The application is dismissed.
12. Costs will abide by the outcome of the appeal.

Dated and Delivered at Nyeri this 25th day of March, 2026.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

.....
**JUDGE OF
APPEAL ALI-**

ARONI

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR