



Nyeri v Nyaga & 5 others (Suing on Their Behalf and as Officials, on Behalf of Mathari Villagers Self Help Project's Membership) (Civil Application E043 of 2022) [2025] KECA 359 (KLR) (28 February 2025) (Ruling)

Neutral citation: [2025] KECA 359 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E043 OF 2022
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
FEBRUARY 28, 2025**

BETWEEN

THE REGISTERED TRUSTEES CATHOLIC ARCHDIOCESE OF NYERI APPELLANT

AND

TARCISIO NYAGA & 5 OTHERS (SUING ON THEIR BEHALF AND AS OFFICIALS, ON BEHALF OF MATHARI VILLAGERS SELF HELP PROJECT'S MEMBERSHIP) RESPONDENT

(An application from the Judgment of the Environment and Land Court at Nyeri (L. N. Waithaka, J.) delivered on 23rd May, 2019 in E.L.C Cause No.119 of 2013 (O.S.))

RULING

1. The applicant, Tarcisio Nyaga & 5 Others (Suing on their behalf and as officials, on behalf of Mathari Village Self Help Project's Membership) have brought a Motion on notice said to be brought under rules 77, 79, 84 and 85 of the Court of Appeal Rules praying that notice of appeal be struck out. They also pray that record of appeal filed on 18th March, 2024 served the same day be struck out. In grounds in support of the Motion and in a supporting affidavit of Karweru Muchemi Charles, the lawyer of the applicant it is said amongst other things that the appellant has never served notice of appeal as required; that the appellant never filed, paid for or served request for proceedings and that record of appeal was filed out of time without leave of court and is therefore incompetent liable for striking out. Further, that the appeal relates to a ruling dated 18th November, 2021 by Olola, J.
2. A long history of the matter at the Environment and Land Court at Nyeri is given which may not be necessary for determination of this application.



3. In a replying affidavit John N. Mugambi, the lawyer for the respondent/appellant depones that the application is misconceived intended to interfere with the respondent's right to access justice and be heard on appeal as envisaged by Articles 48 and 50(1) of *the Constitution* of Kenya, 2010. He admits that:
 4. That we filed a Notice of Appeal Dated 24th November 2021 and inadvertently failed to serve it upon ...Affidavit).”
4. He depones that mistake of counsel should not be visited on the client and gives other explanations on why the applicant would not be prejudiced if we did not allow the application.
5. We have seen and considered written submissions which the parties filed and which their lawyers did not wish to highlight when the application came up for hearing before us on 12th November, 2024.
6. Rule 77 of our rules, which is couched in mandatory terms requires a party who desires to appeal to this Court to give notice of such intentions within fourteen days to the registrar of the High Court. Such a party must, again in mandatory terms (rule 79), before or within seven days of giving notice to the registrar, serve copies of the notice on all persons directly affected by the appeal.
7. There were two applications before Olola, J. the subject of the ruling dated and delivered on 18th November, 2021. The respondent, The Registered Trustees Catholic Archdiocese of Nyeri, gave notice of appeal against the entire ruling. The notice of appeal is dated 24th November, 2021 but it is not clear whether the same was lodged with the registrar as required by rule 77 of our rules.
8. The respondent admits that notice of appeal was not served on the applicant as required by rule 79 of our rules and attempts to give explanations for that failure. The respondent has not explained why it did not avail itself of other processes in our rules to enable it comply with that procedure.
9. The Supreme Court of Kenya had this to say on adherence with procedural rules in *Raila Odinga vs I.E.B.C & Others* [2013] eKLR:

“ Article 159(2)(d) of *the Constitution* was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.”

That Court also stated of Article 159 of *the Constitution* in *Law Society of Kenya vs. Centre for Human Rights & Democracy & 12 Others* [2014] eKLR:

Article 159(2) (d) of *the Constitution* is not a panacea for all procedural shortfalls.” Not all procedural deficiencies can be remedied by Article 159; and such is clearly the case, where the procedural step in question is a jurisdictional prerequisite.”
10. The respondent was required to serve Notice of Appeal on the applicant before or within seven days after lodging notice of appeal with the registrar. It has admitted that it did not do so. The Notice of Appeal is therefore incompetent and being the instrument that gives the court jurisdiction to entertain an appeal the record of appeal filed is also incompetent in those circumstances.
11. There is no valid or competent appeal before the Court. The Notice of Appeal and record of appeal are struck out with costs to the applicant.

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF FEBRUARY, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI – ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

