



Governor, County Government of Homabay & 2 others v Odondo & 10 others; Owino & 5 others (Interested Parties) (Civil Appeal (Application) E231 of 2023) [2025] KECA 343 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KECA 343 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) E231 OF 2023
HA OMONDI, LK KIMARU & AO MUCHELULE, JJA
FEBRUARY 21, 2025**

BETWEEN

**THE GOVERNOR, COUNTY GOVERNMENT OF HOMABAY 1ST APPLICANT
COUNTY GOVERNMENT OF HOMA BAY 2ND APPLICANT
THE HOMA-BAY COUNTY PUBLIC SERVICE BOARD 3RD APPLICANT**

AND

**PAUL OLELA ODONDO 1ST RESPONDENT
TOBIAS OKETCH OJWAYA 2ND RESPONDENT
RISPER OKELLO 3RD RESPONDENT
ORIEMA GUNGA 4TH RESPONDENT
ORIEMA GUNGA 5TH RESPONDENT
JULIUS ONGWECH WADEYA 6TH RESPONDENT
BERNARD ONYANGO OTIENO 7TH RESPONDENT
MAURICE TABU OMORO 8TH RESPONDENT
JACK MAORO 9TH RESPONDENT
CAPHAS ONYANGO OGOLLA 10TH RESPONDENT
SPEAKER, HOMABAY COUNTY ASSEMBLY 11TH RESPONDENT**

AND

**LORNA AOKO OWINO INTERESTED PARTY
OKUMU STEVE NYAKAN INTERESTED PARTY**



JAMES OCHIENG OPERE INTERESTED PARTY
SAMUEL ONYANGO NYABWANA INTERESTED PARTY
DOREEN OWITI INTERESTED PARTY
ALPHONSE OKUKU NYANGUESO INTERESTED PARTY

*(Being an application from the ruling of the High Court of Kenya at Kisii
(T. A. Odera, J.) dated 29th November 2024 in Petition No. E001 of 2023)*

RULING

1. The applicants have brought the instant application under Sections 3,5[2][d] of the [Appellate Jurisdiction Act](#) and Rules 79, 84[1], and 86 of the Court of Appeal Rules 2022, seeking orders inter alia that:
 - a. That the Notice of Appeal dated 13th July 2023 and the record of appeal dated 24th August 2023 be struck out.
 - b. That the 1st, 2nd, and 3rd appellants to meet the costs of the application and the appeal.
2. The applicant's Motion was supported by the annexed affidavit of Mr. Benard Onyango Otieno on behalf of the 7th and 8th respondent, essentially deposing to the ground on which the application was anchored. In further support of the applicant's Motion, learned counsel filed written submissions dated 13th January, 2025 in which the applicants maintain that the notice of appeal dated 13th July, 2023 was filed outside time and without leave of the court. Relying on the case of Mistry Premji Ganji (Investments) Limited vs. Kenya National Highways Authority [2019] eKLR, it is submitted that even a one-day delay is not excusable if there is no plausible explanation for the delay.
3. It is contended that the instant appeal is incompetent as the court lacks jurisdiction to hear and determine the appeal as no leave was sought and granted. Further, that the ruling being contested having emanated from a preliminary objection that sought to dismiss the petition in the superior court, the appellants did not have automatic right of appeal under the [Civil procedure Act](#) and Civil Procedure Rules.
4. Opposing the Motion, the respondents filed their replying affidavit sworn on 26th September, 2023 by the said George Illah, the Principal Legal Counsel of Homa Bay County stating, inter alia, that the impugned notice of appeal was filed on 13th July, 2023 and was served upon counsel for the applicant on 21st September 2023 as evidenced by the annexure marked "G1-3"; and that the annexure contains learned counsel's last known address of service and the email serving the notice of appeal dated 13th July, 2023, thus the service was within the stipulated 7 days.
5. It is further averred that on 31st July, 2023, the High Court in Homabay mentioned Petition No. E001 of 2023 between Paul Olela Odondo and 9 Others vs Governor County Government of Homabay and 3 Others, where the respondent's counsel informed the court about Kisumu Civil Appeal No. E093 of 2023 and sought the proceedings to be stayed pending the appeal. The applicants' counsel insisted on proceeding by way of written submissions, however, the court granted leave to await the confirmation of the status of the appeal.
6. The record of appeal dated 24 August 2023 was filed on 27 August 2023 and served upon the applicants on 29 August 2023, which is within 60 days as stipulated by the law.



7. In addition to the reply, learned counsel for the 1st to 10th respondents, filed written submissions submitting that pursuant to Rule 86, the instant application is incompetent and statute barred. It is submitted that since the applicants admitted having been served with the Notice of Appeal on 21st July, 2023, they ought to have filed the application by 19th August, 2023. The instant application was filed on 20th August, 2023 which is outside the 30 days prescribed by Rule 86 of this Court's Rules.
8. Regarding the impugned notice of appeal, the respondent contends that it was uploaded on July 13, 2023, endorsed on July 14, 2023, and served upon the applicants on July 21, 2023, therefore, service was within 7 days.
9. On the failure to seek leave, the respondents submitted that the instant appeal is related to Civil Application No. E092 of 2023 where leave was indeed sought and granted.
10. Having considered the application, the grounds in support of the application, the replying affidavit, the authorities, the submissions by learned counsel and the law, the main issue for determination is whether the applicant has satisfied the requirements for striking out a notice of appeal.
11. The instant application is pegged on Rules 79, 84(1) and 86 of this court's rules. Rule 79(1) of this Court's Rules requires that a notice of appeal be served before or within 7 days from the date on which it is lodged. That rule reads:

79.

- (1) An intended appellant shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal.

12. Rule 84 of the Court of Appeal Rules on the other hand provides as follows:

84

- (1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged –
 - a. a memorandum of appeal, in quadruplicate;
 - b. record of appeal, in quadruplicate;
 - c. the prescribed fee; and
 - d. security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

- (2). An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.

3.



13. Regarding non-compliance with the prerequisites in Rule 84(1) and (2) of the Court of Appeal Rules. This Court in *Mae Properties Limited vs. Joseph Kibe* [2017] eKLR expressed itself as follows:

“We have said on numerous occasions that the Rules of Court exist for the purpose of orderly administration of justice before this Court. The timelines for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals that come before us. The Rules are expressed in clear and unambiguous terms and they command obedience ...

Failure to comply with the timelines set invites sure consequences.”

14. Where the notice is served out of time, the Court has power to strike it out on such application as is before this Court pursuant to rule 86 of the Court’s Rules, which reads:

86. 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.

15. Rule 86 gives a respondent in the intended appeal the leeway to apply to the Court to strike out the notice and record of 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. Based on the foregoing provision, an applicant can seek an order striking out an appeal on the ground that firstly, either no appeal lies or secondly an essential step in the proceedings has not been taken, or thirdly that the essential step has not been taken within the prescribed time.

16. In the instant application, the applicant is seeking to strike out the notice of appeal and record of appeal on the ground that it was filed out of time and without the leave of the Court. In urging the Court to strike out the notice of appeal, the applicant argued that the respondents have violated the rules of the Court by failing to file and serve the notice of appeal, and the record of appeal within time or with leave of the court.

17. The record indicates that the notice of appeal was lodged on 13th February, 2023 and the record of appeal was filed on 27th August, 2023 and served upon the applicants on 29th August, 2023. The applicant filed the instant application on 20th September, 2023. Pursuant to the proviso to rule 86, the application to strike out should be filed within 30 days from the date of filing of the record of appeal. The instant application is, therefore, brought outside the prescribed time.

18. In addition to the fact that the respondent’s notice of appeal was served in good time and if late, by one day, the applicant’s Motion came too late in the day, that is, more than 30 days from the date of service of the notice as mandated by the proviso to rule 86. Either way, the applicant’s Notice of Motion dated 18th September, 2023 is in itself incompetent and ought to be struck out with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF FEBRUARY, 2025.

H. A. OMONDI



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JUDGE OF APPEAL
L. KIMARU

.....
JUDGE OF APPEAL
A. O. MUCHELULE

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

