



**Kenyatta National Hospital v Muthungu (Civil Appeal (Application)
E594 of 2021) [2025] KECA 270 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KECA 270 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E594 OF 2021
DK MUSINGA, M NGUGI & GV ODUNGA, JJA
FEBRUARY 21, 2025**

BETWEEN

KENYATTA NATIONAL HOSPITAL APPLICANT

AND

PETER MULE MUTHUNGU RESPONDENT

(An application to strike out the record of appeal dated 4th October 2021 in an appeal arising from the Judgment of the High Court of Kenya at Milimani (Sergon, J.) delivered on 28th February 2020 in HC. Civil Suit No. 364 of 2010)

RULING

1. The applicant's notice of motion dated 14th March 2022 seeks an order to strike out the record of appeal dated 4th October 2021. The applicant's affidavit in support of the application reveals that the impugned judgment was delivered on 28th February 2020; that the notice of appeal was filed on 17th July 2020; that the respondent was supplied with certified copies of the proceedings by the trial court on 18th February 2021 but did not file the record of appeal until 4th October 2021, which was about 8 months out of time.
2. In its replying affidavit sworn by Calvin Nyachoti, the respondent's Corporation Secretary, it is conceded that the impugned judgment was delivered on 28th February 2020; that the respondent instructed its advocates, Mose, Mose and Milimo to institute an appeal, the said advocates filed a notice of appeal on 17th July 2020; that on 26th August 2020 the respondent's advocates applied for certified copies of the proceedings and judgment to enable them prepare the record of appeal; that due to the Covid-19 pandemic, there was delay in obtaining certified copies of the proceedings and judgment; that on 4th February 2021 the respondent's advocate received a letter from the deputy registrar of the trial court indicating that the typed proceedings were ready for collection; that indeed the record of



appeal was filed on 4th October 2021 and served upon the applicant's advocate; and that the delay in filing the appeal was occasioned by the Covid-19 pandemic.

3. The respondent urged the Court not to allow the application, contending that no prejudice would be occasioned to the applicant if the appeal is allowed to proceed to hearing since the decretal amount has been deposited in court.
4. The parties filed their respective submissions and the application was set down for hearing on 22nd January 2025. On that day, the applicant's advocate, Prof. Kiama Wangai, did not attend court, though served with a hearing notice. Mr. Omagwa, the respondent's learned counsel was in attendance and sought to rely on his submissions.
5. In his submissions, the applicant basically states that the notice of appeal and the record of appeal were filed out of time and without leave of the Court, and for that reason, urged us to grant the orders sought.
6. The respondent submitted that the record of appeal was filed on 4th October 2021, and served on 14th March 2021, (which is actually 14th October 2021), but the application to strike out the record of appeal was filed on 14th March 2022 contrary to the provisions of rule 84 of this Court's Rules which requires that an application to strike out a notice of appeal or an appeal shall not be brought after expiry of 30 days from the date of service of the notice or record of appeal. The respondent sought to rely on this Court's decisions in *Salama Beach Hotel Limited & 4 Others vs Kenyariri & Associates Advocates & 4 Others* [2016] eKLR and *William Mwangi Ngaruki vs Barclays Bank of Kenya Limited* [2014] eKLR.
7. Whereas there is no dispute that the notice of appeal and the record of appeal were filed out of time and without leave of the Court, it is equally true that the applicant violated the mandatory provisions of rule 84 of this Court's Rules by filing the application to strike out the record of appeal outside the 30 days' period from the date of service of the same. The rule states as follows:

“ 84. Institution of appeals

1. Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged—
 - a. a memorandum of appeal, in four copies;
 - b. the record of appeal, in four copies;
 - 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 subrule (2) within thirty days after 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 subrule (1) unless the appellant’s application for such copy was in writing and a copy of the application was served upon the respondent.
3. The period specified in subrule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction.”

8. The proviso to rule 84 is couched in mandatory terms and we have no discretion to vary the same. The applicant can only blame himself for failing to take the appropriate action timeously.

9. In the circumstances, the application before us is incompetent and is hereby dismissed. Each party shall bear its own costs of the application.

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

D. K. MUSINGA (PRESIDENT)

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JUDGE OF APPEAL

MUMBI NGUGI

JUDGE OF APPEAL

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

