



**Khaemba v Teachers Service Commission & 2 others (Civil Appeal  
186 of 2019) [2025] KECA 203 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 203 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 186 OF 2019  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
FEBRUARY 7, 2025**

**BETWEEN**

**PATRICK WANYONYI KHAEMBA ..... APPELLANT**

**AND**

**TEACHERS SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**BOARD OF MANAGEMENT KAPLETINGI MIXED DAY SEC.  
SCHOOL ..... 2<sup>ND</sup> RESPONDENT**

**FRANCIS TANUI ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the Judgment of the Employment & Labour Relations Court  
at Kisumu (Nduma Nderi, J.) dated 20th September, 2018 in Petition No. 30 of 2017)*

**JUDGMENT**

1. This appeal arises from a ruling which was delivered by the Employment and Labour Relations Court (ELRC), (Nduma, J.), on September 20, 2018. The ruling was in regard to an application in a petition which had been filed by the appellant, Patrick Wanyonyi Khaemba, against the respondents.
2. Upon hearing the application, the learned Judge in a short five paragraph ruling struck out the petition. We reproduce the ruling herein verbatim:
  1. Upon careful consideration of the application dated 4<sup>th</sup> September, 2017, the replying affidavit by the respondent and their respective submissions, the court is satisfied that the petitioner filed constitutional petition being Kisumu ELRC Petition No. 23 of 2013 dated 8<sup>th</sup> October, 2015, raising the same facts and issues for determination as the one raised in the present petition No. 30 of 2017, arising from the petitioners' interdiction by the TSC, the 1<sup>st</sup> applicant.



Any new matters needed to be raised by way of amendments but not filing a new suit on same set of facts between the same parties.

2. All the issues raised in the present petition were canvassed in and are pending determination in Kisumu ELRC Petition No. 23 of 2015, which is pending judgment.
3. The rule of sub-judice goes to the core of the administration of justice. The court has responsibility to stop abuse of its process by deterring multiplicity of suit which clog the judiciary system. See Petition No. 548 of 2015, Okiya Omtata Okoiti & another -vs- Ministry of Transport and infrastructure & 4 Others [2016] eKLR.
4. Accordingly, all pending issues in this petition shall be determined in Kisumu ELRC Petition No. 23 of 2015.
5. The petition is struck out for duplicity which is an abuse of the court process with costs.

Dated and Signed in Kisumu this 20<sup>th</sup> September, 2018.”

3. On 22<sup>nd</sup> August, 2019, the appellant filed a Notice of Appeal under Rule 75 of the Court of Appeal Rules 2010, indicating his intention to appeal against the ruling which was delivered on 20<sup>th</sup> September, 2018. Under Rule 75 of the Court of Appeal Rules, the notice is required to be lodged within fourteen days of the date of the decision subject of the intended appeal. In this case, it is apparent that the appellant lodged his notice of appeal almost one year after the date of the ruling subject of the appeal.
4. In his memorandum of appeal the appellant has faulted the ruling on thirteen grounds. Basically, he is aggrieved by the striking out of his petition for duplicity and abuse of the court process, contending that those were not grounds that were pleaded by the respondents in their defence. He maintains that the learned Judge failed to appreciate the principle of law and the spirit of Rule 15 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013. In addition, that the learned Judge failed to weigh the facts that were before him; erroneously found that any amendment could be done in Petition No. 23 of 2015; and failed to appreciate that his right to a fair hearing was violated by the drastic and draconian action of striking out his petition.
5. In support of his appeal, the appellant filed written submissions in which he focused on the merits of his appeal, and basically said nothing about the delay in filing the notice of appeal. The respondents also filed written submissions in which they argued that the appeal was incompetent and ought to be struck out because the notice of appeal was filed out of time. In addition, the respondents submitted on the merit of the appeal, arguing that the appeal has no merit as the appellant’s remedy lies in amending his earlier petition No. 23 of 2015 and not filing a new petition.
6. In their submissions, the respondents contended that the appellant had filed an application seeking extension of time to lodge and serve the notice and record of appeal out of time, but that application was dismissed. However, there is nothing before us in support of that assertion. Be that as it may, it is a fact that the appellant’s notice of appeal was filed way outside the time stipulated under Rule 75 of the Court of Appeal Rules. The appellant has not exhibited any leave by the Court to file the notice of appeal out of time or to have the notice of appeal deemed as properly filed.
7. We note that this Court (differently constituted) in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike; Lantech Ltd* [2006] KECA 333 (KLR) held that, the validity or otherwise of a notice of appeal is to be determined in accordance with the provisions of Rule 80 under which a notice of



appeal can be struck out. However, the court was then dealing with an application under Rule 5(2) (b) of the Court of Appeal Rules. The validity of a notice of appeal may not be a matter in issue in an application under Rule 5(2)(b) of the Court of Appeal Rules, because at that stage, there is still room for such a notice to be regularized. Indeed, Rule 4 of the Court of Appeal Rules gives the Court discretion to extend time limited by the rules, whether before or after the doing of an act which means, the extension of time could be done after the filing of the notice of appeal. However, at the point of hearing of an appeal, if such extension of time has neither been sought nor obtained, the Court cannot ignore the issue of the validity of the notice in considering its jurisdiction to determine the appeal. We are fortified in this position by the statement of the California Supreme Court in the USA, in *Silverbrand vs County of Los Angeles* (2009) 46 Cal. 4<sup>th</sup> 106, 113 on the filing of a notice of appeal out of time, which position was followed by our Supreme Court in *Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral & Boundaries Commission (IEBC) & 7 others*: 2014 eKLR. This is what the Supreme Court of California stated:

As noted by the Court of Appeal, the filing of a timely notice of appeal is a jurisdictional prerequisite. “Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal.” (Sic) The purpose of this requirement is to promote the finality of judgements by forcing the losing party to take an appeal expeditiously or not at all.”

8. It is not lost on us that Article 159(2)(d) requires the Court to focus on substantial justice rather than procedural technicalities. That article read together with Section 3A & 3B of the *Appellate Jurisdiction Act*, obligates the Court to apply the rules in a way that will facilitate the just, expeditious and proportionate resolution of appeals, while avoiding unnecessary miscarriage of justice. In a situation such as the one before us, where the appellant has had the opportunity to make amends for his infraction of the rules, but had deliberately failed to take that lifeline, Article 159(2)(d) cannot save him.
9. We find that the appellant’s notice of appeal upon which this appeal is anchored is incompetent having been filed out of time without leave of the Court. Without a valid notice of appeal, this Court’s jurisdiction to determine the appeal has not been properly invoked as there is no proper appeal before us, and therefore, we cannot move any further in hearing the appeal nor is it appropriate for us to consider the merits of the appeal. We, therefore, strike out the appeal and award costs to the respondent.

**DATED AND DELIVERED AT KISUMU THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original



Signed

**DEPUTY REGISTRAR**

