



REPUBLIC OF KENYA



KENYA LAW
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**HFC Limited v Kinyanjui (Civil Application E103 of 2023)
[2025] KECA 893 (KLR) (7 March 2025) (Ruling)**

Neutral citation: [2025] KECA 893 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E103 OF 2023
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
MARCH 7, 2025**

BETWEEN

HFC LIMITED APPLICANT

AND

FRANCIS KIARIE KINYANJUI RESPONDENT

(An application to strike out the Notice of Appeal dated 11th October 2023 against the ruling of the High Court at Mombasa (F. Wangari, J.) made on 3rd October 2023 in Mombasa HCC No. 58 of 2019)

RULING

1. The applicant's Notice of Motion dated 22nd November 2023 is brought pursuant to rule 86(b) of the Court of Appeal Rules, 2022 and paragraph 3(f) of the Court of Appeal Practice Directions, 2015 seeking, inter alia, that the Notice of appeal dated 11th October 2023 and filed on 17th October 2023 in Mombasa High Court Civil Suit No. 58 of 2019 be struck out with costs awarded to the applicant.
2. The applicant's Motion is brought on several grounds set out on the face of the Motion which are that: The High Court dismissed the respondent's suit vide a ruling delivered on 3rd October 2023 whereafter the respondent lodged a Notice of Appeal dated 11th October 2023 and filed on 17th October 2023; and that the respondent served the Notice of Appeal upon the applicant on 6th November 2023. Yet, the Notice of Appeal was required to be served within 7 days after it was lodged, that is on or before 24th October 2023, hence a delay of 13 days. It was further contended that the 1st respondent's application seeking to extend time for service of the Notice was declined by this Court; that, further, the High Court ruling sought to be appealed against dismissed the respondent's suit for indolence, and this has persisted into the instant case; that it was therefore in the interests of justice that the Notice of appeal dated 11th October 2023 be struck out with costs.



3. The application is supported by the affidavit of Hedaya Malesi, the applicant's legal officer, which reiterates the grounds on the face of the application.
4. In response, the respondent filed a replying affidavit sworn on 4th December 2023 by Caroline Katisya in which it was deposed that: after a ruling was delivered on 3rd October, 2023 dismissing the suit, they filed a Notice of Appeal on time on 17th October, 2023; that she became indisposed and was unable to effect service until she resumed work; that the errors of the Advocate should not be visited on the party; and that the respondent's intended appeal raises arguable issues, including the issue as to whether a suit that has undergone pre-trial directions and fixed for hearing is eligible for automatic dismissal under Order 17 rule 2(5) of the Civil Procedure Rules. It was further deposed that the trial court failed to take into account the debilitating effects that the Covid-19 lockdown and restrictions had on movement and access to justice, and that the right to be heard should not be unnecessarily fettered; that the subject matter of the suit is the respondent's property which is under threat of sale by the applicant, and that the applicant stands to suffer no prejudice from the two weeks' delay.
5. When the application came up for hearing on a virtual platform, learned counsel Ms. Nzisa holding brief for Mr. Kongere appeared for the applicant while there was no appearance for the respondent despite having been duly served with the hearing notice.
6. Learned counsel for the applicant submitted that the Notice of Appeal was defective since it was served late, whereafter this Court (Gatembu, JA,), in a ruling dated 9th May 2024 concerning an application for extension of time filed by the respondent in Msa Civil Application No. E111 of 2023; Francis Kiarie Kinyanjui vs HFC Limited declined to extend time for service of the Notice of appeal, and that the decision had not been challenged through a reference. It was further submitted that the ruling of this Court also observed that the letter bespeaking the proceedings was never filed and served and that, therefore, it would be an exercise in futility to sustain an appeal founded on a defective Notice.
7. In their written submissions, the respondent conceded that the Notice of Appeal was served on the applicant 13 days out of time.
8. Before us is an application seeking to strike out the respondent's Notice of Appeal as it was served out of time. The application is brought under rule 86(b) of this Court's Rules which provides:

“A person affected by 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 from the date of service of the notice of appeal or record of appeal as the case may be.”

9. It is now settled principle that the power of this Court to strike out an appeal is discretionary, and is exercised based on the peculiar circumstances of each case. See [*Standard Ltd & another vs Onchieku \(Civil Application 134 of 2019\)*](#) [2023] KECA 1275 (KLR).



10. In the case of *Mukenya Ndunda vs Crater Automobiles Limited* [2015] eKLR, this Court observed:
- “The power to strike out an appeal or notice of appeal on account of failure by an appellant to follow the rules of procedure requires to be exercised carefully and only in cases where it is shown that the party at fault flagrantly or deliberately or flippantly or recklessly failed to follow the rules.”
11. The above is clear that this Court is empowered to strike out a notice of appeal or a record of appeal for want of form or failure to follow the rules of procedure. But prior to so doing, the proviso to rule 86 is pertinent. It expressly states that an application to strike out a notice 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...”
12. The record shows that the Notice of Appeal dated 11th October 2023 was filed on 17th October 2023. However, the respondent only served the Notice upon the applicant on 6th November 2023. The Notice of Appeal was required to be served within 7 days of being lodged, that is on or before 24th October 2023. This application was dated 22nd November 2023, which means that the application was brought within the timeframe specified by rule 86.
13. In their written submissions, counsel for the respondent concedes, and it is not disputed, that the Notice of appeal was served on the applicant 13 days out of time. It is also of importance to note that this Court, in a ruling dated 9th May 2024, declined to extend time for the respondent to serve the Notice of Appeal, and as at the time of this application to strike out, no reference had been filed to the full bench to attempt to resuscitate the Notice of Appeal.
14. Consequently, the Notice of Appeal having been served outside the period specified by the Rules, we are satisfied that the applicant’s application is warranted, particularly since the respondent’s application to extend the time for serving the Notice of Appeal has failed, and further the respondent having opted not to file a reference, it would appear that he is no longer interested in pursuing the appeal.
15. Accordingly, the Notice of Motion dated 22nd November 2023 is merited and is hereby allowed, with the result that the Notice of Appeal dated 11th October 2023 and filed on 17th October 2023 in respect of this appeal is hereby struck out with costs to the applicant.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MARCH, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA, CArb, FCI Arb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is the true copy of the original



Signed

DEPUTY REGISTRAR

