



**Nzaro v Karisa (Suing as the Personal Representative of the Late Julius Fondo Karisa) & another
(Civil Appeal (Application) E098 of 2023) [2025] KECA 888 (KLR) (7 March 2025) (Ruling)**

Neutral citation: [2025] KECA 888 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E098 OF 2023
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
MARCH 7, 2025**

BETWEEN

JACKSON NGUA NZARO APPLICANT

AND

**KENNETH SAMMY KARISA (SUING AS THE PERSONAL REPRESENTATIVE
OF THE LATE JULIUS FONDO KARISA) 1ST RESPONDENT**

THE LANDS REGISTRAR KILIFI 2ND RESPONDENT

(Being an application to strike out the appeal for being filed out of time)

RULING

1. Jackson Ngua Nzaro, the applicant, has brought this Notice of Motion dated 25th July 2023 pursuant to rules 44, 86 as read with rule 84 of the Court of Appeal rules, 2022 praying that the 1st respondent/appellant's Record of Appeal filed on 11th January 2023 be struck out for having been filed outside the time prescribed by the Rules, and for costs of this application and of the appeal be provided for.
2. The applicant's Motion is brought on the grounds that the Judgment from which the appeal arises was delivered on 24th January, 2023 following which a Notice of Appeal was filed on 8th February, 2023 and served on the applicant's counsel on 10th February 2023; that, vide a letter dated 13th February, 2023 and filed in court on 16th February, 2023, the applicant sought to be supplied with copies of the proceedings and Judgment, whereupon the proceedings were certified as ready on 24th February 2023.
3. It was contended that the Record of Appeal was filed outside the time prescribed by rule 84 of the Rules, and without a Certificate of Delay, which in any event, could not adequately account for the delay between 24th February, 2023 and the date of filing the Record on 11th July, 2023, a period of about 90 days; that, additionally, the Record does not contain a certified copy of the decree. It was further contended that to sustain the Record of Appeal would undermine the integrity of the appellate



process and set a dangerous precedent were the infractions inherent in the appeal to be disregarded; that on point of fact, breach of the timelines prescribed by the Rules insofar as they underpin the appeal process are not matters curable under Article 159 of *the Constitution*, 2010.

4. The application is supported by the affidavit of Jackson Ngua Nzaro, the applicant, in which he deposed that a Notice of appeal was filed by M/s. Sherman, Nyongesa & Mutubia Advocates, the previous advocates on record for the 1st respondent/appellant on 10th February, 2023 and duly served; that on 24th February, 2023, the applicant's advocate was served with another Notice of appeal dated 22nd February 2023 and filed by the 1st respondent/appellant in person together with a Notice to act in person; that by way of Notice of Motion dated 14th March, 2023, the 1st respondent/appellant filed Civil Application No. E021 of 2023 Kenneth Sammy Karisa vs Jackson Ngua Nzaro & the Lands Registrar Kilifi, seeking extension of time to file a Notice and Memorandum of Appeal and a Record of Appeal out of time; that, by the time of filing the Motion of 14th March, 2023, the 1st respondent/appellant had already been supplied with the certified copies of the proceedings, the judgment and decree; that the appeal was filed well within the 60 day period specified for filing the Record of Appeal, since the 1st respondent/appellant had up to 9th April, 2023 to file the Record; that on 3rd May, 2023 the 1st respondent/appellant formally withdrew the application for extension of time when it came up before a single judge of this Court; that thereafter, for the next two months, no further steps were taken, until the Record of Appeal was filed on 11th July, 2023 and served on 14th July 2023, which was out of time; that, in the circumstances, considering that there is no Certificate of Delay and no further steps have been taken to remedy the delay in filing the Record of Appeal, it should be struck out.
5. In a replying affidavit sworn by Sharia Nyange, counsel for the 1st respondent/appellant, it was deposed that: there were disagreements between the 1st respondent/appellant and his previous advocates, Sherman Nyongesa & Mutubia Advocates whereupon the 1st respondent/appellant instructed the firm of Sharia Nyange Njuguna & Co Advocates to take up this appeal; that, as a result of the change of advocates, the deponent was instructed to file the Notice of Motion dated 14th March 2023 in Civil Application No E021 of 2023 Kenneth Sammy Karisa vs Jackson Ngua Nzaro & the Lands Registrar Kilifi seeking to extend time to file the Notice and Memorandum of Appeal; that, by this time, counsel was not aware that the firm of Sherman Nyongesa & Mutubia Advocates had lodged a Notice of Appeal in good time; that, on being served with a replying affidavit in response to the Motion dated 14th March 2023, counsel became aware of the Notices of Appeal and the request for proceedings obtained by the firm of Sherman Nyongesa & Mutubia Advocates; that the 1st respondent/appellant's proposal to compromise the application by way of a consent was rejected and were forced to await the date of hearing of the Motion to formally withdraw it; that, by the time the Motion was listed for hearing, the time within which to lodge the record had since lapsed; and that her mistake in failing to file the record of appeal in time should not be visited upon the 1st respondent/appellant.
6. It was deposed that it is only fair that the Motion be disallowed; that the Record of Appeal though filed late and out of time be deemed as properly filed, and that the applicant will not suffer any prejudice should the application be dismissed.
7. The parties filed written submissions and, when the Motion came up for hearing on a virtual platform, learned counsel Mr. Mwakisha appeared for the applicant, learned counsel Mr. Nyange was on record for the 1st respondent/appellant and learned counsel Ms. Opiyo, was for the 2nd respondent. In his written submissions, the applicant reiterated the contents of the Motion and concluded that there is neither a Certificate of Delay nor an application to extend time for filing the record and that, for this reason, the appeal ought to be struck out.



8. For their part, counsel for the 1st respondent submitted that the Motion for extension of time was withdrawn, since the Notice of Appeal had been filed within the specified timeframe.
9. Counsel for the 2nd respondent supported the application and concurred that no application seeking to extend time to file and serve the Record of Appeal had been filed.
9. We have considered the Motion, the reply and the submissions of counsel, where the applicant seeks to strike out the record of appeal filed by the 1st respondent for the reason that it was filed out of time.
10. Rule 86 of this Court's Rules specifies:

“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 that some essential step in the proceedings has not been taken or
- b. 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.”

11. 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).
12. 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.”

13. Hence, 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 84 is of pertinence. It expressly states that the power 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...”
14. According to the Motion, the Record of aAppeal was filed on 11th July, 2023 and served on 14th July 2023. This application was dated 25th July 2023 which means that it was brought within the 30 days' timeframe specified by rule 86.
15. Having so found, the applicant contends that the Record was filed beyond the 60 days' period specified by the Rules without a Certificate of Delay, and no explanation has been provided for the 90 days' delay; that further the 1st respondent/appellant has not moved the Court to extend the time to file the Record of Appeal as required by the Rules. It is not in dispute that the Judgment was delivered on 24th January 2023, and the Notice of Appeal was filed on 10th February, 2023. It is not also in dispute that the letter requesting for proceedings was lodged on 16th February, 2023 and the Record of Appeal was filed on 11th July, 2023 and served on 14th July 2023. From the date of the Notice to filing of the record is about 5 months. The 1st respondent/appellant was required to file the record within 60 days



of lodging the Notice of Appeal, or to apply the proviso to rule 84 to exclude the period for preparation of the proceedings with the aid of a Certificate of Delay to explain the delay in filing the record, all of which the 1st respondent/appellant has failed to do.

16. Given that the record of appeal has been filed outside the period specified by the Rules, we are satisfied that the applicant's Motion is warranted, particularly since the 1st respondent/appellant has failed to undertake any remedial steps to regularize the appeal prior to this Motion.
17. Accordingly, the Notice of Motion dated 25th July 2023 is merited and is hereby allowed, with the result that the Record of Appeal filed on 11th July 2023 and served on 14th July 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, FCIArb.

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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

