



**Kirira v Deputy Registrar High Court Nyeri & 4 others (Civil Appeal
(Application) 128 of 2020) [2025] KECA 953 (KLR) (11 April 2025) (Ruling)**

Neutral citation: [2025] KECA 953 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) 128 OF 2020
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
APRIL 11, 2025**

BETWEEN

GEORGE WACHIRA KIRIRA APPELLANT

AND

DEPUTY REGISTRAR HIGH COURT NYERI 1ST RESPONDENT

NANCY WARUINGI T/A PROVIDENCE AUCTIONEERS ... 2ND RESPONDENT

JOE MAINA RUTHUTHI 3RD RESPONDENT

DISTRICT LAND REGISTRAR NYERI 4TH RESPONDENT

HONOURABLE ATTORNEY GENERAL 5TH RESPONDENT

(An application to strike out the notice of appeal and record of appeal lodged against the Judgment and Decree of the Environment and Land Court at Nyeri (Oundo, J.) delivered on 13th February 2020 in ELC Petition No. 5 of 2018)

RULING

1. Before the court is a notice of motion dated 17th September 2020 brought under rules 77(1), 82(1), 84, and 87(1)(h) of the [Court of Appeal Rules 2010](#), seeking that the appellant's notice of appeal dated 13th February 2020 and lodged on 20th February 2020 and the record of appeal filed on 2nd September 2020 be struck out with costs.
2. The application is predicated on the grounds on the face of the application stating that the notice of appeal was not served upon the applicant, the 3rd respondent in the appeal, or upon his counsel; the record of appeal was filed out of time and without leave of the court; the appellant has not attached a certified copy of the decree and has thereby not complied with the mandatory requirement of rule 87(1)(h) of the [Court of Appeal Rules \(2020\)](#).



3. The application is supported by the affidavit of Samuel Kabugi Njuguna, the applicant's counsel, sworn on 17th September 2020, in which he deposes that on 3rd September 2020, his office received the record of appeal, which was filed on 2nd September 2020. This appeal arose from the judgment delivered on 13th February 2020 in *Petition No. 5 of 2018*, filed in the Environment and Land Court (ELC) at Nyeri. On reviewing the record of appeal, the applicant's counsel came across a notice of appeal on pages 129-130 of the record that was filed on 20th February 2020, but had not been served on their firm, despite the requirement that it be served within 7 days of filing, as stipulated under rule 77(1) of the *Court of Appeal Rules*. Therefore, the applicant deposed that the notice should be struck out. Additionally, the letter dated 13th February 2020 from the appellant, bespeaking the typed proceedings, was not copied to the law firm.
4. Learned counsel further states that the record of appeal should have been filed on or before 14th April 2020. By filing the record of appeal on 2nd September 2020, without the leave of this Court, the appellant was clearly beyond the set timeline. He adds that the appellant did not submit a certificate of delay, which means it is impossible to determine when the High Court received his request for proceedings or when the same were provided to him. The appeal is, therefore, incompetent and should be struck out with costs. Furthermore, the record of appeal is defective because the copy of the decree on page 160 of the record is not certified, as required by the mandatory provisions of rule 87(1)(h) of this *Court's Rules*.
5. The application is also supported by the affidavit of Joe Maina Ruthuthi and Justus Ngure Kamau, the court clerk of counsel on record, both of whom reiterate the averments of his counsel.
6. In opposition, the respondent filed a replying affidavit dated 26th November 2020, wherein he deposes that the affidavit supporting the application was signed by an individual who did not possess a practicing certificate for 2020; further, that the record of appeal was filed during the period of the Covid-19 pandemic by the appellant in person to save costs, as he could not afford to hire an advocate; given the circumstances and the confusion that arose, along with the registry's restrictions on receiving hard copies of documents; and the court closures, it was difficult to obtain the decree needed to file the appeal promptly; further the basis of an appeal is a decree and not the date of delivery of judgment; hence from 14th July 2020 to 2nd September 2020, the days lapsed are 47 days, thus well within rule 82(1) of this *Court's Rules*; the applicant has not demonstrated the prejudice he has suffered by the appellant not filing a certified decree; the applicant is keen on procedural technicalities instead of addressing substantial issues raised in the appeal; that it is good practice that the Court of Appeal ought not to dismiss an appeal summarily but to examine and interrogate the merits of an appeal as envisaged under Article 159(2)(d) of the *Constitution* of Kenya.
7. The applicant's counsel swore and filed a supplementary affidavit dated 2nd July 2024 in response to the replying affidavit, stating that both the Commissioner and the LSK confirmed that the Commissioner for Oaths had a practicing certificate for the year 2020.
8. Learned counsel for the applicant has filed submissions and a list of authorities dated 4th July 2024. He submits that the inclusion of a decree in the record of appeal is a mandatory requirement and it is one of the primary documents; where there is no certified decree on record, the court can suo moto strike out the appeal without an application seeking to do so; he relied on the case of *Paul Wepukhulu & 2 Others vs. Charles Nakitare* [1997] eKLR.

The applicant also relied on the case of *Kirimi M'Muna vs. Peter Riungu* (268 of 1998) [1999] KECA 117 (KLR).



9. Learned counsel contends that the notice of appeal herein was neither served on his client nor his firm, and therefore, the appeal should be struck out. Further, he argues that the record of appeal was filed late without the court's leave. Furthermore, he notes that the respondent failed to mention in his replying affidavit or submissions that he did not serve the letter requesting the proceedings. Further, the certificate of delay was omitted. The omissions cannot be attributed to Covid-19. The applicant relies on the case of *Morris Thurania vs. M'ibiri Mbogori & 2 Others* Nyeri Civil Appeal (Application) No. 305 of 2006, where the court held that the delay, though for one day, had not been sanctioned by the court; hence, an application on that ground could not be resisted. The applicant objects to the respondent's reliance on sections 3A and 3B of the *Appellate Jurisdiction Act* and Article 159 of the Constitution. On the contention that no prejudice is to be suffered by the applicant, the applicant submits that the matter has been pending in court for 42 years, which is prejudicial to him.
10. Learned counsel for the respondent filed submissions and a list of authorities dated 26th November 2020. Learned counsel submitted that failure to serve a notice of appeal within 7 days after lodging the appeal is not fatal to the appellant's case where such failure was purely inadvertent, and the court is furnished with a plausible explanation for such failure. Learned counsel placed reliance on the case of *Mistry Premji Ganji (Investments) Limited vs. Kenya National Highways Authority* [2019] eKLR.
11. Further, it is the respondent's counsel's submission that this Court ought to look favorably at the appellant in the exercise of its discretion, by not striking out the suit since the delay as to service of notice of appeal was excusable, and further aggravated by the unforeseen travel restrictions and intervening events arising from the Covid-19 pandemic.
12. On the failure to annex the certified copies of the decree, the respondent submits that it is not fatal to the appellant's case as the omission was purely inadvertent and that the Court of Appeal and Supreme Court of Kenya have severally informed themselves of the effect of the failure of parties to adhere to the rules of procedure vis-a-vis the duty of the court to consider substantive justice in the exercise of its discretion to strike out an appeal on technical grounds. To this end, the respondent intends to rely on the case of *Autoports Freight Terminal Limited vs. Kenya Ports Authority* [2019] eKLR.
13. On whether the irregular commissioning of the applicant's affidavit by an unqualified person renders the application fatally and incurably defective, learned counsel submitted that the application was commissioned by a person who was not a practicing advocate as he had no practicing certificate and could not exercise the powers of a commissioner. He relied on the case of *Pius Njogu Kathuri vs. Joseph Kiragu Muthura & 3 Others* [2018] eKLR.
14. Learned counsel adds that the applicant's act of seeking dismissal of the appeal with a defective affidavit is tantamount to approbating and reprobating. Furthermore, in line with the overriding objectives, the court should exercise its discretion to ensure justice and fairness between the parties. In support of this assertion, learned counsel relied on the case of *Flystar Limited vs. Delphis Bank Limited* [2015] eKLR to be taken as nullifying the proceedings affected.
15. We have carefully reviewed the application, the rival affidavits, the authorities cited by the parties, and the relevant law. The application raises several issues for determination: one, whether the counsel who commissioned the affidavit in support of the application was qualified; second, whether the appeal should be struck out due to lack of service of the notice of appeal; and third, whether the record of appeal should be struck out for having been filed out of time and without a certified copy of the decree being appealed against.
16. On the first issue, LSK issued conflicting letters regarding whether the Commissioner for Oaths who commissioned the affidavit in support of the application before us held a practicing certificate. The



last letter from LSK has cleared up the confusion regarding the status of the Commissioner of Oaths; it is now a non-issue.

17. Rule 79 of the *Court of Appeal Rules 2022* states in mandatory terms that:

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, provided that the Court may, on application which may be made ex parte, within seven days after the lodging of the notice of appeal, direct that service need not be effected on any person who did not take part in the proceedings in the superior court.

Rule 84 provides as follows:

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 sub-rule (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 sub-rule (1) unless the appellant's application for such copy was in writing and a copy of the application was served upon the respondent.

18. In this matter, two facts are not disputed: the notice of appeal was not served on the 3rd respondent, and the record of appeal was filed out of time and without the court's leave. The defence against the two anomalies is that the failure to serve the notice of appeal and to copy the letter bespeaking the proceedings was due to the restrictions of the Covid-19 pandemic. Counsel has also attempted to invoke Article 159 of the *Constitution*. Article 159 of the *Constitution* enjoins the court to ensure that substantive justice is not overlooked due to mere technicalities. To ensure that the provisions of the Constitution are adhered to as a whole, the courts have established rules and regulations that facilitate the expeditious disposal of cases and ensure that justice is served equally for all parties.

19. Giving notice of an intended appeal is good practice and ensures that the opposing party is put on notice. The requirement of this Court's rule is couched in mandatory terms.

20. The rules also require that the letter bespeaking proceedings be copied to the other side and a record be prepared and filed within 60 days. Recognizing the exigencies that may make it practically impossible to obtain proceedings on time, the proviso to rule 84 allows for obtaining a certificate of delay, indicating the period it took to obtain the proceedings. A party may, for any other reason, seek leave of the court to file the record of appeal out of time.

21. In this matter, no plausible explanation has been provided for why the notice of appeal was filed but not served or why the letter initiating the proceedings was not copied to the opposing party. We agree with the applicant that this omission cannot be attributed to the Covid-19 restrictions, as both the



notice of appeal and the letter bespeaking the proceedings could have been served online. Equally, the court has also not been informed why leave to file the record out of time was not obtained.

22. The courts have numerously held that rules of procedure are the handmaidens of justice. We share this view and do not believe that a party that flouts all rules of procedure can seek refuge in Article 159 of the Constitution. The intention of the framers of the Constitution could not have been to assist litigants who do not comply with rules and who have no plausible reasons for their sloppiness or omission. To do so would be to throw the court into disarray and interfere with the administration of justice, and would be totally unfair to the party on the other side. This is not to say that in deserving cases, the court will not use its discretion in favor of such a litigant.
23. Ultimately, we allow the application with costs by striking out the notice of appeal and the record of appeal.

DATED AND DELIVERED AT NYERI THIS 11TH DAY OF APRIL, 2025.

S. OLE KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL ALI-ARONI

.....

JUDGE OF APPEAL

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

Signed

Deputy Registrar

