



Onyango & another (Suing as the Legal Representatives of the Estate of Japheth Omondi Owino) v District & 2 others (Civil Application E140 of 2024) [2025] KECA 692 (KLR) (11 April 2025) (Ruling)

Neutral citation: [2025] KECA 692 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E140 OF 2024
HA OMONDI, LK KIMARU & LA ACHODE, JJA
APRIL 11, 2025**

BETWEEN

**ELIJAH OCHIENG ONYANGO 1ST APPLICANT
JOSHUA OKOTH ONYANGO 2ND APPLICANT
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JAPHETH
OMONDI OWINO**

AND

**DISTRICT LAND REGISTRAR KISUMU DISTRICT 1ST RESPONDENT
THE HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT
REMKU LIMITED 3RD RESPONDENT**

(Being an application to strike out the Notice of Appeal filed on 8th March 2023 from the judgment of the Environment and Land Court at Kisumu (S. Okongo, J.) dated 23rd February 2023 in Case No. 023 of 2022)

RULING

1. The application for consideration by this Court is the Notice of Motion Application dated 27th September 2024, brought pursuant to rules 83 and 84 of the *Court of Appeal Rules*; and supported by an affidavit of even date, sworn by the applicant's counsel, Cecil Kouko. The applicant seeks for orders that:
 - i. The Notice of Appeal dated 8th March 2023 be struck out;
 - ii. costs be provided, there is no reply to the application either in the form of an affidavit or written submissions.



2. The events leading to this application trace back to the point where the 1st respondent lodged a Notice of Appeal dated 8th March 2023 against the decision in Kisumu ELC Appeal No. E023 of 2022 together with a letter bespeaking proceedings. The certified typed proceedings were ready for collection by 23rd March 2023 and the 1st respondent was notified of the same.
3. That the 1st respondent collected the certified typed proceedings; but to date has neither lodged the record of appeal nor sought to file the same out of tie. The applicant contends that the 1st respondent ought to have filed its record of appeal within 60 days from 23rd March 2023, which 60 days lapsed on 24th May 2023
4. Has the applicant satisfied the requirements for striking out the Notice of Appeal? The gist of the application is that the 1st respondent has failed to file the Record of Appeal within the 60 days stipulated by Rule 82 of the Court of Appeal Rules. The application is based on grounds that one year after filing the notice of appeal on 8th March 2023, the 1st respondent has never taken any steps to have the appeal filed. Despite the 1st respondent making a request for proceedings and collecting the same, no record of appeal has been prepared within the stipulated period. Further, that no prejudice will be occasioned if the application is allowed as it is apparent that the 1st respondent is no longer interested in pursuing the appeal, and is simply delaying the fair execution of the judgment and decree.
5. The 1st respondent has neither put in a response to the application nor submissions despite being properly served.
6. Rule 86 of the *Court of Appeal Rules* is instructive on the basis upon which an application for striking out a Notice or Record of Appeal, to this effect:

...provided that an application to strike out 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.

This Court has held on several occasions that parties are bound by the mandatory proviso to Rule 84 that the failure to comply with the same renders an application filed thereunder defective. See *Total Kenya Limited vs. Rueben Mulwa Kioko* [2018] eKLR.

7. In addition, this Court in *Esther Onyango Ochieng vs. Transmara Sugar Company* [2020] eKLR quoting this Court's decision in the case of *Salama Beach Hotel Limited & 4 Others vs. Kenyariri & Associates Advocates & 4 Others* [2016] eKLR stated:

“...In *Joyce Bochere Nyamweya vs. Jemima Nyaboke Nyamweya & Another* [2016] eKLR this Court held that parties are bound by the mandatory nature of the proviso to Rule 84 of the Court of Appeal Rules. An application seeking to strike out a notice of appeal must be filed within thirty (30) days of service of the notice of appeal, or the filing of the appeal ought to be struck off. The failure to do so renders such an application fatally defective and liable to be struck out”.

8. Similarly, in *William Mwangi Ngaruki vs. Barclays Bank of Kenya Ltd* [2014] eKLR, this Court held that an application to strike out a notice of appeal that is brought after 30 days from the date of service of the notice of appeal is incompetent unless leave is sought and obtained to file the application out of time. See also *Michael Mwalo vs. Board of Trustees of National Social Security Fund* [2014] eKLR.
9. The applicants filed the instant application on 27th September 2024 whereas the Notice of Appeal was served on 8th March 2023. The instant application is well over the 30 days referred to under Rule 84 and obviously fails to meet the requirements under Rule 84.



10. On several occasions various benches from this Court have made pronouncement on the consequences of non-compliance with the timelines prescribed under the Court's Rules. In that regard, we adopt the position taken by the Court in *John Mutai Mwangi & 26 Others vs. Mwenja Ngure & 4 Others* [2016] eKLR in which it was appreciated that the strict timelines:

“...is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispense justice in a timely, just, efficient and cost- effective manner.”

11. Indeed, Kiage, JA in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 6 Others* [2013] eKLR states:

“... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”

12. The rationale for strict adherence to rules of practice and procedure was likewise explained in *Chelashaw vs. Attorney General & Another* [2005] 1 EA 33, where it was held that without rules of practice and procedure, the application and enforcement of the law; and the administration of justice, would be chaotic and impossible; and their absence or non- adherence would lead to uncertainty of the law and total confusion since laws serve a purpose and they enhance the rule of law. That enforcement of such rules is imperative was emphasized by this Court in *Onjula Enterprises Ltd vs. Sumaria* [1986] KLR 651, where it was held that:

“The rules of the court must be adhered to strictly and if hardship or inconvenience is thereby caused, it would be that easier to seek an amendment to the particular rule. It would be wrong to regard the rules of the court as of no substance. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to disregard of the principle involved.”

13. It is abundantly clear to us, that this Court should not wish away the Rules of Court so ignobly. Certainly, the applicant fails the test on technicality, yet our considered assessment and evaluation, discloses non activity, nay a lack of interest in pursuing the appeal. We are persuaded that we are not completely hapless and helpless as a court, because the rule 85 allows us to exercise our suo moto jurisdiction as regards the effect of default in instituting appeal.; and is couched in the following terms:

85.

- (1) If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, that party shall be deemed to have withdrawn the notice of appeal and



the Court may, on its own motion or on application by any other party, make such order.

14. We therefore find that no record of appeal has been for over a year; and although the applicant is caught flatfooted by rule 86, this court moves suo moto to order that the notice of appeal be and is hereby struck out under Rule 85 of this Court's rules.

We make no orders on costs.

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

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

