



**Achola v Onyango (Civil Application E041 of 2024)
[2025] KECA 638 (KLR) (4 April 2025) (Ruling)**

Neutral citation: [2025] KECA 638 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E041 OF 2024
MSA MAKHANDIA, F TUIYOTT & LK KIMARU, JJA
APRIL 4, 2025**

BETWEEN

NELSON OMOLO ACHOLA APPLICANT

AND

MAURICE OKELLO ONYANGO RESPONDENT

(Being an application for striking out the Notice of Appeal lodged against the judgment of the Environment and Land Court at Migori (Kullow, J.) delivered on 18th October, 2022, in ELC Case No. 433 of 2017 (Formerly Kisii ELC No. 380 of 2015))

RULING

1. The applicant filed a notice of motion dated 3rd April, 2024, brought under Rules 44, 45, 79(1), 84(1) & (2) and 85 of the Court of Appeal Rules, Section 3A of the Appellate Jurisdiction Act, and all enabling provisions of the law. The applicant substantively seeks orders to strike out the respondent's notice of appeal dated 1st November, 2022.
2. The application is supported by grounds on its body, and a supporting affidavit dated 3rd April, 2024, together with annexures thereto. It's the applicant's contention that the respondent lodged the notice of appeal dated 1st November, 2022, on 2nd November, 2022, as well as a letter bespeaking certified copy of the proceedings and judgment of the superior court on 9th November, 2022. According to the applicant, the correspondence and the notice of appeal were not served upon him as required by the rules of this Court. He only became aware of the same on 14th March, 2024, when his advocate was served with an application lodged by the respondent, seeking orders stay for execution of the judgment and decree of the Environment and Land court. He urged that the respondent having failed to serve the notice of appeal upon the applicant within seven (7) days of lodging the same, as required by the Rule 79(1) of this Court's rules, the said notice was incompetent.



3. The applicant further asserted that the firm of M/s Abisai & Company Advocates, who lodged the notice of appeal on behalf of the respondent, had not obtained the leave of court to come on record for the respondent, having come on record at the appellate stage. The applicant urged that the respondent was yet to take any steps to lodge the record of appeal, which ought to have been filed on or before 24th January, 2023, pursuant to Rule 84(1) of the *rules of this Court*. He urged that the instant application has been filed within the statutory thirty (30) days' timelines from the time he was served with the application. He invited us to strike out the notice of appeal lodged by the respondent for being incompetent.
4. The application was opposed vide the respondent's replying affidavit dated 24th April, 2024, sworn by the respondent's counsel, Rodgers Abisai. Mr. Abisai deposed that on 1st November, 2022, he was instructed by the respondent to file a notice of appeal against the impugned judgment of the Environment and Land Court ("the ELC) delivered on 18th October, 2022. He stated that he received the said instructions on the verge of the expiry of the statutory timeline allowed for filing the notice of appeal, thus he had no time to seek the leave of court to come on record. He averred that he filed an application seeking leave of this Court to be properly on record on 28th February, 2024, as well as a notice of appointment as counsel for the respondent.
5. Counsel for the respondent deposed that he is yet to receive a certified copy of the proceedings from the superior court, despite formally requesting for the same. It was his contention that this Court has the requisite jurisdiction to excuse late service should the circumstances of the case allow. He deposed that the respondent's right to be heard ought not be muffled on account of procedural technicalities beyond his control. He urged that the respondent was ready and willing to prosecute his appeal, and that the applicant will suffer no prejudice should the appeal be heard and determined on its merit.
6. During the hearing of the application, Mr. Mulisa, learned counsel represented the applicant, while Mr. Singei, learned counsel appeared for the respondent. Both parties relied on their written submissions. Mr. Mulisa reiterated the averments made by the applicant in his grounds in support of the application, as well as the supporting affidavit.
7. Mr. Singei, on his part, urged that the respondent's counsel was unable to serve the notice of appeal as he was unaware of who was on record for the applicant before the ELC, as the court file was not available at the registry at the time for perusal. It was his submission that the applicant did not abide by the provision of Rule 81(1) of the *rules of this Court*, which require a party upon whom a notice of appeal is served, to within fourteen days of service, lodge and serve a notice of address for service. He reiterated that the delay in service of the notice of appeal was excusable in the circumstances, and that no prejudice has been suffered by the applicant. It was his contention that striking out the notice of appeal would be a drastic measure and at the expense of substantive justice.
8. By dint of Rule 77 of the *rules of this Court*, any party who desires to appeal to this Court is required to lodge a notice of appeal within fourteen (14) days of the date of the decision against which it is desired to appeal. Rule 79 directs such a party to serve a copy of the notice of appeal to all persons directly affected by the appeal within seven (7) days, after the lodging of the notice of appeal.
9. It is evident that the impugned judgment of the ELC was delivered on 18th October, 2022. The respondent, through his counsel, lodged his notice of appeal against the said decision on 2nd November, 2022. A copy of the notice of appeal was served upon the applicant approximately one year and five months later, on 14th March, 2024, which is outside the timeline provided by the rules of this Court. In fact, the applicant only became aware of the said notice of appeal after an application lodged by the respondent, seeking orders of stay of execution of the impugned judgment and decree of the ELC, was



served upon him. A copy of the notice of appeal was annexed to the affidavit in support of the said application.

10. It has previously been held by this Court that the rules of procedure and timeline of this Court, are not amenable to the general discretion provided for under Article 159 of the *Constitution*, with respect to procedural technicalities, but are there to regulate the conduct of parties before this Court so as to accord fairness to all parties. (See *Patrick Kiruja Kithinji v Victor Mugira Marete* [2015] eKLR.)
11. The respondent conceded that service of the notice of appeal was not effected within seven (7) days, as per the provisions of Rule 79 of this *Court's rules*, for the reason that counsel for the respondent, who was newly instructed at the time, did not have the applicant's address for service, having come on record at the appellate stage, and that a certified copy of the proceedings and judgment of the superior court was yet to be availed to him by the court at the time this application was being urged before this Court.
12. Counsel for the respondent further admitted that he had not sought the leave of court to come on record for the respondent, the respondent having been represented by a different firm of advocates in the proceedings before the superior court. He stated that he was instructed to lodge the appeal late in the day, and in his opinion, he had no time to seek leave of court to properly come on record for the respondent if the notice of appeal was to be lodged on time. It is our considered view that while the reasons advanced by the respondent may have been considered in an application for extension of time under Rule 4 of the rules of this Court, they are of no assistance to the respondent in the instant application.
13. This Court in *Mwawasi v Shako* (Civil Application E053 of 2023) [2024] KECA 632 (KLR) (7 June 2024) (Ruling) observed as follows:

“In our view, a person who runs/falls afoul of the law ought to speedily take remedial measures before the other party takes action to have the process nullified. A party who has defaulted in complying with the procedural stipulations should not merely tell the Court, when confronted with an application to strike out its processes, that no prejudice has been occasioned, and that its cause ought to be determined on merits. This Court in *Sukwinder Singh Jutley v Prudential Association Co. of Kenya Ltd & Another* Civil Appeal (Application) No. 62 of 2004 held that:

“In procedural rules that lack clarity, the Court is at liberty to lean on constructions which aid the course of justice but not in clear rules which have been interpreted many times by the Court as to depart from the rule without changing it would be an aberration that would confound and confuse litigants and should not be countenanced even for a solitary unintentional omission.”

In this case, the notice of appeal was served out of time, in particular, approximately one year and five months after it was lodged by the respondent. The respondent did not bother to seek extension of time before this Court to serve the said notice upon the applicant, out of time. In *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court reiterated that where a law provides for the time within which an action or step in the proceedings ought to be done, if that time lapses, one must seek extension of time.

14. The applicant filed the instant application, seeking to strike out the respondent's notice of appeal, within thirty days of service of the notice of appeal, as is required by Rule 86 of this Court's rules.



15. Accordingly, we allow the application dated 1st November, 2022, for contravening the provisions of Rule 79 of the rules of this Court. The said notice of appeal is consequently struck out. The applicant will have costs of the motion.

DATED AND DELIVERED AT KISUMU THIS 4TH DAY OF APRIL, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of original.

Signed

DEPUTY REGISTRAR.

