



**County Government of Laikipia v Ngugi & another (Civil Appeal
(Application) 62 of 2019) [2025] KECA 997 (KLR) (23 May 2025) (Ruling)**

Neutral citation: [2025] KECA 997 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) 62 OF 2019
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
MAY 23, 2025**

BETWEEN

COUNTY GOVERNMENT OF LAIKIPIA APPELLANT

AND

P.N GICHOHO NGUGI 1ST RESPONDENT

JACK M MBUGUA 2ND RESPONDENT

(An application to strike out the appeal from the Judgment of the High Court at Nyeri (Kasongo, J.) delivered on 14th December 2017 in H.C.C.C. No. 3 of 2016)

RULING

1. The applicant herein, who is also the 1st respondent in the main appeal, has filed a Notice of Motion dated 26th April 2019, brought pursuant to Rules 42 (1), 43 (1), 82 (1) and 84 of the Court of Appeal Rules (2010) [now Rules 44(1), 45(1), 84 and 86 of the 2022 Rules] (hereafter the Rules). He seeks to have this appeal struck out and that costs of this application be paid by the respondent who is the appellant in the appeal [hereinafter the respondent].
2. The grounds for the application are that: The appeal was lodged more than 60 days from the date the notice of appeal was lodged and was therefore filed out of time. The letter from the appellant's advocate to the Deputy Registrar of the High Court, applying for certified copies of the proceedings was not served on the 1st respondent and therefore the proviso to rule 86 (1) of the Rules of this Court cannot come to the help or benefit of the applicant. The memorandum of appeal is not lodged at the registry of this Court as required by Rule 90 (3) of the rules of this Court. The appeal has left out completely and has not been served upon the 1st third party as required by Rule 94 of the Rules of this Court. The memorandum of appeal is not dated.



3. The applicant relies on the supporting affidavit sworn by P. N. Gichocho Ngugi, dated 26th April 2019, and written submissions by Waweru Macharia & Company advocates dated 26th June 2020. He urged that it is trite that where the letter be-speaking the proceedings is not served, the appeal should be filed within 60 days from the date of filing of the notice of appeal. Counsel urged that since the notice was filed on the 21st December, 2017 the appeal ought to have been filed on or before 21st February 2018. That the appeal was filed on 4th April 2019 without leave of the Court, and was way out of time by over one year. He urges that the delay was inordinate and not properly explained. He relies on this Court's decision in *Mwaniki Munyi & 55 Others vs. Attorney General & 7 Others* [2014] eKLR, for the proposition that the competency of the appeal for being filed out of time without leave goes to jurisdiction and cannot be cured by the application of the overriding objective.
4. Learned counsel urged us to find that the application is incompetent. He urges further that failure to serve the interested party due to the failure of the interested party to file an address for service was a lame excuse. He urged that the memorandum of appeal filed was not signed and that if there exists one that had a signature, the two are not the same.
5. The respondent has filed written submissions through counsel on record, Messrs. J. M. Mwangi & Company advocates dated 6th February, 2023 in opposition to the application as well as a replying affidavit sworn by Joseph Mwangi advocate dated 25th June, 2019 and filed on 26th June, 2019. He relies on the averments in the replying affidavit and the annexures thereto. He also relies on the list and digest of authorities dated 25th June, 2019 and filed on 26th June, 2019 as well as the supplementary list and digest of authorities dated 31st January 2023.
6. On non-service of the letter be-speaking the proceedings, counsel admitted that the letter was not served and urged that it was a regrettable oversight on the part of the respondent's counsel. That although Rule 84 (2) is couched in mandatory terms, he invites the Court to apply Article 159 (2)(d) of the *Constitution*, which enjoins all courts to administer justice without undue regards to procedural technicality. It also urges us to invoke sections 3A and 3B of the *Appellate Jurisdiction Act*, which provides for the overriding objective of the Act and Rules made thereunder, being to facilitate the just, expeditious, proportionate and affordable resolution of appeals governed by the Act. He also urges us to invoke the inherent powers of this Court provided under Rule 1 of the Court of Appeal Rules, which clothes this Court with inherent powers.
7. The respondent further argued that all the provisions it invites us to invoke serve the same end; to wit, that procedure should not trump the way of substantive justice. He relies on the case of *Hunker Trading Company Limited vs. Elf Oil Kenya Limited* [2010] eKLR, which gives Courts guidelines on the application of the overriding objective as including:
 - “ 1. The overriding objective is a double-edged sword and any litigant who seeks succour under it should place itself on the ‘right side’.
 2. All rules must either in form or in their application be compliant with the overriding objective...”
8. Counsel urged that admittedly, Rule 86 (2) is couched in mandatory terms, however, Rule 1(2) states that nothing in the Rules shall limit or affect the inherent power of the court. That it is also subject to Article 159(2) of the *Constitution* and section 3A and 3B of the *Appellate Jurisdiction Act*. He urged that according to the decision in *Hunker Trading Company Limited supra*, all rules are subject to an application and interpretation which upholds the overriding objective. He contended that there have been examples before this Court where breaches of mandatory rules of this Court have been remedied



under the overriding objective. He urged us to consider the instances in the list of digest dated 31st January 2023 and the case of Dorcas Indombi Wasike vs. Benson Wamalwa Khisa [2010] eKLR, where the Court declined to strike out an appeal which did not contain a certified copy of the decree.

9. The respondent submits that the overriding objective of this Court will be achieved if this appeal is upheld for the following two reasons: one that the appellant did not obstruct or otherwise delay the preparation of proceedings. It is a matter of judicial notice that the typing and certification of proceedings are within the supervision of the Deputy Registrar of the High Court; two, there is no prejudice suffered by the respondents. Rule 86 provides for two procedural rights to a party entitling such a party to move the court and halt the appellate process. The respondent in this appeal could have moved this Court within 30 days from the date of service of the notice of appeal and halt the appeal process. The respondent chose not to do so.
10. The respondent submits that this Court will uphold its overriding objective by sustaining this appeal rather than striking it out.
11. The respondent has addressed the issue of leaving out the 1st third party and not serving them with the notice of appeal. He placed reliance on Rule 92, that it was not obligated to serve them as they failed to file a notice of address. In respect to the claim that the memorandum of appeal is not dated and has not been lodged, the respondent's counsel has, in the replying affidavit, annexed a duly dated and lodged memorandum of appeal.
12. The respondent submits further that the applicant has not demonstrated the prejudice he has or is likely to suffer from the procedural infractions alleged in his supporting affidavit. He submits that striking out the appeal for a procedural infraction will be misappropriate to the prejudice, if any, suffered herein and will not accord with the overriding objective under section 3A and 3B of the Appellate Jurisdiction Act and the Article 159 (2)(d) of the Constitution of Kenya. Further that striking out this appeal on account of non-service of the impugned letter will simply restore the parties to the pre-appeal stage and require the appellant to re- initiate the appellate process and thereby delay the disposal of the real issues in controversy.
13. This application has invoked rules 84 and 86 Rule 86 of this Court's Rules provides:

“ 84. Institution of appeals

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

14. We have considered that the notice of appeal was filed on the 21st December 2017 and the appeal on the 4th of April 2019, over a year later, without leave of the Court and way out of time. We also note that it is admitted that the letter be- speaking the proceedings was not served upon the applicant, which means that the respondent cannot benefit from Proviso 1 under Rule 86 of the Rules. That also means then that the respondent should have filed the appeal within 60 days from the date of filing the notice of appeal. Alternatively, the respondent could have sought an extension to file the appeal out of time.
15. We note that the respondent has not made any attempt to explain the delay in filing the appeal, instead it has invoked the overriding objective under section 3A and 3B of the Appellate Jurisdiction Act; the inherent powers of the Court under Rule 1 of the Rules and the constitutional requirement that justice should not be administered with technicalities under Article 159 (2)(d) of the Constitution.
16. In *Felister Wakonyo Wamahiu vs. Joseph Wachira Mwangi – Civil Appeal (Application) No. 8 of 2013*, this Court while dealing with a similar application expressed itself as follows: -

“The appeal was filed out of time on 19th April, 2013 and without leave of this Court. No explanation was given by the respondent for the delay in filing the Record of Appeal. Can the overriding objective of this Court be invoked to save the appeal? We are of the view that the competency of the appeal goes to the jurisdiction of this Court and cannot be cured by the overriding objective of this Court. It's trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. In *City Chemist (NRB) & Others – vs- Oriental Commercial Bank Ltd- Civil Application No. Nai. 302 of 2008* this Court in discussing the overriding objective of the Court stated: -

“That however is not to say that the new thinking totally uproots well established principles or precedents in the exercise of discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and ambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application.”

17. In the circumstances, we are of the considered view that the appeal herein is not competently before this Court and is hereby struck out.
18. The applicant and the 2nd respondent shall have costs of this application.



DATED AND DELIVERED AT NYERI THIS 23RD DAY OF MAY, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL ALI - ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

