



**Ochiely v Limisi & 2 others (Civil Appeal (Application)  
E258 of 2021) [2025] KECA 819 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KECA 819 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E258 OF 2021  
DK MUSINGA, M NGUGI & GV ODUNGA, JJA  
MAY 9, 2025**

**BETWEEN**

**ARGWINGS KODHEK OCHIELY ..... APPELLANT**

**AND**

**HESBON K LIMISI ..... 1<sup>ST</sup> RESPONDENT**

**DELILAH ACHIENG MATHEWS ..... 2<sup>ND</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**

*(An application to strike out the appellant's Notice of Appeal dated 14th February 2020 filed on 18th February 2020 and the Memorandum and Record of Appeal arising from the judgment of the Environment and Land Court at Nairobi (L. Komingoi, J.) delivered on 6th February 2020 in ELC Case No. 1227 of 2013)*

**RULING**

1. The applicant, Hesbon K. Limisi, is the 1<sup>st</sup> respondent in the appeal. For the sake of clarity and to avoid confusion, the parties in an application, ought to intitule the applications in the manner in which they are intended to be referred to by the Court in the ruling, as opposed to the manner in which they are referred to in the main appeal. That is why applications within an appeal bear the title “Appeal (Application)” to differentiate applications made in the appeal from the appeal itself.
2. Therefore, for the purposes of this ruling, we shall refer to Hesbon K. Limisi as the applicant, Argwings Kodhek Ochiely, as the 1<sup>st</sup> respondent, Delilah Achieng Mathews, as the 2<sup>nd</sup> respondent and The Chief Lands Registrar, as the 3<sup>rd</sup> respondent.
3. The applicant, in his Notice of Motion dated 26<sup>th</sup> May 2021, expressed to be brought under rules 84, 82(1) and (2) and 87(1) and (2) of the Court of Appeal Rules (the Rules), seeks an order striking out the Notice of Appeal dated 14<sup>th</sup> February 2020 and filed in court on 18<sup>th</sup> February 2020 and the



- Memorandum of Appeal dated 10<sup>th</sup> May 2021 together with the entire Record of Appeal filed by the 1<sup>st</sup> respondent herein on 12<sup>th</sup> May 2021. He also seeks costs.
4. Vide a plaint dated 11<sup>th</sup> November 2013, the applicant sued the respondents claiming vacant possession of Flat No. F situated on Block No. MF 32 Madaraka Estate Nairobi, within LR No. 25980, mesne profits at the rate of Kshs. 30,000.00 per month, general damages for trespass, exemplary and punitive damages, interest and costs of the suit.
  5. In the judgment delivered on 6<sup>th</sup> February, 2020, the learned Judge (Komingoi, J.) found the case merited and granted the reliefs sought, save for the claim for exemplary and punitive damages.
  6. Aggrieved, the 1<sup>st</sup> respondent lodged a Notice of Appeal dated 14<sup>th</sup> February 2020 on 18<sup>th</sup> February 2020.
  7. The application is premised on grounds: that although the 1<sup>st</sup> respondent filed the Notice of Appeal on 18<sup>th</sup> February 2020, he did not serve it until 9<sup>th</sup> March 2020 which was out of time as it ought, pursuant to rule 77(1) of the Rules, have been served on or before the 25<sup>th</sup> February 2020; that although the 1<sup>st</sup> respondent requested for proceedings from the Deputy Registrar on 24<sup>th</sup> February 2020, he never served the said letter on the applicant's advocates as required under rule 82(1) and (2) of the Rules; that as a result, the prescribed period for filing the Record of Appeal lapsed on 18<sup>th</sup> May 2020 which is sixty (60) days from the date of lodging the Notice of Appeal, on 18<sup>th</sup> February 2020; that even assuming that the 1<sup>st</sup> respondent's advocates served the applicant's advocates with the letter requesting for proceedings, since the Deputy Registrar notified the 1<sup>st</sup> respondent's advocates that the proceedings were ready on 2<sup>nd</sup> March 2021, the time for filing the Record of Appeal, as provided for under the provisions of rule 82(1) and (2) of this Court's Rules, still lapsed on 1<sup>st</sup> May 2021; that despite the applicant not filing the application to strike out the Notice of Appeal within 30 days of service thereof and notwithstanding that his application for extension of time to apply for extension of time, in Civil Application No. E216 of 2020, was declined on 7<sup>th</sup> May 2021, the 1<sup>st</sup> respondent has not been diligent in complying with the law, to the prejudice of the applicant; that the 1<sup>st</sup> respondent has, in contravention of the mandatory provisions of rule 87(1) and (2) of this Court's Rules, omitted from the record the primary pleadings in form of list of documents (exhibits) produced by the 1<sup>st</sup> respondent and the applicant during the hearing of the case; and that the justice of the matter in the circumstances dictate that the Memorandum and the entire Record of Appeal herein, together with the Notice of Appeal dated 14<sup>th</sup> February 2020, be struck out.
  8. In opposition to the application, the 1<sup>st</sup> respondent filed a replying affidavit sworn on 10<sup>th</sup> March, 2025 wherein he averred: that the Notice of Appeal was filed within 13 days of the decision and hence, cannot be said to have been out of time; the applicant was served with the Notice of Appeal via email on 21<sup>st</sup> February 2020 and thereafter, with the physical copy on 9<sup>th</sup> March 2020, thus the initial service via email was within the statutory limit of 7 days as stipulated in rule 79 of this Court's Rules; that the application contravenes rule 86 of this Court's Rules as the same has not been filed within 30 days but after one year from the date when the application ought to have been filed; that the Certificate of Delay was prepared and made ready for collection on 21<sup>st</sup> April 2021; that from 15<sup>th</sup> March 2021 when the certified typed proceedings and judgment were availed to the applicant's advocates, the statutory period of 60 days lapsed on 13<sup>th</sup> May 2021; that his advocate filed the Record of Appeal dated 10<sup>th</sup> May 2021 on 12<sup>th</sup> May 2021, 59 days after the certified typed proceedings were availed and 22 days after the Certificate of Delay was prepared and made ready for collection, thus the Record of Appeal was filed within time; and that it is in the interest of justice that the application be struck out with costs to the 1<sup>st</sup> respondent.



9. We heard the application on the Court’s virtual platform on 17<sup>th</sup> March 2025 during which learned counsel, Mr Sumba, appeared for the applicant, learned counsel, Dr. Arwa appeared for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, and learned counsel, Mr Ngumbi, appeared for the 3<sup>rd</sup> respondent. Mr Ngumbi informed the Court that although he was not served with the application, nevertheless, the application did not prejudice his client. Both Mr Sumba and Dr. Arwa relied on their respective submissions in which they rehearsed the contents of the respective replying affidavits.
10. The applicant, in his submissions, cited several authorities including Nairobi Civil Appeal No. 94 of 2001 – Richard Kanyago & 2 Others v David Mukii Mereka, highlighting that time starts running from the date the court notifies a party that copies of proceedings and judgement are ready for collection.
11. In his submissions, the 1<sup>st</sup> respondent cited: Daniel Ngángá Kanyi v Sophinaf Company Limited & Another Civil Appeal (Application) No. 315 of 2001 to highlight the fact that the 60 days prescribed for filing of the Record of Appeal runs from the date of the delivery of copies of the proceedings to the appellant; and Municipal Council of Mavoko v Aristocrats Concrete Company Limited [2015] KLR, submitting on the timelines for applying for striking out a Notice of Appeal.
12. We have considered the application, the affidavits both in support of and in opposition to the application, the submissions made and the authorities relied upon.
13. The first issue for our determination is the competence of the application. According to the 1<sup>st</sup> respondent, the application contravenes rule 86 of the Rules of this Court which provides that:

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
- b. that some essential step in the proceedings has not been taken or 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 after the date of service of the notice of appeal or record of appeal, as the case may be.

14. The applicant disclosed that his advocates were, on 9<sup>th</sup> March 2020, served with the Notice of Appeal filed by the 1<sup>st</sup> respondent on 18<sup>th</sup> February 2020. Pursuant to rule 86 aforesaid, if the applicant was desirous of having the Notice of Appeal struck out, he ought to have moved the Court within 30 days of service thereof. Realising that he had not done so, he rightly sought, via Civil Application No. E216 of 2020, to have the time prescribed for filing the application for striking out the Notice of Appeal extended but that application was disallowed on 7<sup>th</sup> May 2021. The consequences of the failure to apply for striking out a Notice of Appeal or the Record of Appeal within 30 days of service thereof pursuant to rule 84 of the 2010 Rules (now rule 86), were set out by this Court in the case of Salama Beach Hotel Limited & 4 Others v Kenyariri & Associates Advocates & 4 Others (2016) eKLR where this Court explained that:

“This Court has in the past had occasion to decide the fate of applications made under Rule 84, but which had been filed out of time. In Joyce Bochere Nyamweya v Jemima Nyabokey Nyamweya & another [2016] eKLR, this Court held that parties are bound by the mandatory nature of the proviso to Rule 84 of this Court’s Rules. An application seeking to strike out a notice of appeal or an appeal must be made within thirty (30) days of service



of the notice of appeal or the appeal sought to be struck out. That failure to do so renders such an application fatally defective and liable to be struck out. As was held in the Joyce Bochere case (supra), stipulations on time frames within which acts should be done in law are of essence and must be strictly observed. In the event that a party finds itself caught up by the lapse of time as was in this case, the proper thing to do is to file an application for extension of time under Rule 4 of this Court's Rules. Similarly, in *William Mwangi Nguruki v Barclays Bank of Kenya Ltd* [2014] eKLR, the 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 v Board of Trustees of National Social Security Fund* [2014] eKLR." The instant application is therefore clearly incompetent, as it is filed out of time in violation of the proviso to Rule 84, having been lodged on 14th April 2021, after almost two years since the Applicant was served with the Notice of Appeal on 6th June 2019. The Applicant did not bring any evidence of having been granted extension of time to file the said application, and it is therefore amenable for striking out."

15. Therefore, the applicant's application for extension of time to apply for striking out the Notice of Appeal having been declined, he cannot rely on the grounds that the Notice of Appeal was served out of time. That ground fails.
16. However, the applicant contends that the appeal itself was filed out of time. It is not in doubt that the appeal was filed on 12<sup>th</sup> May 2021 and served on 17<sup>th</sup> May 2021. The present application is dated 26<sup>th</sup> May 2021 which is within the 30 days period prescribed under rule 86 aforesaid. Accordingly, the application, in so far as it seeks to strike out the Memorandum and Record of Appeal, was made within time and is competently before us.
17. Rule 84(1) and (2) of the Rules provides that:
  - a. 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.
  - b. 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. An appeal is, under the above rule, required to be filed within 60 days of lodging of the Notice of Appeal. A party who fails to do so can only validate the appeal by seeking leave of the Court by way of extension of time under rule 4 of the Rules. The only exception is where the intending appellant had,



within thirty days after the date of the decision against which it is desired to appeal, applied in writing for a copy of the proceedings and copied the letter requesting for the proceedings to the intended respondent. In that event, in computing the time within which the appeal is to be instituted, the period certified by the registrar of the lower court as having been required for the preparation and delivery to the appellant of such copy is to be excluded. Unless this is done, the appellant does not benefit from the period taken in preparation and delivery of the proceedings. As was held by this Court in *Joseph Ngwele Nduwa v Ahmed Abubakar T/A Bajaber Service Station & another* [1998] eKLR:

“...in the absence of a copy of the letter bespeaking copies of proceedings and judgment not having (sic) been sent to the respondent to appeal within 30 days, the benefit of the proviso to rule 81(1) does not inure to the appellant. The record of appeal is also therefore filed out of time without leave.”

19. The same position was adopted in the case of *Kenya Iron Mongers Limited v Muhoroni Sugar Company Limited* [2000] eKLR where this Court expressed itself as hereunder:

“The decision appealed from was given on 24th November, 1999, and on 7th December, 1999, the appellant filed its Notice of Appeal declaring its intention of appealing against it. It was required to file its memorandum and record of appeal within sixty days, thereafter, which period was to expire on 29th February, 2000, if the Christmas vacation, which by reason of the provisions of rule 3(b) of the Rules is excluded time, is excluded from computation. But the appellant did not file its memorandum and record of appeal until 3rd March, 2000, which then means that its appeal was filed at least two days out of time. The appellant has included in the record of appeal a certificate of delay suggesting that it intended to rely on the proviso to rule 81 of the Rules. However, the applicant contends that it is not entitled to do so because, in its letter bespeaking copies of proceeding and the ruling appealed from dated 8th December, 1999, the appellant did not copy it to the applicant as is mandatorily required by rule 81, aforesaid and cannot therefore take advantage of the proviso. Mr. Kasamani for the appellant conceded before us, quite properly so, that as counsel for the appellant did not comply with that proviso, his client is for that reason disentitled to rely on it. In view of that, it is quite clear that in the absence of leave of the court to file the appeal out of time, the appeal is incompetent.”

20. In this case, the 1<sup>st</sup> respondent does not dispute the averment that it did not send a copy of the request for proceedings to the applicant. It follows that, unless time was extended within which it could file the appeal, his appeal ought to have been filed within 60 days from the date of lodging the Notice of Appeal on 18<sup>th</sup> February 2020 and that day would have been around 20<sup>th</sup> April 2020. The Record of Appeal was however filed on 12<sup>th</sup> May 2021, clearly out of time.

21. Even if the letter bespeaking proceedings had been copied to the applicant, the Certificate of Delay dated 21<sup>st</sup> April 2021 states:

“That the Defendants were notified on 2nd March 2021 that the uncertified proceedings were ready for collection and would be supplied upon payment of requisite fees.

That the time taken by the Court to prepare and supply the certified copies of proceedings was from 24th February 2020 to 2nd March 2021 being a total of 371 days

That the requisite court fees was paid on 3rd March, 2021 and certified typed proceedings and judgement was availed to the Defendants’ advocate on 15th March, 2021



That I therefore certify that 371 days were taken in typing out the proceedings and the ruling and should accordingly be excluded in computation of time.”

22. Under rule 84(2) of the Rules, the period to be excluded is the time certified as having been required for the preparation and delivery to the appellant of a copy of the proceedings. That rule does not talk about delivery of certified copy of the proceedings. That was the position in *Rodgers Abisai v Wachira Waruru & Another* [2009] eKLR where it was held by this Court that:

‘On 30<sup>th</sup> May, 2007 the respondents requested the Deputy Registrar of the superior court for “typed certified copies of the proceedings and judgment” none of which, we are informed from the bar, have been received to date. We would agree with Mr. Oguttu, learned counsel for the applicant, that certified copies of proceedings and judgment are not necessary documents for the purposes of an appeal. An intended appellant only requires uncertified copies of proceedings and judgment to facilitate the compiling of a record of appeal. These documents comparatively take a shorter time to obtain than certified ones. Thus, it is clear that the respondents had requested for wrong copies of proceedings and judgment. Mr. Oguttu submits that this omission is contrary to rule 81(1) of the Court of Appeal Rules and that the respondents having failed to comply with the said rule, then they had failed to lodge the record of appeal within the statutory duration and the grace period conferred by the said rule is not available to them due to the breach of the mandatory proviso to rule 81. We do not agree with that submission. The said rule is not breached by merely asking for certified copies of proceedings. It may be breached if the uncertified copies are available but the intending appellant does not use them insisting on being supplied with the certified ones. Again, it would appear that certified copies may be used to mount an appeal if they are supplied timeously.” [Emphasis ours].

- 23.

In this case it is clear from the Certificate of Delay that the 1<sup>st</sup> respondent was notified on 2<sup>nd</sup> March 2021 that the uncertified proceedings were ready for collection and would be supplied upon payment of requisite fees. From that day, the 60 days period started running so that the Record of Appeal that was filed on 12<sup>th</sup> May 2021 was out of time. The 1<sup>st</sup> respondent’s view that time started running from 15<sup>th</sup> March 2021 when the certified typed proceedings and judgment were availed to his advocates is clearly erroneous. Once a party is notified that proceedings are ready, it is upon him to make the necessary arrangements to have them collected. The applicant only has himself to blame for the delay in collecting the proceedings till 15<sup>th</sup> March 2021. The period required for the preparation and delivery of the Certificate of Delay is, however, not excluded from computation of time.

24. It is clear that the Record of Appeal was, in violation of rule 84 of this Court’s Rules, filed out of time. In *Mae Properties Limited v Joseph Kibe & Another* [2017] KECA 238 (KLR), this Court stated that:

“We have said on numerous occasions that the Rules of Court exist for the purpose of orderly administration of justice before this Court. The timelines appointed for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals that come before us. The Rules are expressed in clear and unambiguous terms and they command obedience.”



25. In *Gituro v Maki & 3 Others* (Civil Appeal (Application) E050 of 2023)[2024] KECA 1204 (KLR) (20 September 2024) (Ruling), the Court held that:

“ A notice of appeal filed out of time bereaves this Court of jurisdiction to entertain the appeal and must suffer only one fate: striking out”.

26. Similarly, a Record of Appeal filed out of time and without leave is for striking out.

27. We grant this application and hereby strike out the 1<sup>st</sup> respondent/appellant’s Memorandum of Appeal dated 10<sup>th</sup> May 2021 together with the entire Record of Appeal filed herein on 12<sup>th</sup> May 2021 with costs to the applicant.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF MAY, 2025.**

**D. K. MUSINGA, (PRESIDENT)**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

