



**Khavere v Kavuludi & 3 others (Civil Application E098 of 2024)
[2025] KECA 1403 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1403 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E098 OF 2024
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA
JULY 31, 2025**

BETWEEN

CAROLINE KHAVERE APPLICANT

AND

PETER KHENDI KAVULUDI 1ST RESPONDENT

EMILY KHAVERE 2ND RESPONDENT

FLORENCE KHAVAI 3RD RESPONDENT

HELLEN KHADI 4TH RESPONDENT

(Being an application to strike out a Notice of Appeal against the Judgment of the Environment and Land Court at Vihiga (E. Asati, J.) dated 13th June, 2024 in E.L.C Appeal No. 12 of 2022)

RULING

1. The Notice of Motion dated 23rd July 2024, filed by Caroline Khavere, the applicant herein, is brought pursuant to sections 3, 3A, and 3B of the [Appellate Jurisdiction Act](#) and Rules 77[1][6], 79[1], and 86 of the [Court of Appeal Rules 2022](#), seeking, *inter alia*, that the Notice of Appeal dated 13th June 2024 and filed herein from the Judgment of the Environment and Land Court delivered on 13th June 2024 be struck out.
2. That in the alternative and without prejudice to the foregoing, the said Notice be deemed to have been withdrawn.
3. The motion is premised on the grounds that upon delivery of the impugned judgment on 13th June, 2024, the respondent lodged a Notice of Appeal dated 13th June, 2023.
4. The said Notice of Appeal is described as defective for failure to conform to the provisions of Rule 77[6] of the [Court of Appeal Rules](#). Further, the said notice was served upon the applicant's counsel on



- 20th June, 2024 outside the stipulated 7 days. It is contended that the Notice of Appeal being defective, then there is no valid appeal that can be lodged by the respondent, as such, it is in the interest of justice that the Notice of Appeal be struck out for being defective and for being served outside time.
5. The application is opposed by a replying affidavit sworn on 14th August, 2024 by Peter Khaendi Kavuludi, the 1st respondent on the grounds that the notice of appeal dated 13th June, 2024 was filed through e-filing at the Vihiga Environment and Land Court for endorsement by the Deputy Registrar; and was lodged within 14 days.
 6. It is contended that on 15th June, 2024, the respondent's counsel paid for certified copies of proceedings and judgment, which copies were to include a copy of the endorsed copy of the Notice of Appeal; that a copy of the Notice of Appeal pending endorsement was annexed to the respondent's application for stay of execution, therefore, it is not true that the Notice of Appeal has been lodged in this Court as the same is still before the Vihiga ELC waiting for the endorsement by the Deputy Registrar.
 7. Regarding the service of the impugned Notice of Appeal, the respondent submits that the said notice was uploaded for filing on the e-filing platform on 14th June, 2024 but due to poor network connectivity, it reflected as filed on 15th June, 2024, which was a Saturday, while 17th June 2024 was a public holiday; that the said Notice of Appeal could neither be served on a Saturday, Sunday nor a holiday, thus the said notice was served upon the applicant on 24th July 2024, which was 2 days outside the timeline due to poor network connectivity that prevented the prompt mail delivery.
 8. It is contended that the instant application is brought in bad faith and is meant to defeat justice as the delay in endorsing the Notice of Appeal was not the respondent's fault.
 9. In support of the application, it was submitted for the applicant that the respondent conceded that service of the Notice of Appeal was effected two days out of time, but blames it on a hitch in uploading the same. Further, that the appeal as filed does not conform to the provisions of Rule 77[6] which requires the Deputy Registrar to endorse a proper Notice of Appeal. Relying on the case of *Andrew Muciri Muruiki vs. Nancy Waguama Kareitbi* [2021] eKLR, the applicant submits that the impugned Notice of Appeal does not qualify to be one, a fact that is admitted by the 1st respondent.
 10. Regarding service of the Notice of Appeal, the applicant contends that it was served outside the 7-day timeline provided by law. In his replying affidavit, the 1st respondent admits that they were two days late in serving the notice of appeal. In support of this proposition reference is made to the case of *Erdemann Property Limited vs. Safaricom Staff Pension Scheme Registered Trustees and 3 Others; Everest Limited and Another [Interested Parties]* [2023] KESC 76 [KLR], where the Supreme Court deemed a Notice of Appeal defective due to failure of service within the requisite period, and consequently struck it out along with the record of appeal that had been filed pursuant thereto.
 11. Regarding whether the impugned notice should be considered withdrawn under Rule 85 of this *Court's Rules*, the applicant asserts that there is no Notice of Appeal on record. Furthermore, ten months have passed since the delivery of the judgment, but no record of appeal has been filed. Relying on the case of *Mae Properties Limited vs. Joseph Kibe & Another* [2017] eKLR, the applicant urges the Court to make a finding that the impugned Notice of Appeal be deemed to have been withdrawn with costs to the applicant.
 12. In rebuttal, the respondents submit that a Notice of Appeal dated 13th June 2024, was filed through the e-filing platform at the Environment and Land Court at Vihiga, for endorsement by the Deputy Registrar on 14th June, 2024; that on 1st June, 2024, his counsel on record requested, and paid for certified copies of proceedings, judgment, and an endorsed Notice of Appeal. Therefore, all the



procedures leading to the endorsement of the Notice of Appeal were duly followed, including payment of the same.

13. It is further argued that the delay in endorsing the said Notice of Appeal was by the court and/or the Deputy Registrar, as such, the same was timely filed for endorsement, hence fit for consideration. By dint of Section 77[2] of the *Court of Appeal Rules*, the said Notice of Appeal needed to be filed before its endorsement to avoid it being deemed to be filed out of time. Relying on the case of *Galambussion Noormohamed Cassam & Another* 1 KAR 24, the respondent urges us to find that the Notice of Appeal dated 13th June is properly filed and served.
14. We have given due consideration to the submissions and the applicable law. An appeal to this Court is commenced by way of a Notice of Appeal. It is trite law that a party who desires to appeal to this Court against a judgment or decision of the High Court or courts of equal status should, by dint of the provisions of rule 77 of the *Rules of this Court*, give notice in writing within fourteen days of the date of the decision. By dint of the provisions of rule 79 (1), the party must serve the lodged Notice of Appeal on all persons directly affected by the appeal within seven days of lodging it.
15. A pertinent question in this application is whether the instant application complied with the provisions of Rule 86 of this *Court's Rules*. Has the application to strike out the Notice of Appeal been brought within thirty (30) days from the date of service, in compliance with the proviso to Rule 86? Rule 86 of this *Court's Rules* 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 from the date of service of the notice of appeal or record of appeal, as the case may be.

16. From the record, it is not in dispute that the Notice of Appeal was served upon the applicant on 26th June, 2024 while the instant motion was filed on 25th July, 2024 which was one (1) day outside the 30 days provided for by the proviso to Rule 86 of this *Court's Rules*.
17. In *Joyce Bochere Nyamweya vs. Jemima Nyaboke Nyamweya & Another* [2016] eKLR, this Court, in dealing with a similar situation where an application to strike out an appeal had been made outside the stipulated thirty days, expressed as follows:

“(13) It is not at all in dispute that this application was filed outside the period of 30 days after the notices sought to be struck out were lodged and served. The above proviso is couched in mandatory terms and we have no discretion to second guess what was intended by the framers of the Rules when they gave a time frame. See the case of *Gichuki King'ara & Co Advocates v AL Jalal Enterprises Ltd & Others*, Civil Appl. No. Nai 211 of 2012(unreported) where this Court stated in reference to Rule 84 as follows;

“The applicant did not file its application within the stipulated period of thirty days. It did so on the 9th August 2012 which was about five months outside



the limit set by the Rules. It is clear to us that such an omission renders the application before us a non-starter given the logic and rationale of the time-bound provision. The rule is mandatory and an application brought outside the thirty-day period properly qualifies to be seen as an afterthought.”

(14) The instant application is on all fours with the above case and so many others that were referred to in this matter. In the circumstances, we find this application is incompetent for the reason that it was filed outside the stipulated time. The same is hereby dismissed with costs to the 1st respondent.”

18. Similarly, in the case of *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 its service 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.

19. In the case of *Mukenya Ndunda vs. Crater Automobiles Limited* [2015] eKLR, this Court observed:

“The power to strike out an appeal or notice of appeal on account of failure by an appellant to follow the rules of procedure requires to be exercised carefully and only in cases where it is shown that the party at fault flagrantly or deliberately or flippantly or recklessly failed to follow the rules.”

20. The above is clear that this Court is empowered to strike out a Notice of Appeal or a record of appeal for want of form, or for failure to comply with the procedure spelt out by the rules. But prior to so doing, the proviso to rule 86 is of pertinence as it expressly states that the power to strike out a notice or an appeal shall not be brought

“...after the expiry of thirty days from the date of service of the notice of appeal or record of appeal...”

21. In the instant case, it is common ground that service of the impugned Notice was effected on 26th June 2024, while the application seeking to strike out the Notice of Appeal was filed on 25th July 2024. The instant application was therefore filed one day outside time. No leave was sought or obtained to file the application to strike out the notice of appeal out of time.

22. In the circumstances, the instant application dated 23rd July 2024 and lodged in Court on 25th July, 2024 offends the provisions of Rule 86 of this *Court’s Rules*. The upshot is that this application incompetent and is struck out with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF JULY, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

L. KIMARU

.....



JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

