



REPUBLIC OF KENYA



KENYA LAW

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Gitunga (Suing as the Legal Representative of Itunga Kiragau alias M'itonga Kiragau) & 6 others v Mbataru & another (Civil Appeal (Application) E143 of 2024) [2025] KECA 1351 (KLR) (18 July 2025) (Ruling)

Neutral citation: [2025] KECA 1351 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) E143 OF 2024
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
JULY 18, 2025**

BETWEEN

**JUDSON MWENDA GITUNGA (SUING AS THE LEGAL REPRESENTATIVE OF ITUNGA KIRAGAU ALIAS M'ITONGA KIRAGAU) 1ST APPELLANT
GITUNGA KIENDE ESTHER 2ND APPELLANT
JAMLICK KABURU GITUNGA 3RD APPELLANT
JOYCE NDURU M'RUKARIA 4TH APPELLANT
HELLEN NKUENE WILFRED GITUNGA 5TH APPELLANT
ESTHER MUGURE JOHN 6TH APPELLANT
FAITH KATHUE MURITHI 7TH APPELLANT**

AND

**JULIUS MBATARU 1ST RESPONDENT
GEORGE GITONGA GITU (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF RIRIA KARAGAU ALIAS FESTUS GIITU KIRAGAU - DECEASED) 2ND RESPONDENT**

(An application to strike out the appeal and record of appeal filed on 2nd August 2024 against the Judgment and Decree of the Environment and Land Court at Meru (Yano, J.) delivered on 23rd November 2023 in ELC Case No. E003 of 2022)



RULING

1. Before the court is an application by way of notice of motion dated 29th August 2024, brought *inter alia*, under Rules 84(2), & 86(b) of the [Court of Appeal Rules 2022](#), seeking to strike out the notice of appeal and record of appeal filed on 2nd August 2024.
2. The application is predicated on the grounds on the face of the application and in the affidavit of the applicant/1st respondent, sworn on 29th August 2024, where he deposes that he sued the estates of his two late brothers, the Late Itunga Kiragau (also known as M'Itunga Kiragau) and the Late Riria Kiragau (also known as Festus Giitu Kiragau) in Meru ELC Case No. E003 of 2022, claiming that his two brothers held the properties known as Abogeta/U-Kithangari/502 and Abogeta/U-Kithangari/503 on his behalf under a customary trust; in a judgment delivered on 23rd November 2023, the court found in his favour; dissatisfied with the judgment, the appellants filed a notice of appeal on 5th December 2023 and served it on the 1st respondent's counsel on 8th December 2023; the applicant was never served with the letter bespeaking certified typed proceedings or the judgment; he extracted a formal decree on 6th March 2024; on 22nd March 2024 he registered the decree at the Lands Registry against Parcel Nos. Abogeta/U- Kithangari/502 and Abogeta/U-Kithangari/503; on 1st July 2024, he moved the court at Nkubu in Succession Cause No. 92 of 2016 to review a secretly obtained grant and exclude 1.5 acres from his deceased elder brother's estate as directed by the trial court in Meru ELC Case No. E003 of 2022.
3. Further, he contends that his efforts to enforce the decree in Meru ELC Case No. E003 of 2022 prompted the appellants to hastily file Nyeri Civil Appeal No. E143 of 2024 on 2nd August 2024, out of time, aimed solely at obstructing the applicant's application in the succession matter. He is an elderly and ailing man, the last surviving son of the Late Kiragau Mbataru.
4. Further, he asserts that the appellants improperly obtained a certificate of delay, having filed their record of appeal 63 days after the certified proceedings were ready on 30th May 2024; this application is, and it is in the interest of justice that the application be granted.
5. In response, the appellants' counsel filed a replying affidavit on 5th September 2024, asserting that the appellants promptly instructed him to file a notice of appeal, which was lodged with the Deputy Registrar on 8th December 2023; contemporaneously with the notice of appeal, he requested certified copies of the proceedings and judgment; he served the applicant's counsel on the same day; the notice of appeal was acknowledged and stamped as received; however there was an omission by the receiving clerk, Doreen, in stamping the letter requesting the certified copies; despite this oversight, counsel asks the court to find that the letter was indeed served based on the evidence and events; he was not informed of the proceedings' readiness for collection until 30th May 2024; he received the certificate of delay on 23rd July 2024; the record of appeal was filed on 30th July 2024 within the 60-day limit from the certification date; the claim that the appeal was filed 63 days late is incorrect, considering the public holidays on June 1st and 17th, 2024; and the appeal was indeed timely.
6. The 1st appellant swore a replying affidavit on 5th September 2024, where he went into the merits of the case, which we shall not dwell on as the same is not relevant for the purposes of the application before us.



7. The 2nd respondent, in a replying affidavit sworn on 10th December 2024, deposed that his family decided not to appeal the judgment against his late father's estate, and that he is in support of the application. He sought to have the appeal struck out.
8. Learned counsel for the applicants filed submissions dated 13th December 2024 and submitted that the issues for determination are whether the appellants served the notice of appeal and the letter requesting for typed proceedings and judgment; whether a certificate of delay ought to have been issued; whether the record of appeal was filed and served on time; whether the record of appeal as filed should be struck out under Rule 86; and who should bear the costs of the application and the appeal.
9. On whether the appellants served the notice of appeal and the letter requesting typed proceedings and judgment, counsel submitted that the appellants failed to serve the letter requesting typed proceedings and that blaming the former counsel is insufficient without an order extending the time to serve documents. In support of his contention, learned counsel relied on the case of *Chena v. Hindocha* (Civil Appeal (Application) E015 of 2022) [2024] KECA 819 (KLR), where this Court emphasized the need to seek extension of time even when there has been a mistake of counsel.
10. Regarding the certificate of delay issued on 23rd July 2024, counsel submitted that it ought not to be considered because the appellants did not serve the letter requesting proceedings on any of the respondents. In support of this contention, counsel relied on the case of *Ali v. Grain Industries Limited* (Civil Application E066 of 2023) [2024] KECA 400 (KLR), where the court cited the case of Joseph Ngwele Nduwa v. Ahmed Abubakar & Another Civil Appeal No. 287 of 1997 (UR), agreeing that a party cannot benefit from a certificate of delay issued by the Deputy Registrar where the letter bespeaking proceedings was never served upon the respondents.
11. On whether the record of appeal was filed and served on time, the applicant's counsel asserts that the appellants filed a valid notice of appeal on 8th December 2023 but failed to serve the application seeking proceedings. Therefore, the appeal was to be lodged by 8th February 2024. However, the appeal was filed on 2nd August 2024, making it over five months late, and served outside the time allowed, without court permission. Counsel cited the case of *Patrick Kiruja Kithinji v. Victor Mugira Marete* [2015] eKLR, to urge that failure to file on time is a fundamental issue that goes to the jurisdiction of the court.
12. On the issue of whether the record of appeal as filed should be struck out under Rule 86, of this *Court's Rules*, learned counsel submits that the application to strike out the appeal was filed within the required thirty days and given that the appeal was filed out of time and in non-compliance with Rule 84 of this *Court's Rules*, the applicant submits that the same is for striking out for non-compliance.
13. Counsel for the appellants filed submissions dated 14th January 2025, distinguishing the same issues as the 1st respondent for our consideration. The appellants' counsel argued that the delay in filing the record of appeal was not inordinate, as they had been diligent in ensuring timely compliance with the guidelines. In support, he relied on the case of *County Executive of Kisumu v. County Government of Kisumu & 8 Others* [2017] eKLR, noting that delays related to the typing of proceedings are common and the court's responsibility, and that an extension of time ought to be permitted.
14. Regarding the service of the letter requesting judgment and typed proceedings, counsel submitted that the notice of appeal was served on M/s Ngunjiri & Co. Advocates, the former advocates of the 1st respondent; however, an oversight occurred when the receiving clerk did not affix the official stamp. He referred to Rule 79 of this Court's Rules, asserting that the service of the document was proper.
15. On whether the appeal should be struck out, counsel argued that the late issuance of the certified copies of the judgment and proceedings caused the delay. He implored the court to consider the substance of



the appeal. In support of his proposition he relied on the case of *Sonko v. Clerk, County Assembly of Nairobi City & 11 Others* (Petition (Application) 11 (E008) of 2022) [2022] KESC 28 (KLR), and Article 159(d) of the *Constitution*, asserting that the appeal should not be struck out due to an omission of 1st respondent's counsel's receiving clerk.

16. Regarding costs, counsel argues that they should follow the event, recommending that costs be awarded to the appellants as the application is unmeritorious.
17. Counsel for the 2nd respondent filed submissions dated 14th February 2025, and submitted that in an adversarial system such as ours, it remains the appellants' obligation to ensure service of the letter requesting proceedings. He relied on the case of *Kadunda v. Douglas* [1981] eKLR, where the court affirmed that this duty falls on the appellant.
18. On the certificate of delay, whether the record of appeal was filed on time, and whether the record of appeal be struck out, learned counsel for the 2nd respondent rehashed the submissions of the applicant's counsel.
19. We have carefully considered the application, the replying affidavits and the submissions. It is imperative to examine the relevant provisions. Rule 86 of this Court's Rules provides:

“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 that no appeal lies or 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.”

20. There is no dispute that the application subject of this appeal was filed within the time stipulated. It is therefore well before the court. There is a contention as to whether the letter initiating the proceedings was served upon the 1st respondent, who is the applicant herein. The 1st respondent's counsel contends that the same was not served. It is indeed how it was served alongside the notice of appeal; then it would bear the same stamp as the notice of appeal. The appellants' counsel insists that the same was served, but inadvertently not stamped. He further urged that, based on Article 159 of the *Constitution*, the court ought to overlook the inadvertence and consider the substance of the appeal.
21. Rule 84 of the *Court's Rules* states as follows:
 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 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.



2. 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.
22. The rule is explicit and couched in mandatory terms. In the case of *Ali v. Grain Industries Limited* (*supra*), where a similar issue arose, the court stated:
- “...It follows then that he does have a competent appeal. Furthermore, we note that the respondent did not even attempt to explain the failure to serve, never mind that such an explanation would have amounted to nothing without an order extending the period of service. Instead, counsel has entirely blamed the respondent’s former advocate. That is not enough.”
23. The appellants failed to comply with Rule 84, never mind the explanation given, which we do not find convincing. They were not without a solution; they could have moved the court to extend the time within which to file the record of appeal. They chose not to. Counsel cannot be heard to rely on the provision of the *Constitution*, having overlooked rules set for expediency and good order in the court. Indeed, the courts have stated time without number, that regulations and procedures ought not to be ignored as they are the handmaidens of justice.
24. In the end, we find that the application is merited, and allow the same with costs.

DATED AND DELIVERED AT NYERI THIS 18TH DAY OF JULY, 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

