



**Company for Habitat and Housing in Africa (Shelter Afrique) v  
Sunset Paradise Apartments Limited (Civil Appeal (Application)  
E131 of 2022) [2024] KECA 30 (KLR) (26 January 2024) (Ruling)**

Neutral citation: [2024] KECA 30 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) E131 OF 2022  
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA  
JANUARY 26, 2024**

**BETWEEN**

**COMPANY FOR HABITAT AND HOUSING IN AFRICA (SHELTER  
AFRIQUE) ..... APPELLANT**

**AND**

**SUNSET PARADISE APARTMENTS LIMITED ..... RESPONDENT**

*(Being an application to strike out the appeal from the Judgment  
and Decree of the High Court of Kenya at Mombasa (P. J. O. Otieno,  
J.) delivered on 13th December 2019 In H.C.C.A No. 198 OF 2018)*

**RULING**

1. Before us is a Notice of Motion dated 21<sup>st</sup> December 2022 filed by Sunset Paradise Apartments Limited (the applicant herein) pursuant to rules 82 and 84 of the *Court of Appeal Rules*, 2010 (now rules 84 and 86 of the 2022 Rules). The applicant sought orders to strike out the appeal by Company for Habitat and Housing in Africa (Shelter Afrique) (the respondent) on 8 grounds set out on the face of the Motion, to wit: that the certificate of delay dated 31<sup>st</sup> March 2021 indicated that the period required for preparation and delivery of certified copies of the proceedings, judgment and decree was between 15<sup>th</sup> January 2020 and 15<sup>th</sup> March 2021; that the appeal herein was lodged on 7<sup>th</sup> December 2022; that the record of appeal was served upon the applicant on 13<sup>th</sup> December 2022; that the appeal herein was filed in contravention of rule 82 of the Court of Appeal Rules (rule 84 of the 2022 Rules), in other words, way beyond the sixty (60) days provided for under the Rules; that the respondent ought to have lodged its appeal within 60 days from 15<sup>th</sup> March 2021; that the record of appeal was not accompanied by a certificate of delay duly issued by the Deputy Registrar of the superior court; that the respondent is guilty of inordinate and inexcusable delay; and that, in the circumstances, the appeal herein does not lie, and that the same ought to be struck out as prayed.



2. The applicant's Motion is supported by the annexed affidavit of its learned counsel Mr. Gikandi Ngibuini sworn on 22<sup>nd</sup> December 2022 essentially deposing to the grounds on which the Motion is anchored, but which we need not replicate here.
3. In addition to the supporting affidavit, learned counsel for the applicant, M/s. Gikandi & Company, filed written submissions dated 11<sup>th</sup> April 2023 citing 5 judicial authorities, including the case of Munir Abubakar Masud (as member of Taweed Muslim Association vs. Ali Abdala Salim & Another [2018] eKLR where this Court sitting in Malindi underscored the fatal consequences of belated filing of an appeal without extension of time with leave of the Court on application by the appellant. In its ruling, the Court took to mind its decision in *Patrick Kiruja Kithinji vs. Victor Mugira Marete* [2015] eKLR where it had this to say:

“In our view whether or not an appeal is filed on time goes to the jurisdiction of this Court. It is 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. Consequently, we find that an appeal filed out of time is not curable under Article 159.”

4. Mr. Gikandi submitted that the respondent's appeal should have been filed within sixty (60) days from 15<sup>th</sup> March 2021, the date when certified copies of the proceedings, judgment and decree were delivered to the respondent, as mandated by rule 84(1) of the 2022 *Rules* as read together with the proviso thereto. According to counsel, the respondent's appeal was filed nineteen (19) months outside the prescribed period. He submitted that the delay was inordinate and unexplained, and urged us to strike out the record of appeal with costs pursuant to rule 86 of the 2022 *Rules*.
5. The respondent opposes the Motion vide the replying affidavit of its learned counsel Mr. Patrick Mbugua sworn on 24<sup>th</sup> March 2023 in which he deposes that the delay in filing the record of appeal was not inordinate; that it was occasioned by delay in preparation of typed proceedings, which are pre-requisite to filing an appeal; that the respondent included the certificate of delay issued by the Deputy Registrar of the trial court dated 21<sup>st</sup> November 2022 as part of the record of appeal; that the respondent filed the record of appeal immediately after obtaining the certificate of delay; that there was an error on the face of the certificate of delay initially issued on 6<sup>th</sup> October 2021, which indicated the date of issue as 6<sup>th</sup> October 2021; that the mistake was attributable to his firm's agent; that, by a letter dated 8<sup>th</sup> November 2021, they drew the Registrar's attention to the alleged error and requested rectification and issuance of an amended certificate of delay indicating that it was dated and lodged on 31<sup>st</sup> March 2021 and not 5<sup>th</sup> October 2021; that, they wrote several letters to follow up on their request and eventually received an amended certificate of delay dated 21<sup>st</sup> November 2022; that the delay in filing the record of appeal was occasioned by the delay in correcting the error on the certificate of delay issued on 6<sup>th</sup> October 2021; and that the delay in filing the record of appeal was occasioned by circumstances entirely out of their control and that, therefore, the record of appeal should not be struck out.
6. The first three paragraphs of counsel's letter dated 8<sup>th</sup> November 2021 read as follows:

“We hereby request for a copy of an amended Certificate of Delay in the above matter. The reason for this is that the agent who filed it on our behalf indicated the wrong date on the document.

The proceedings in the matter were collected sometime in March this year and we immediately thereafter prepared the Certificate of Delay.



We forward herewith the new certificate of delay properly dated as when we submitted it for signing and dating. We also enclose the following documents:

1. Copy of the typed proceedings.
  2. Copy of the judgment.
  3. Copy of the wrongly dated certificate of delay.”
7. In addition to the foregoing, counsel filed written submissions together with a list of authorities both dated 5<sup>th</sup> June 2023 citing the cases of *Daniel Nganga Kanyi vs. Sosphinaf Company Limited & Another* [2005] eKLR where this Court underscored the principle that the only thing the Court needs to consider in relation to the proviso to rule 84 of the 2022 rules is the date on which copies of the proceedings were delivered to the appellant as confirmed in the certificate of delay; *Charles Wanjobi Wathuku vs. Gitbinji Ngure & Another* [2016] eKLR where the Court pronounced itself on the effect of default in instituting an appeal within the period prescribed under the Court’s Rules; and the High Court decision in *Paul Njagi Njeru vs. Karija K. Mugambi* [2021] eKLR for the proposition that the court must consider the reason for the delay before making a final determination on whether it is inordinate and unexplained.
8. Rule 84 of the 2022 Rules of this Court reads:
- 84.
- (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.
9. As explained by counsel for the respondent in their letter dated 8<sup>th</sup> November 2021, they collected certified copies of the proceedings, judgment and decree “sometime in March this year” to wit 2021. Learned counsel for the applicant draws our attention to the specific date being the 15<sup>th</sup> day of March 2021 as clearly indicated in the certificate of delay dated 31<sup>st</sup> March 2021. However, they did not file the record of appeal within 60 days from the date of delivery confirmed in the certificate of delay dated 31<sup>st</sup> March 2021. They only filed the record of appeal about 21 months later on 7<sup>th</sup> December 2022. Discounting 60 days within which they ought to have complied with rule 84(1) as read with the proviso



thereto, it is indisputable that the respondent's record of appeal was filed 19 months out of time, and without leave of the Court.

10. We need not overemphasise the primary objective of the certificate of delay, which is to aid the Court in computing and reckoning the strict timelines prescribed for filing the record of appeal after supply to the appellant of the requisite copies of the proceedings and the impugned decision. As observed by this Court in *Michael Mwalo vs. Board of Trustees National Social Security Fund* [2014] eKLR –

“A certificate of delay is prima facie evidence that the court took the period it relates to prepare and deliver the proceedings. A certificate of delay has always been relied upon unless salient and cogent reasons are set out to challenge it.”

11. The respondent has not explained why it elected to ignore the certificate of delay issued on 31<sup>st</sup> March 2021. To our mind, its move to procure another certificate of delay dated 6<sup>th</sup> October 2021, whose date its counsel sought to be amended to read 21<sup>st</sup> November 2022, was undoubtedly designed to sanitise the delay in filing the record of appeal that was a whopping 19 months out of time. Yet, nothing stood in the respondent's way to file the record of appeal within 60 days next following the 15<sup>th</sup> day of March 2021 when the requisite proceedings were supplied. In our considered view, counsel's explanation that the delay was occasioned by the time taken to rectify the date of the certificate of delay does not hold. The delay was inordinate and unexplained. Accordingly, the respondent's appeal is, in our considered view, incurable, and for good reason.

12. This Court sitting in Nyeri in *Patrick Kiruja Kithinji vs. Victor Mugira Marete* [2015] eKLR had this to say:

“12. In our view whether or not an appeal is filed on time goes to the jurisdiction of this Court. It is 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.”

13. We also take to mind the mandatory nature of, inter alia, rule 84 of the Rules of this Court. This Court sitting in Nakuru in *John Mutai Mwangi & 26 others vs. Mwenja Ngure & 4 others* [2016] eKLR held that:

“The filing of a record of appeal is required to be done within 60 days of the lodgment of the notice of appeal by dint of Rule 82 [now rule 84] of the Court of Appeal Rules. That timeline is strict and is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispense justice in a timely, just, efficient and cost-effective manner.”

14. In the same vein, the Court reasoned as follows in *MAE Properties Limited vs. Joseph Kibe & Another* [2017] eKLR:

“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 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...”



Failure to comply with the timelines set invites sure consequences.”

15. In this regard, rule 86 of the 2022 Rules empowers the Court to strike out an appeal which does not comply with the mandatory timelines prescribed under rule 84. And that is what the applicant has asked us to do. Rule 86 reads:

“86. 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.”

16. The only question that remains to be answered is whether the applicant’s Motion dated 21<sup>st</sup> December 2022 and filed on 22<sup>nd</sup> December 2022 satisfies the requirements of the proviso to rule 86 with respect to the time within which it should have been filed. We find that it does. The Motion was filed only fifteen (15) days after the respondent’s record of appeal was filed. The inordinate and unexplained delay in filing the record of appeal without leave to extend time renders the respondent’s appeal incompetent. Accordingly, the same is hereby struck out pursuant to rule 86 with costs to the applicant. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JANUARY, 2024**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

.....

**JUDGE OF APPEAL**

**G.V. ODUNGA**

.....

**JUDGE OF APPEAL**

I certify that this is a True copy of the original

**DEPUTY REGISTRAR**

