Musambayi & others (Sued on his own behalf and on behalf of 41 others) v Katula & another (Suing as the legal representatives of the Estate of Stephen Katula Muyendi) (Civil Appeal (Application) E827 of 2022) [2024] KECA 186 (KLR) (23 February 2024) (Ruling)

Neutral citation: [2024] KECA 186 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) E827 OF 2022

DK MUSINGA, K M'INOTI & M NGUGI, JJA

FEBRUARY 23, 2024

BETWEEN

SILAS KHAEMBA MUSAMBAYI & OTHERS ..... APPELLANT

SUED ON HIS OWN BEHALF AND ON BEHALF OF 41 OTHERS

AND

PIDDAN MUSAU KATULA ..... 1ST RESPONDENT

CHRISTINE MUTILE MWANGI ..... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF STEPHEN KATULA MUYENDI

(An application to strike out the record of appeal from a Judgment of the Environment and Land Court at Machakos (Ochieng, J.) delivered on 31st October 2022 in ELC Suit No. 209 of 2017)

RULING

1. By way of a notice of motion dated 2nd September 2023 brought under rules 79 (1), 84 (1) and (2), 85, 86 (a) and (b) of the *Rules of this Court*, the applicant seeks the striking out of the record of appeal dated 11th May 2023 that was filed against the decision of the Environment and Land Court at Machakos (Ochieng, J.), delivered on 31st October 2022 in ELC Suit No. 209 of 2017.

2. We note that although the application is said to be supported by an affidavit sworn by one Piddan Musau Katula, the said affidavit is not part of the record, the affidavit in support that is on record was sworn by one John Odera Were, the applicant's advocate. It is contended that although judgment was delivered by the trial court on 31st October 2022, the appellants failed to serve upon the applicant the notice of appeal dated 8th November 2022 within the stipulated time frame. In addition, the appellants' letter requesting for typed proceedings from the trial court was not served upon the applicant and

therefore the certificate of delay obtained by the appellants cannot come to their aid. It is also contended that the appellants' failure to serve upon the applicant the notice of appeal and the letter bespeaking proceedings led the latter to believe that no appeal was going to be preferred against the trial court's judgment.

3. In sum, it is argued that the appellants failed to take all the necessary and essential steps towards filing the record of appeal, which renders the same incompetent and, on this basis, this Court was urged to strike it out with costs.

4. The application was opposed by way of a replying affidavit sworn by Silas Khaemba, one of the 42 appellants. He stated that although judgment was delivered on 31st October 2022 in favour of the applicant, the trial court gave parties 120 days to negotiate. The negotiations began in earnest but did not proceed as anticipated, owing to the applicant's hardline position and unreasonable terms. The 120 days period was lapsing on or about 31st February 2023 and on 15th February 2023, the appellants filed an application seeking stay of execution of the impugned judgment. The application was served upon the applicant on 16th February 2023 together with a notice of appeal that had been filed on 8th November 2022 and the letter requesting for proceedings which had been filed in the trial court on 10th November 2022.

5. The appellants contended that they were always intent on appealing against the impugned judgment, as evidenced by the filing of the notice of appeal, which they said was filed within the stipulated timeframe. On the issue of non-service of the letter requesting for proceedings, they contended that the striking out of the record of appeal owing to non-service of the said letter would be unconscionable and unjustified, and that the applicant has not demonstrated any intentional default on their part.

6. In sum, we were urged to sustain the appeal rather than strike it out on purely technical grounds; that the failure complained of by the applicant does not go to the root of the dispute and ought not to be elevated to the level of a criminal offence; that rules of procedure are intended to be handmaidens of justice; and lastly, that justice must not be sacrificed at the altar of strict adherence to provisions of procedural law. We were asked to dismiss the application as no prejudice would be occasioned to the applicant if the main appeal were to proceed to hearing on its merits.

7. The applicant filed written submissions in support of this application, but the appellants do not appear to have filed any submissions in respect of the instant application. Their submissions on record relate to an application seeking orders of stay of execution. The written submissions by the applicant consist of a reiteration of the arguments as contained in the motion and in the affidavit in support, which we have summarized hereinabove. It shall therefore serve no useful purpose rehashing the said arguments.

8. We have given due consideration to this application, the replying affidavit, 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.

9. The notice of appeal giving rise to the appeal herein was filed on 8th November 2022 and was therefore supposed to be served upon the applicant on or about 15th November 2022. It had not been served by this date, and was, in fact, served upon the applicant on 16th February 2023, more than 3 months from the date of its lodging. In essence, an essential step in the proceedings was not taken within the

stipulated timeframe. On the purpose of service of a notice of appeal, this Court stated in *Daniel Nkirimpa Monirei vs Sayialel Ole Koilel & 4 Others* [2016] eKLR thus:

> "... The purpose of service of a Notice of Appeal is to alert the parties being served that the case in question has not been concluded yet as the same has been escalated to another level. This enables the party to prepare and get ready for another fight, be it by way of gathering resources or just getting mentally prepared for defending the intended appeal. Failure to serve a party with a Notice of Appeal within the time prescribed by law gives a party false belief that the matter has been concluded, only to be ambushed later with the record of appeal in which the said notice is tucked away somewhere in the record. That occasions prejudice to the ambushed party, and it is in our view a habit that should not be countenanced in any fair and just process. That would explain why Rule 77(1) of the Court of Appeal Rules is couched in mandatory terms."

10. It is evident that there is no valid notice of appeal on record for want of service thereof upon the applicant. The argument by the appellants that since the notice of appeal was filed within the 14 days period contemplated under the Rules, then the record of appeal is properly on record is in our view flawed. It is evident that by raising such argument, the appellants engaged in a disjunctive as opposed to a conjunctive reading of the Rules of this Court. What the appellants should have done, in our view, was to file an application under rule 4 seeking enlargement of time within which to serve the notice of appeal upon the applicant.

11. The applicant urged us to strike out the record of appeal owing to the appellant's failure to serve the letter bespeaking proceedings.

The filing of the record of appeal is provided for under rule 84 of the *Rules of this Court* 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.
>
> (3) ....."

12. It is an incontrovertible fact that the letter requesting for proceedings from the trial court was not served upon the applicant. In the circumstances, and pursuant to the provisions of rule 84 (1), the

appellants were required to lodge their record of appeal within 60 days from 8th November 2022 when they lodged their notice of appeal. This Court in *Mistry Premji Ganji (Investments) Limited vs Kenya National Highways Authority* [2019] eKLR held thus:

> "It is common ground that the letter bespeaking proceedings was never served upon the respondent in this case. The appellant therefore was obliged to file the record of appeal strictly within sixty uninterrupted days of filing the notice of appeal, this period lapsed on 25th April, 2017."

13. In the circumstances herein, the reprieve provided for under the proviso to rule 84 (1) cannot come to the appellant's aid as the letter bespeaking proceedings was never served upon the applicant. The certificate of delay availed by the appellants is of no legal import. The appellants ought to have lodged their record of appeal on or about 8th January 2023 and therefore, the record of appeal dated 11th May 2023 is incompetent by dint of the provisions of rule 84 and must, by dint of the provisions of rule 86 be struck out.

14. Before we pen off, we deem it necessary to address the argument by the appellants that failure to abide by the timeline set out in the rules is purely procedural and does not go into the root of the dispute, and that justice dictates that this Court should strive to sustain as opposed to striking out pleadings on purely technical grounds. In essence, the appellants were referring us to, inter alia, the provisions of Article 159 (2) (d) of the *Constitution* as well as Sections 3A and 3B of the *Appellate Jurisdiction Act*. Whereas the provisions of Article 159 (2) (d) of {the *Constitution* provide for the dispensation of justice without undue regard to procedural technicalities, the provisions of Sections 3A and 3B of the *Appellate Jurisdiction Act* provide for the overriding objective of the Act and the Rules made thereunder, which is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act. In *Ramji Davji Vekaria vs. Joseph Oyula* [2011] eKLR, this Court held that lodging an appeal out of time is not a procedural technicality that can be cured by the Court invoking the overriding principle. The issue is a substantive one, it goes to the core of ensuring that an intended respondent or interested/affected party is accorded reasonable time to prepare for an appeal.

15. The Supreme Court in *Law Society of Kenya vs Centre for Human Rights & Democracy & 12 Others* [2014] eKLR held that Article 159 (2) (d) of {the *Constitution* is not a panacea for all procedural short falls, as not all procedural deficiencies can be remedied by it. Similarly, in *Jaldesa Tuke Dabelo vs Independent Electoral & Boundaries Commission & Another* [2015] eKLR, this Court held that:

> "Rules of procedure are handmaidens of justice and where there is a clear procedure for redress of any grievance prescribed by an Act of Parliament, that procedure should be strictly followed as Article 159 of {the *Constitution* was neither aimed at conferring authority to derogate from express statutory procedures for initiating a cause of action."

16. In other words, neither Article 159 (2) (d) of {the *Constitution*, nor sections 3A and 3B of the *Appellate Jurisdiction Act* was intended to lessen the duty of parties to draft proceedings or move the Court in the manner provided by Statute. Furthermore, the statutory timeframes cannot be said to be procedural technicalities. See the decision of this Court in *Intercounties Importers and Exporters vs Teleposta Pension Scheme Registered Trustees & 5 Others* (Civil Appeal (Application) No. 293 of 2016) [2021] KECA44 (KLR) (23 September 2021) (Ruling).

17. In upshot, this application is merited. As a consequence, the record of appeal dated 11th May 2023 is found to be incompetent, having been filed out of the prescribed timeframe under rule 84 of the Rules

of this Court and without leave of this Court. We therefore strike out the record of appeal dated *11th May 2023* with costs to the applicant.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.

D. K. MUSINGA, (P).

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL MUMBI NGUGI

.....

JUDGE OF APPEAL

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

Signed

Deputy Registrar