



Munguti & another v Simiyu & another (Suing as administrators of the Estate of Frank Mwasi Mwabaga (Deceased) (Civil Appeal (Application) E039 of 2023) [2024] KECA 340 (KLR) (22 March 2024) (Ruling)

Neutral citation: [2024] KECA 340 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL (APPLICATION) E039 OF 2023
F SICHALE, FA OCHIENG & WK KORIR, JJA
MARCH 22, 2024**

BETWEEN

FRANCIS NZIVO MUNGUTI 1ST APPLICANT

SOUTH SIOUX FARM LIMITED 2ND APPLICANT

AND

LINDA MUTIEMBU SIMIYU & JANET NDUTA SIMIYU (SUING AS ADMINISTRATORS OF THE ESTATE OF FRANK MWASI MWABAGA (DECEASED) RESPONDENT

(An application to strike out the Notice of Appeal and the Record of Appeal arising from the Judgment of the High Court of Kenya at Eldoret (R. Nyakundi, J.) dated 12th October 2022 in HCCA NO. 45 OF 2019)

RULING

1. Before us is a Notice of Motion dated July 21, 2023 under rules 33,44, 45, 84, 85 and 86 of the [Court of Appeal Rules, 2022](#), and Order 45 of the Civil Procedure Rules. The applicants pray for orders that:
 - “a) The notice of appeal dated October 17, 2022 be deemed as withdrawn under rule 85.
 - b. The record of appeal dated July 4, 2023 and served on July 7, 2023 be declared incompetent for want of a notice of appeal.
 - b. The record of appeal dated July 4, 2023 be struck out with costs.”



2. The application is based on the following grounds:

- “ a) The respondents being aggrieved by the impugned judgment, lodged a notice of appeal on October 17, 2022 and served the same on the applicants on October 21, 2022.
- b. However, the respondents have never applied for typed proceedings or a certified judgment, nor have they filed and served the applicants with a letter bespeaking proceedings.
- c. The respondent’s application for review before the High Court was dismissed by the court in its ruling dated December 16, 2022.
- d. The respondents’ right of appeal was waived by operation of the law when they filed for review.
- e. The respondents misled the Deputy Registrar into issuing them with a certificate of delay dated June 2, 2023 having failed to file and serve a letter bespeaking proceedings. The certificate of delay was obtained irregularly and unprocedurally.
- f. The provisions of rule 84 are couched in mandatory terms hence the record of appeal ought to be struck out for failure by the respondents to comply.
- g. The purported letter bespeaking proceedings was made after 30 days on December 16, 2022.
- h. The respondents ought to have filed the appeal by 12th December 2022 as time did not stop running when they failed to apply for proceedings.
- i. The record of appeal was filed and served after 60 days hence the appeal is not properly before the court and the notice of appeal and record of appeal ought to be struck out with costs.
- j. The application has been made promptly within the timelines provided.”

3. In her supporting affidavit sworn on July 21, 2023, Anne Halwenge Odwa, learned counsel reiterated the grounds on the face of the application.

4. In response, the respondents through their counsel, Abigael Chebet Ngala in her replying affidavit sworn on July 28, 2023 stated that:

- “ a) The application lacks merit and is an abuse of the court process.
- b. The principle of striking out an appeal is a draconian act that may only be resorted to in plain and outright instances.
- c. Rule 86 is instructive of the timelines to be followed when applying to strike out a notice or a record of appeal and the notice of appeal sought to be withdrawn was served upon the applicants on October 21, 2022.
- d. Therefore, the present application was filed 9 months from the date of service as opposed to 30 days. This renders the application fatally defective.



- e. The application has also been overtaken by events as an appeal has already been filed.
 - f. It will not be in the interest of justice to turn away the respondents who have exercised due diligence in pursuit of their case.
 - g. The applicants have not demonstrated sufficient cause to warrant the grant of the orders sought.”
5. When the application came up for hearing on November 14, 2023, Ms. Odwa, learned counsel appeared for the applicants whereas Ms. Ngala learned counsel appeared for the respondents. Counsel relied on their respective written submissions which they briefly highlighted.
 6. Ms. Odwa submitted that the notice of appeal was filed within the stipulated timelines but the letter bespeaking proceedings was not filed or served upon the applicants. Furthermore, the record of appeal was filed 6 months after the notice of appeal was filed. The applicants seek to have the record struck out as an essential step was not taken in compliance with Rule 86, and the noncompliance cannot be cured by the certificate of delay.
 7. Counsel pointed out that by applying for review, the respondents waived their right to appeal. Counsel submitted that the application is for striking out the record of appeal and it was filed 14 days upon service of the record of appeal as envisioned by rule 86.
 8. The applicants submitted that the certificate of delay issued on 2nd June 2023 was issued in error and the court should ignore it for being irregular as the respondents failed to apply for proceedings and to serve the letter upon the applicants. The respondents cannot therefore rely on the proviso to rule 84(1). To buttress this submission, they relied on the cases of *Tharaka Nithi County Government & another v Gaichu & 129 others* [2022] eKLR and *Sheikh Ali Taib & another v Selina Wekesa & another* [2021] eKLR.
 9. While citing the case of *Charles Wanjohi Wathuku v Gitinji Ngure & another* [2016] eKLR, the applicants submitted that since the respondents did not institute the appeal within time, the notice of appeal stood withdrawn by operation of law.
 10. Opposing the application, Ms. Ngala submitted that the notice of appeal was lodged within 10 days of the judgment and an application to have the notice withdrawn should have been filed within 30 days. Counsel relied on the cases of *Municipal Council of Mavoko v Aristocrats Concrete Company Limited* [2015] eKLR and *Runji & 3 others v National Land Commission & another* [2022] eKLR in support of this submission.
 11. Counsel was of the view that the certificate of delay validated the notice of appeal. To buttress this submission, counsel relied on the case of *C.B.Gor Advocates v Oriental Commercial Bank* [2022] KECA 634 KLR.
 12. The respondents pointed out that the letter bespeaking proceedings was served upon the applicants in January 2023 due to the Christmas recess.
 13. We have carefully considered the application, affidavit in support, replying affidavit, submissions by parties, authorities cited, and the law. The issues for determination are whether or not the application herein was filed within the stipulated timelines, and if so, whether or not the notice of appeal ought to be deemed as withdrawn, and the record of appeal struck out.



14. The respondents contended that the application herein had been filed out of time. The same ought to have been filed within 30 days of service of the notice of appeal.
15. The proviso to rule 86 reads as follows:

“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. It is trite that parties are bound by the mandatory proviso to rule 86, and the failure to comply with the same renders an application filed thereunder defective. In the case of *Tome & another v Attorney General & 2 others* [2021] KECA 150 (KLR), the court held that:

“This Court in *Esther Onyango Ochieng v Transmara Sugar Company* [2020] eKLR quoting this Court’s decision in the case of *Salama Beach Hotel Limited & 4 others v Kenyariri & Associates Advocates & 4 others* [2016] eKLR stated ‘in *Joyce Bochere Nyamweya v Jemima Nyaboke Nyamweya & another* [2016] eKLR this Court held that parties are bound by the mandatory nature of the proviso to Rule 84 of the Court of Appeal Rules (currently Rule 86). An application seeking to strike out a notice of appeal must be filed within thirty (30) days of service of the notice of appeal, or the filing of the appeal ought to be struck off. The failure to do so renders such an application fatally defective and liable to be struck out.
17. Similarly, in *William Mwangi Ngaruki v 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 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.”
18. It is common ground that the notice of appeal herein was filed on October 17, 2022, well within the stipulated timelines. The notice of appeal was served on 21st October, 2022. The application before us is dated July 21, 2023, which is about 9 months after the notice of appeal. It is evident that the application was filed more than 30 days after the service of the notice of appeal.
19. The applicants seek to strike out the notice of appeal based on the ground that the certificate of delay was issued irregularly. The applicants’ assertion was that the Deputy Registrar was misled to issue the certificate of delay. In a manner of speaking, the applicants are complaining about the manner in which the learned Deputy Registrar carried about her work. However, there is no material before us to demonstrate that the respondents had misled the Deputy Registrar, as alleged or at all.
20. We find no basis upon which we can fault the Deputy Registrar, especially considering that she is not a party to the application; and has therefore not been called upon to answer to any assertions levelled against her.
21. As matters stand currently, there is a certificate of delay which was issued by the learned Deputy Registrar. The court cannot make any presumptions, leave alone a considered determination on the regularity or otherwise of the said certificate.
22. The applicants submitted that since the respondents had opted to have the impugned judgment reviewed, they were barred from filing an appeal. We find that that may be an issue in the main appeal.
23. In the result, we find that the application dated July 21, 2023 was filed out of time. It is therefore fatally defective and incompetent. The application is hereby dismissed with costs to the respondents.



Orders accordingly.

conclusions

DATED AND DELIVERED AT NAKURU THIS 22ND DAY OF MARCH, 2024.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

