



**Kipyego & another v Kiyuk (Civil Application E041 of 2023)  
[2024] KECA 263 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KECA 263 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPLICATION E041 OF 2023  
F SICHALE, FA OCHIENG & WK KORIR, JJA  
MARCH 8, 2024**

**BETWEEN**

**ISAAC KIPYEGO ..... 1<sup>ST</sup> APPLICANT**

**COLLINS CHOGE ..... 2<sup>ND</sup> APPLICANT**

**AND**

**KIMOI TAMINING KIYUK ..... RESPONDENT**

*(An application to strike out the Notice of Appeal dated 20th July 2023  
filed against Judgment at Environment and Land Court at Iten (L.N.  
Waithaka, J) delivered on 27th June 2023 in E&LC Appeal No. E017 of 2022)*

**RULING**

1. Before us is a notice of motion application dated 18<sup>th</sup> August 2023. The 1<sup>st</sup> applicant (Isaac Kipyego) and the 2<sup>nd</sup> applicant (Collins Choge) are seeking to strike out the notice of appeal of the respondent (Kimoi Tamining Kiyuk) dated 20<sup>th</sup> July 2023. They also pray for the costs of the application. The application is supported by the grounds on its face as well as the averments of the 2<sup>nd</sup> applicant in the affidavit sworn on the date of the application.
2. In a nutshell, the applicants’ case is that on 27<sup>th</sup> June 2023 L.N. Waithaka, J. of the Environment and Land Court (ER&LC) at Iten delivered judgment in E&LC Appeal No. E017 of 2022. Subsequently, the respondent lodged a notice of appeal dated 21<sup>st</sup> July 2023 against the said judgment and the same was served upon the applicants on 28<sup>th</sup> July 2023. It is the applicants’ case that the notice of appeal should be struck out as it was filed and served out of time in breach of Rule 77(1) and (2) of the *Court of Appeal Rules*. The applicants affirm that their application has been made within 30 days as required by the *Rules of this Court*. In the supplementary affidavit sworn on 9<sup>th</sup> November 2023, the 2<sup>nd</sup> applicant deposed that the respondent was present during the delivery of the judgment by the first appellate Court and the fact that he was unrepresented cannot override the Rules of this Court.



3. In his replying affidavit sworn on 6<sup>th</sup> October 2023, the respondent averred that he acted in person before the E&LC and only instructed counsel on 20<sup>th</sup> July 2023. According to the respondent, the delay in filing the notice of appeal was not deliberate as he did not have the benefit of legal representation. He also deposed that he has an arguable appeal and he has already requested for proceedings so as to file his appeal. According to the respondent, it would be unjust to strike his notice of appeal considering that the applicants had been granted an extension of time at the E&LC.
4. This application came up for hearing virtually before us on 15<sup>th</sup> November 2023. Mr. Arusei appeared for the applicants while Mr. Maritim was present representing the respondent. Counsel had filed written submissions which they sought to rely on accompanied by brief oral highlights.
5. In support of the application, Mr. Arusei relied on the submissions dated 9<sup>th</sup> November 2023 and argued that the notice of appeal in question was filed 25 days after the E&LC had delivered its judgment hence the same was filed in contravention of Rule 77 (1) and (2) of the Court of Appeal Rules. Counsel also submitted that the notice of appeal was filed without seeking extension of time and was also in contravention of Rule 79(1) which requires a notice of appeal to be served. To buttress his arguments, counsel relied on the case of Mistry Premji Ganji (Investments) Ltd v. Kenya National Highways Authority [2019] eKLR. Counsel additionally submitted that the applicants’ application was filed in compliance with the timelines set in Rule 86 of the Rules of the Court considering that the notice of appeal was served upon the applicants on 28<sup>th</sup> July 2013. According to counsel, even though there is no application for enlargement of time, the respondent has not adduced sufficient reasons for the delay to warrant extension of time. Counsel consequently urged us to allow the application.
6. In response, Mr. Maritim through the submissions dated 8<sup>th</sup> November 2023 argued that the impugned notice of appeal should be deemed as duly filed because the respondent’s memorandum of appeal discloses an arguable appeal. Further, that the applicants had benefited from extension of time at the E&LC Court and similar treatment should be extended to the respondent by this Court. According to counsel, the interests of justice will be served if his client’s intended appeal is heard on merit, considering that the application for extension of time has been brought without delay. We have therefore been beseeched to dismiss the application.
7. We have considered the pleadings and submissions of the parties as well as the law. It is the applicants’ contention that the respondent’s impugned notice of appeal offends Rule 77 of the Court of Appeal Rules. Sub-rules (1) and (2) of that rule state:
  - “(1) Any person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.
  - (2) Each notice under sub-rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.”
8. Rule 86 on the other hand provides as follows:
  - “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-
    - a. 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.”

9. In order to carry the day, the applicants have to demonstrate that they filed the present application within 30 days from the date of the service with the impugned notice of appeal, and, that the impugned notice of appeal was not filed at the superior court within 14 days from the date of the delivery of the decision which the respondent intends to appeal. The 2<sup>nd</sup> applicant deposed that the respondent’s notice of appeal was lodged on 21<sup>st</sup> July 2023 and served upon them on 28<sup>th</sup> July 2023. This evidence was not challenged by the respondent. The present application is dated 18<sup>th</sup> August 2023 and it follows that this application was brought timeously as the applicants approached this Court within 30 days as required by Rule 86 of the *Court of Appeal Rules*.
10. The next issue is whether the application should be allowed. It is not disputed that the impugned notice of appeal was filed out of time. What the respondent has done in reply to the application is to attempt to proffer an explanation for the late filing of the notice of appeal by averring that he was acting in person at the first appellate Court. The judgment of the E&LC was delivered on 27<sup>th</sup> June 2023 while the notice of appeal was lodged on 21<sup>st</sup> July 2023. The notice of appeal was therefore lodged after 24 days instead of within the 14 days provided in the rules. The applicants have averred, and again without any rebuttal, that the respondent was present during the delivery of the judgment by the E&LC and that he ought to have filed his notice of appeal within time. In our view, and as has been held by this Court on numerous occasions, Rule 77(2) is couched in mandatory terms. (See *Borderless Tracking Limited v. Thigah* [2022] KECA 38 (KLR) and *Nakuru Water & Sanitation Company Ltd v. Asanyo & 2 others* [2022] KECA 139 (KLR)). Once time lapses, a party seeking to resuscitate his appeal must invoke the Court’s jurisdiction to extend time. A notice of appeal once filed out of time cannot be sanctioned by the Court but must be struck out. As appreciated by counsel for the respondent in the submissions, the reasons for delay are open for consideration only when the Court is moved appropriately and not through a reply to an application for striking out. Furthermore, an application for extension of time ideally falls within the docket of a single judge.
11. In the result, the applicants’ application dated 18<sup>th</sup> August 2023 succeeds. The respondent’s notice of appeal dated 20<sup>th</sup> July 2023 and lodged in the registry on 21<sup>st</sup> July 2023 is hereby struck out. In short, the notice of motion dated 18<sup>th</sup> August 2023 is hereby allowed.
12. Regarding the issue of costs, the principle is that costs follow the event unless for good reason the court directs otherwise. In this matter, no reason has been advanced to make us to depart from the established rule. As such the respondent shall meet the applicants’ costs of the application.

**DATED AND DELIVERED AT NAKURU THIS 8<sup>TH</sup> 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**

