



REPUBLIC OF KENYA



KENYA LAW
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**Embu Gaturi Housing Co-op Society v Njenga & 2 others (Civil Application
71 of 2018) [2024] KECA 1038 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KECA 1038 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 71 OF 2018
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
APRIL 12, 2024**

BETWEEN

EMBU GATURI HOUSING CO-OP SOCIETY APPELLANT

AND

WAMAE NJENGA 1ST RESPONDENT

SIMON NJOGU MUTURI 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

*(Application under Rule 84 of the COA rules seeking to strike out the
notice of appeal against the decision of the High Court at Embu (F.
Muchemi, J.) dated 22nd February 2017 in HCCA Case No. 22 of 2014)*

RULING

1. The 1st and 2nd applicants are the respondents in the substantive appeal. They have, by way of a Notice of Motion dated 31st May, 2018 moved this Court under sections 3A and 3B of the [Appellate Jurisdiction Act](#) and rule 84 of the Court of Appeal rules, for orders of striking out the notice of appeal dated 8th March, 2017 and filed on 9th March, 2017 and they have further prayed that the appeal dated 9th April, 2018 and filed on 2nd May, 2018 be struck out.
2. The motion is premised on the grounds on its face and supported by an affidavit sworn by Wamae Njenga, the first applicant, on his behalf and that of the 2nd applicant. The gist of the application is that the appeal was filed out of time and it is, therefore, incompetent and it should be struck out.
3. In his affidavit, Wamae Njenga deposes, inter alia, that their advocate on record was served with the record of appeal on 2nd May, 2018; the judgment was delivered on 22nd February, 2017 and the appellant filed an application for a stay of execution and a notice of appeal on 9th March, 2017 yet the notice was



supposed to be filed within 14 days of the judgment. The notice of appeal was filed out of time since the last day was 8th March, 2017.

4. He further deposes that the appellant/respondent has failed to annex the letter requesting for typed proceedings with evidence of service to enable his advocate on record to invoke rule 82(1) of the Court of Appeal rules. Even after the appellant was issued with a certificate of delay on 28th March, 2018 it took 35 days to file the record of appeal. He avers that the record of appeal and memorandum of appeal was not filed within 60 days of filing the notice of appeal. The same having been filed after almost 14 months had lapsed since the filing of the notice of appeal.
5. In response to the notice of motion, Sylvester Njeru Muruatetu the chairperson of the appellant herein swore a replying affidavit dated 18th September, 2018. He avers that a notice of appeal was filed and served upon the applicants on 9th March, 2017. Further, that this application ought to have been filed within 30 days from the 9th of March, 2017 latest 13th April, 2017 as provided by rule 84 of this Court's rules (Currently Rule 86). Therefore, the application is incompetent since no leave was sought to extend time under rule 4 of this Court's rules for the application to be filed out of time.
6. Counsel for the appellant filed submissions expounding on the said averments and also urging the Court to dismiss the application. The applicants filed a further affidavit attaching a ruling by a single Judge of this court (Murgor, JA.) which dismissed the appellant's application seeking for extension of time in respect of filing the record of appeal out of time. The learned Judge, however, found the one day delay in filing the Notice of appeal excusable, and consequently validated the notice of appeal on record. That issue cannot be revisited vide this application as this is not a reference to full court. Prayer No. 1 seeking to have the notice of appeal struck out is therefore, misplaced.
7. At the plenary hearing of the application, learned counsel Mr. Magee and Mr. Anyona appeared for the applicants and the respondent respectively. Mr Magee informed the Court, and this was conceded by the respondents, that the appellant had made an application for extension of time to file the record of appeal but the application had been dismissed. Mr. Magee reiterated that the Notice of Appeal was not filed within time; the record of appeal was filed out of time and without leave of the court and lastly, that the application to strike out the record of appeal was filed within the time stipulated in the rules.
8. On his part, Mr Anyona while conceding that their application for extension of time before the single Judge of this court had been dismissed, told the Court that they had filed an application to extend time to file a reference. This therefore, means, that the appellant concedes that the record of appeal was filed out of time without the leave of the Court in circumstances where no extension has been granted. That being so, we need not waste further judicial time on the issue.
9. On whether this application was filed out of time, we note that the record of appeal was filed on 2nd May, 2018. Even assuming that it was served on the applicants on the same day, the application for striking out the record was filed on 31st May, 2018, which is within the timelines set out under rule 86 of the Court of Appeal Rules 2022.
10. In all, for the foregoing reasons, we are satisfied that the record of appeal was filed out of time; there being no order enlarging time in that regard, the same ought to be struck out. Accordingly, the application partially succeeds and orders granted in terms of prayer 2. The record of appeal is thus struck out with costs to the applicants.

DELIVERED AND DATED AT NYERI THIS 12TH DAY OF APRIL, 2024.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

