



Rukunga v Remu Microfinance Bank Limited & 2 others (Civil Application E104 of 2021) [2024] KECA 1007 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KECA 1007 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E104 OF 2021
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
APRIL 12, 2024**

BETWEEN

SILAS NJERU RUKUNGA APPLICANT

AND

REMU MICROFINANCE BANK LIMITED 1ST RESPONDENT

VIEWLINE AUCTIONEERS 2ND RESPONDENT

HELLEN KARINTHONI 3RD RESPONDENT

(Being an application to strike out the Notice of Appeal from the Judgment of the Environment and Land Court of Kenya at Meru (C. K. Nzili, J.) dated 13th October, 2021 in ELC Appeal No. 25 of 2020)

RULING

1. Silas Njeru the applicant filed a suit before the Magistrate's Court at Githongo, against the respondents herein. The 3rd respondent (Hellen Karinthoni) was/is his wife. He sought orders *inter alia*, to deregister a charge on a property which charge he claimed had been registered without spousal consent from him. His suit was dismissed and he moved to ELC on appeal.
2. At the ELC, the learned Judge (C. K. Nzili, J.) found merit in the appeal and allowed it, thus holding in favour of the applicant. Being dissatisfied with the outcome Remu Microfinance Bank Limited and Viewline Auctioneers (1st & 2nd respondents herein) filed notice of appeal dated 27th October, 2021, but stamped at the court registry on 16th November, 2021. The notice of appeal and the letter bespeaking the proceedings were served on the applicant's counsel via email on 25th November, 2021.
3. According to the applicant, the said service was out of time hence this application which was filed on 22nd December, 2021. The notice of motion is brought under Rule 84 (*Court of Appeal Rules* 2022)



and seeks an order for striking out the notice of appeal for being served out of time. The application was served on the respondents herein on 24th December, 2021 but it elicited no response from them.

4. Hearing Notices were served upon the respondents via email.

No written submission was filed by the respondents. The notice of motion is, therefore, unopposed. It bears repeating, however, that even where applications are not opposed, it is incumbent on the Court to consider the facts and law and make a proper determination based on the law and the evidence. The fact that an application is unopposed does not *ipso facto*, accord it merit. Does this application meet the threshold for striking out? Even assuming that the notice of appeal was lodged on 16th November 2021 the last date of service would have been 23rd November, 2021. It was, therefore, served outside the statutory timelines under Rule 77(1) of the Court of Appeal Rules 2022. There was no application for extension of time to serve the notice of appeal out of time and no order to that effect has been presented to us.

5. Having confirmed that the notice of appeal was served out of time, and there being no evidence to the contrary before us, the fate of this appeal is sealed. The notice of appeal is hereby struck out. We allow it with costs to the applicant as against 1st and 2nd respondents.

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

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

