



REPUBLIC OF KENYA



**Mathingira Wholesalers Company Limited v Lucy Mwai and Company Advocates
(Civil Application E027 of 2021) [2024] KECA 1029 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 1029 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E027 OF 2021
W KARANJA, J MOHAMMED & LK KIMARU, JJA
MAY 24, 2024**

BETWEEN

MATHINGIRA WHOLESALERS COMPANY LIMITED APPLICANT

AND

LUCY MWAI AND COMPANY ADVOCATES RESPONDENT

(An application for striking out a notice of appeal from the judgment of the Environment and Land Court of Kenya at Nyeri (Y. Angima, J.) dated 10th February, 2021 in ELC Misc Cause No. 2 of 2020)

RULING

Background

1. Before us is a notice of motion dated 24th March, 2021 brought by Mathingira Wholesalers Company Ltd. (the applicant) expressed to be brought under Sections 3A of the *Appellate Jurisdiction Act*, Rules 3, 75 and 84 of the Court of Appeal Rules, 2022 now Rules 3, 77 and 86 of the Court of Appeal Rules (this Court's Rules). The motion substantively seeks an order that the notice of appeal filed by the respondent on 26th February, 2021, be struck out with costs.

Lucy Mwai and Company Advocates is the respondent herein.

2. The application is supported by grounds on its body and supporting affidavit and supplementary affidavits sworn by Daniel Githinji (Githinji), a legal representative of Gadson Gitonga Mbutia (deceased) who was a shareholder in the applicant herein together with annexures thereto. Githinji deposed, inter alia, that in the impugned ruling, the ELC failed to find that there was a retainer agreement between the applicant and the respondent; that after delivery of the impugned ruling on 10th February, 2021 the respondent filed a notice of appeal in this Court on 2nd March, 2021; that Rule 75 of the Court of Appeal Rules, 2010 (now Rule 77) provides that a notice of appeal should be filed within fourteen (14) days from the date of delivery of the impugned decision; that the notice of appeal



was therefore filed out of time; that in the circumstances the respondent failed to comply with the rules of this Court; that the applicant has not been served with an application for extension of time within which to file the notice of appeal; that leave to file the notice of appeal out of time has neither been sought nor granted; that the notice of appeal filed on 2nd March, 2021 is therefore incompetent; that the instant application has been filed under Rule 84 of this Court's Rules (now Rule 86) and is competently before this Court; and that there must be finality in litigation.

3. The application was opposed by the respondent's replying affidavit sworn by Lucy Waruguru Mwai (Ms. Mwai) together with annexures thereto.

Ms. Mwai deponed, inter alia, that the respondent filed a notice of appeal on 25th February, 2021 and served the same on counsel for the applicant on 2nd March, 2021; that when the respondent was served with the instant application they realized that there was an error in the calculation of the calendar days that led to the filing of the notice of appeal a day late; that the delay of a day was an inadvertent error and was not so inordinate as not to be reasonably explained; that this Court has wide discretionary powers; that no harm or prejudice has been occasioned to the applicant as a result of the delay; that the notice of appeal should be deemed as properly filed; and that the appeal should be heard and determined on its merit.

Submissions by Counsel

4. At the hearing, the applicant was represented by Senior Counsel, Dr. amau Kuria while the respondent was represented by learned counsel, Ms. Lucy Mwai.
5. Senior Counsel had filed written submissions which he briefly highlighted. Senior Counsel submitted that the notice of appeal was lodged on 26th February, 2021, two (2) days out of time contrary to rule 75 (now Rule 77) of this Court's Rules hence their application to have the impugned notice of appeal struck out.
6. The applicant relies on the authorities of *County Government of Bomet v Moi University & 9 others* [2017] eKLR; *Mae Properties Limited v Joseph Kibe & Another* [2017] eKLR; *Kahinga v Mutura* (Civil Application 22 of 2020) [2022] KECA 428 (KLR) and *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR in support of its contention that the respondent failed to timeously initiate the appeal process as it failed to comply with the prerequisite in Rule 75 (now Rule 77) of this Court's Rules. Dr. Kuria emphasized that the respondent failed to file the notice of appeal within fourteen (14) days from the date of delivery of the impugned ruling. Further, that the respondent was required to file the notice of appeal within fourteen (14) days which lapsed on 24th February, 2021. The notice of appeal was therefore filed two (2) days out of time which was conceded by the respondent.
7. Dr. Kuria asserted that under Rule 3 of this Court's Rules, when computing time within which to undertake an act or proceedings under the Rules of this Court such as to file a notice of appeal, all days are reckoned in the computation of time with the exclusion of the time with the exclusion of the day when the act is taken and public holidays.
8. Dr. Kuria further submitted that under Rule 84 (now Rule 86) of this Court's Rules, a party may file an application to strike out a notice of appeal if the same is not lodged within the prescribed time. Counsel urged this Court to allow the application.
9. While opposing the application, Ms. Mwai conceded that the notice of appeal was filed a day late and that the delay was inadvertent attributed to an error in calculating the calendar days arithmetically



which led to filing the notice of appeal a day out of time. Counsel submitted that the delay was not inordinate and urged us to exercise our discretion in favour of the respondent.

10. To buttress the above submissions, the respondent relied on the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others (supra) which counsel submitted lays sufficient basis for this Court to decline the applicants' application.

Counsel urged that the interests of justice demand that the substantive appeal already filed and served be heard on its merits.

Determination

11. We have considered the application, the submissions filed, the authorities cited and the law. The applicant's application seeks to strike out the notice of appeal filed by the respondent on 26th February, 2021.
12. From the record, the respondent concedes that the notice of appeal was filed out of time due to an error in calculating the calendar days arithmetically. It is therefore not in dispute that the notice of appeal was filed outside time and that no extension of time has been sought or granted.
13. Rule 84 of this Court's Rules (now Rule 86) provides as follows:

“ 86. Application to strike out notice of appeal or appeal

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 no appeal lies or 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.” (Emphasis supplied.)

14. Rule 3 of this Court's Rules provides as follows:

“ 3. Any period of time fixed by these Rules or by any decision of the Court for doing any act shall be computed in accordance with the following provisions –

- a. the period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or that act or thing is done;
- b. if the last day of the period is a Sunday or a public holiday (in this rule referred to as “excluded days”), the period shall include the next following day, not being an excluded day;
- c. where any act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;



- d. where any act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of time; and
- e. unless the Court otherwise directs, the period of the Christmas recess shall not be reckoned in the computation of time.”

15. A pertinent question in this application is whether the instant application complied with the provisions of Rule 86 of this Court’s Rules? Has the application to strike out the notice of appeal been brought within thirty (30) days from the date of service of the notice of appeal in compliance with the proviso to Rule 86?
16. From the record, it is not in dispute that the notice of appeal was served upon the applicant on 2nd March, 2021 while the instant motion was filed on 6th April, 2021 which was four (4) days outside the 30 days provided for by the proviso to Rule 86 of this Court’s Rules.
17. In the case of *Salama Beach Hotel Limited & 4 others v Kenyariri & Associates Advocates & 4 others* [2016] eKLR this Court stated as follows as regards applications brought under Rule 84 (now Rule 86) of this Court’s Rules out of time:

“This Court has in the past had occasion to decide the fate of applications made under Rule 84, but which had been filed out of time. 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 this Court’s Rules. An application seeking to strike out a notice of appeal or an appeal must be made within thirty (30) days of service of the notice of appeal or the appeal sought to be struck out. That failure to do so renders such an application fatally defective and liable to be struck out. As was held in the *Joyce Bochere* case (*supra*), stipulations on time frames within which acts should be done in law are of essence and must be strictly observed. In the event that a party finds itself caught up by the lapse of time as was in this case, the proper thing to do is to file an application for extension of time under Rule 4 of this Court’s Rules. Similarly, in *William Mwangi Nguruki v Barclays Bank of Kenya Ltd* [2014] eKLR, the 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.

It would thus appear that both the court and the litigants are strictly bound by the timelines set by the proviso to Rule 84. In this case, it is common ground that service of the purported notice of appeal was effected on 2nd July, 2015 while this application, seeking to strike it out, was filed in November 2015; four months after service of the notice. No leave was sought to file it out of time. In view of the aforesaid provisions of law and the authorities, the inescapable result is that the advocate’s application fails and must be dismissed.”

18. In the instant case, it is common ground that service of the notice of appeal was effected on 2nd March 2021, while the application seeking to strike out the notice of appeal was filed on 6th April 2021. The instant application was therefore filed four days outside time. No leave was sought or obtained to file the application to strike out the notice of appeal out of time.
19. In the circumstances, the instant application dated 24th March 2021 and lodged in Court on 6th April, 2021 offends the provisions of Rule 86 of this Court’s Rules.



20. Accordingly, in view of the aforesaid provisions of law and the authorities, we find that the application dated 2nd April, 2021 fails and is dismissed.

21. The order that commends itself to us is that each party bears its own costs.

DATED AND DELIVERED AT NYERI THIS 24TH DAY OF MAY, 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

