



Chesingei alias Joseph Kimutai Suter v County Land Registrar, Elgeyo Marakwet County & 2 others (Civil Application E057 of 2023) [2024] KECA 746 (KLR) (21 June 2024) (Ruling)

Neutral citation: [2024] KECA 746 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E057 OF 2023
S OLE KANTAI, FA OCHIENG & WK KORIR, JJA
JUNE 21, 2024**

BETWEEN

**JOSEPH KIMUTAI CHESINGEI ALIAS JOSEPH KIMUTAI
SUTER APPLICANT**

AND

**THE COUNTY LAND REGISTRAR, ELGEYO MARAKWET
COUNTY 1ST RESPONDENT**

THE ATTORNEY GENERAL 2ND RESPONDENT

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 3RD
RESPONDENT**

*(An application to strike out the Notice of Appeal arising from the
Judgment of the Environment & Land Court of Kenya at Kabarnet (L. N.
Waithaka, J.) dated 25th September 2023 in ELC Cause No. E006 OF 2022)*

RULING

1. Before us is a Notice of Motion dated 1st November 2023. The applicant prays for an order that the notice of appeal dated and filed by the respondent on 9th October 2023 and served upon the applicant on 28th October 2023 against the decision of L. N. Waithaka, J. in ELC Cause NO. E006 of 2022 be struck out with costs to the applicant.
2. The application is based on the grounds that the 1st and 2nd respondents were dissatisfied with the impugned judgment and filed a notice of appeal dated 9th October 2023. However, they did not serve the applicant with the said notice until 28th October 2023. By this time, 19 days had lapsed. Therefore, the notice of appeal was not served within the set timelines and it is liable for striking out. The notice of appeal ought to have been served within seven days from the date it was filed.



3. The applicant in his supporting affidavit reiterated the grounds on the face of the application.
4. There was no response from the respondents.
5. When the application came up for hearing on 7th February 2024, Mr. Bundotich Korir, learned counsel appeared for the applicant. There was no appearance by the respondents.
6. The applicant submitted that Rule 77(1) is couched in mandatory terms, that an intended appellant shall, within seven days after lodging a notice of appeal, serve copies on all persons affected by the appeal. He relied on the case of Mistry Premji Ganji (Investments) Limited v Kenya National Highways Authority [2019] eKLR to buttress this submission.
7. The applicant cited the case of Daniel Nkirimpa Monirel v Sayialel Ole Koilel & Others [2016] eKLR in submitting that service of a notice of appeal is the cornerstone of appellate proceedings, that cannot be wished away as a technicality that could be cured by Article 159 of *the Constitution*.
8. The applicant also cited the case of Selestica Limited v Gold Rock Development Limited [2015] eKLR where the court held that unreasonable delay depends on the circumstances of the case and that even a delay of one day may be unreasonable.
9. We have carefully considered the application and the affidavit in support thereof, the submissions by the applicant, the authorities cited, and the law. The issue for determination is whether the notice of appeal ought to be struck out.
10. The applicant's main contention is that the notice of appeal was not served upon him on time. Rule 79 of the Court of Appeal Rules, 2022 provides that:

“(1) An intended appellant shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal:

Provided that the Court may, on application which may be made ex parte, within seven days after the lodging of the notice of appeal, direct that service need not be effected on any person who did not take part in the proceedings in the superior court.

(2) Where any person who is required to be served with a copy of a notice of appeal gave any address for service in or in connection with the proceedings in the superior court, and has not subsequently given any other address for service, the copy of the notice of appeal may be served on that person at that address, notwithstanding that it may be that of an advocate who has not been retained for the purpose of an appeal.”

11. It is undisputed that the notice of appeal herein was served upon the applicant after the lapse of more than seven days of lodging the same. Rule 86 of the Court of Appeal Rules provides that:

“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-

- a. that 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.”

12. It follows therefore that the applicant brings this application because an essential step in the proceedings has not been taken, being service of the notice of appeal within the stipulated timelines. The respondents have failed to give any explanation for the delay in service.

13. In the case of *Martin Kabaya v David Mungania Kiambi, Nyeri Civil Application 12 of 2015*, the court stated thus:

“The need for judicial proceedings to be concluded in a timely fashion is too plain for argument. It is a desideratum of a rational society. A justice that is too long in coming, encumbered by sloth or inattention on the part of those who seek it, is a pain and a bother. An expensive one at that. A justice that comes too late in the day is a tepid drop on perched lips that quenches no thirst. A justice delayed is a justice denied. Litigants, especially those summoned by plaints, petitions, applications or appeals are vexed when those who summoned them hence go to sleep yet the proceedings and processes they engendered remain alive but comatose, a burden to the mind and to the pocket. And they form part of the dead weight the Judiciary bears as backlog.”

14. Accordingly, this application succeeds and the notice of appeal filed on 9th October 2023 is struck out.

15. As costs follow the event, and in compliance with Rule 85(2), the respondents shall bear the costs of this application.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 21ST DAY OF JUNE, 2024.

S. ole KANTAI

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

