



**Kobiro & 2 others v Orina (Civil Appeal (Application)  
E203 of 2022) [2024] KECA 705 (KLR) (21 June 2024) (Ruling)**

Neutral citation: [2024] KECA 705 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL (APPLICATION) E203 OF 2022  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
JUNE 21, 2024**

**BETWEEN**

**BERNARD ONKOBA T/A BETICO AUCTIONEERS ..... 1<sup>ST</sup> APPLICANT**

**ASKA NYABOKE KOBIRO ..... 2<sup>ND</sup> APPLICANT**

**HEGEONS AUCTIONEERS ..... 3<sup>RD</sup> APPLICANT**

**AND**

**EZEKIEL KEMUE ORINA ..... RESPONDENT**

*(Being an application to strike out the record of appeal from the Judgment and Decree of the High Court of Kenya at Kisii (R.E Ougo, J.) dated 7th October 2021 in HCCA NO. 30 of 2019)*

**RULING**

1. The Notice of Motion Application dated 31<sup>st</sup> October 2022, made pursuant to rules 42, 43, 82(1) and 84 of the *Court of Appeal Rules*, seeks that the Record of Appeal dated 29<sup>th</sup> November 2021 lodged on 25<sup>th</sup> August 2022 be struck out; and that costs be provided for. It is supported by the affidavit of even date sworn by Bernard Kiriamu Gichana, the advocate on record for the applicants.
2. The background leading to this application is that the respondent herein, Aska Nyaboke, had filed an appeal at the High Court against the ruling and/or decision of the subordinate court rendered on the 2<sup>nd</sup> day of February 2019. Pursuant to filing of the appeal vide Kisii HCCA No.30 of 2019, the High Court (Ougo, J.) dealt with and disposed of the appeal by a judgment rendered on the 7<sup>th</sup> October 2021. The respondent (sic) felt aggrieved by the outcome; and consequently, filed a Notice of Appeal on the 9<sup>th</sup> November, 2021.
3. The respondent was required to lodge his Notice of Appeal within fourteen (14) days of delivery of the impugned judgment, in keeping with the requirements of Rule 75(2) of *Court of Appeal Rules*, 2010 [Now Rule 77 (2) of 2022 COA Rules]. In this instance, the Notice of Appeal was filed and/



lodged in the High Court Civil Registry Nineteen (19) days after the lapse of the Statutory period and without leave of the Court.

4. Apart from filing the Notice of Appeal out of the prescribed timeframe, the respondent herein did not serve it upon the applicants as required under rule 77 (1) of the *Court of Appeal Rules*, 2010 [Now Rule 79 (1) of *COA Rules* 2022]. Meanwhile, the respondent also applied for typed and certified copies of proceedings on the 9<sup>th</sup> day of November 2021, two (2) days after the lapse of the statutory period of 30 days. Apparently, upon filing the letter bespeaking proceedings, the respondent herein, did not cause the same to be served on the applicants' advocates on record, as per the requirements of rule 82 (2) of the *Court of Appeal Rules*, 2010.
5. Be that as it may, following the filing of the letter bespeaking proceedings, the Deputy Registrar of the High Court, processed and remitted certified copies of the proceedings and judgment to the respondent on the 8<sup>th</sup> March 2022. The applicant in the present application contends that pursuant to and upon being furnished with the proceedings and judgment, it was incumbent upon the respondent to process, prepare and/or otherwise compile the Record of Appeal; that in any event, the only timeline exempted from the computation of time, is the time taken to process and avail the requisite proceedings and judgment; that in any event, the provisions of rule 82(2), only relate to the provision of proceedings and judgment.
6. It is the applicant's argument that upon being supplied with the typed and certified copies of the proceedings and judgment, the respondent was obliged to mount the appeal within 60 days. Nevertheless, the respondent herein failed and/or neglected to compile and file the record of appeal within the statutory timelines.
7. The applicant points out that the respondent herein has since misled the Deputy Registrar of the High Court to generate a slanted certificate of delay, which nonetheless authenticates the position that the requisite documents were typed, certified and furnished as at 8<sup>th</sup> day of March 2022; and it was incumbent upon the respondent to file and/or lodge the record of appeal on or before the 8<sup>th</sup> May 2022; and in view of the foregoing, the record of appeal lodged on the 25<sup>th</sup> August 2022, has been filed and/or lodged outside the stipulated timeline. It is on account of the foregoing that the applicant submits that the appeal filed herein, is premature, misconceived and bad in law; and should be struck out, as the instant application has not been filed within the statutory 30 days' timeline.
8. By a replying affidavit dated 25<sup>th</sup> February, 2022 sworn by Ezekiel Kemue Orina, the respondent herein has opposed the application. The respondent maintains that the Notice of Appeal was lodged on 9<sup>th</sup> November 2021 and immediately served on the applicants' counsel; that the record of appeal was filed within time on 28<sup>th</sup> March 2022, but the court registry personnel felt that he had filed too many unnecessary documents, and advised him to remove some of the documents from the record; as such, the application for determination before this Court is incompetent as per this court's Rules; and ought to be dismissed.
9. In his submissions, the respondent urges us to take judicial notice of the mandatory nature of section 84 which provides:

“ provided that an application to strike out Notice of Appeal or an appeal shall not be brought after expiry of 30 days from the date of service of the notice or record of appeal.”
10. The respondent points out that whereas the applicant filed this application on 31<sup>st</sup> of October 2023, he filed his Notice of Appeal on 5<sup>th</sup> November 2021, yet he is bound by the mandatory provision of Rule 84, that the failure to comply with the same renders an application filed thereunder incompetent. The



respondent argues that he has also demonstrated that he moved the sub registry in real time save for the administrative hiccups which cannot be contested. In support of his arguments, the respondent refers us to the case of William Mwangi Nguruki vs. Barclays Bank of Kenya limited [2014] eKLR and *Salama Beach Hotel Limited & 4 Others vs. Kenyariri & Associated Advocates & 4 Others* [2016] eKLR, where this Court, (differently constituted) expressed itself thus:

“Having given this matter due consideration, I have no doubt in my mind that the application to strike out the notice of appeal on the grounds that it was served out of time and that it was not followed by the filing of the record of appeal is incompetent. It is incompetent because while it seeks to enforce timelines as against the respondent, it is itself violative of the proviso to Rule 84 which mandatorily requires that it be filed within 30 days. It was not so filed and leave to file it out of time not having been sought and given, the notice of motion should be for striking out. I can do no better than quote what this Court stated in *Salama Beach* (Supra);

11. 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 vs. 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 vs. 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.
12. It is trite that striking out a pleading is a draconian act, which may only be resorted to in plain cases. The power of this Court to strike out an appeal is discretionary and is exercised based on the peculiar circumstance of each case. The respondent herein was required to lodge a notice of appeal within 14 days of the High Court's judgment, which was delivered on 7<sup>th</sup> October 2021. The respondent lodged the notice of appeal on 9<sup>th</sup> November, 2021 this being way more than 14 days after the said High Court's judgment. The main issue for this Court to deal with in this application is the competency of the appeal.
13. Rule 86 of this Court's Rules is instructive on the basis upon which an application for striking out a Notice or Record of Appeal may be made. It provides:  
Rule 86 also provides:  
“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 notice of appeal or an appeal shall not be brought after expiry of 30 days from the date of service of the notice or record of appeal.”



14. The applicants filed this application on 31<sup>st</sup> October 2022 whereas the respondent alleges that the notice of appeal was served on 9<sup>th</sup> November 2021. If this Court was to go by these timelines, then clearly the applicants are in violation of rule 86 of this *Court's Rules*. However, reading through the respondent's replying affidavit and the annexures thereto, this Court is at pains to determine when the notice of appeal was filed and served, when the certificate of delay was issued and when the record of appeal was filed.
15. The proviso in Rule 86 has received considerable deliberation and in particular its import. In *Joyce Bochere Nyamweya vs. Jemima Nyaboke Nyamweya & Another* [2016] eKLR, this Court held that parties are bound by mandatory nature of the proviso to Rule 86 of the rules and failure to comply with the timeline in the proviso renders the application defective. See also *Salama Beach Hotel Limited & 4 Others vs. Kenyariri & Associates Advocates & 4 Others* [2016] eKLR, *Pickwell Properties Limited vs. Kenya Commercial Bank Ltd* [2016] eKLR, and *Michael Mwalo vs. Board of Trustees of National Security Fund* [2014] eKLR.
16. The question before this Court would therefore be, is the instant application competently before court? Was the application filed within the requisite time frame? The respondent has failed to show this Court when the salient documents were filed and served; The applicant has maintained that he was not served with the notice of appeal and that the record of appeal was served on 24<sup>th</sup> October, 2022, and we are satisfied that the applicants have fulfilled the proviso of rule 86 of this Court's Rules having filed the application for striking out on 31<sup>st</sup> October, 2022; as such the application is competently before this Court.
17. We agree with the applicants that no steps have been taken to institute the appeal. Rule 85 of this Court's Rules provides:

“if a party who has lodged a notice of appeal fails to institute an appeal within the stipulated time he shall be deemed to have withdrawn the notice of appeal and the court may on its own motion or on application by any party, make such order. The party in default shall be liable to pay costs arising therefrom.”
18. In *John Mutai Mwangi & 26 Others vs. Mwenja Ngure & 4 Others* [2016] eKLR the Court stated that the import of Rule 85 essentially is to enable the court to clean out its record by striking out all the notices of appeals which have not been followed up, within 60 days by records of appeal; whilst the case of *Charles Wanjohi Wathuku vs. Githinji Ngure & Another* [2016] eKLR reiterates the intent of Rule 84 of this Court's Rules stating that:

“that timeline is strict and is meant to achieve the constitutional, statutory and rule based objective of ensuring that the court process dispense justice in a timely manner.”
19. This Court has, on numerous occasions, stated that the Rules of this Court exist for the purpose of orderly administration of justice before the court. The timelines for doing of certain things and taking of certain steps are indispensable in the proper adjudication of the appeal before this Court. The rules are expressed in clear and unambiguous terms and as per Kiage, J, *Esther Anyango Ochieng vs. Transmara Sugar Company* [2020] eKLR.
20. Kiage J, as per this court's reasoning in *Mae Properties Limited vs. Josephine Kibe & Another* [2017] eKLR, goes further to state that where a record of appeal has not been filed, then without further ado, the court ought to deem the notice of appeal as having been withdrawn.



- 21. Our own observation is that the respondent herein was required to serve the belated notice of appeal within 7-days of lodging the same in compliance with Rule 79(1) of the *Court of Appeal Rules*, 2022. The appellant/respondent never served the notice of appeal upon any of the applicants. Further, under Rule 84 of the *Court of Appeal Rules*, 2022, the respondent herein was required to file the appeal within 60 days of lodging the notice of appeal - this period being exclusive of any time certified by the High Court as having been necessary for preparation of copies of proceedings, provided that the respondent's application request for copies of proceedings was in writing and served upon the applicants. As matters stand, the respondent has neither placed any written request for proceedings on record nor was any such request served upon any of the applicants.
- 22. Even if we were to give credit to the respondent that the period of delay was expressly certified by the High Court as having been necessary for preparation and delivery of typed proceedings, that period lapsed on 8<sup>th</sup> March 2022. The instant appeal was filed on 25<sup>th</sup> August 2022, this being more than 5 months after lapse of the period of delay excused and certified by the High Court.
- 23. From the foregoing, it is our view therefore that the application before us is merited and is allowed. The appeal is struck out with costs to the applicant.

**DATED AND DELIVERED AT KISUMU THIS 21<sup>ST</sup> DAY OF JUNE, 2024.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

