



**Ngiela (Suing as the Legal Administrator of Joseph Ngiela Mbori – Deceased) v Mboya & another  
(Civil Appeal (Application) E045 of 2023) [2024] KECA 706 (KLR) (21 June 2024) (Ruling)**

Neutral citation: [2024] KECA 706 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL (APPLICATION) E045 OF 2023  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
JUNE 21, 2024**

**BETWEEN**

**MARY ACHIENG NGIELA (SUING AS THE LEGAL ADMINISTRATOR OF  
JOSEPH NGIELA MBORI – DECEASED) ..... APPLICANT**

**AND**

**BERNARD OUMA MBOYA ..... 1<sup>ST</sup> RESPONDENT**

**CAROLYNE KHADEITSA KARANI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application to strike out a Notice of Appeal in an intended appeal  
from the Judgment and Decree of the Environment and Land Court at Homa  
Bay (G.M.A Ongondo, J.) dated 7th March 2023 in Case No. 47 of 2021 (O.S)*

**RULING**

1. The Notice of Motion dated 5<sup>th</sup> April 2023, made pursuant to Rules 44, 47, & 86 of the [Court of Appeal Rules](#) seeks that the Notice of Appeal, dated 7<sup>th</sup> March 2023 and lodged on 9<sup>th</sup> March 2023 be struck out; and costs be provided for. The application is supported by the affidavit of even date sworn by Mary Achieng Ngiela, the applicant.
2. The background leading to this application is that after the death of Joseph Ngiela Mbori, his daughter Mary Ngiela (the applicant) and her late brother Andronico Ondoro Ngiela, were appointed as the administrators of the estate of the deceased herein. They subsequently filed a suit against one Sophia Madewa Amayi (sued as the Legal Adminstratix of Alexander Mireri, in Homa Bay [ELC Case No.47 of 2021 \(O.S\)](#) (formerly [Migori ELC No. 851 of 2017 \(OS\)](#) seeking inter a declaration that Sophia Madewa's (Sophia) rights to recover 0.5 Ha. of the suit land known as Central Kasipul/Kamuma/13 was barred under the [Limitation of Actions Act](#); her title thereto extinguished on the grounds that the deceased and the beneficiaries of the estate had openly, peacefully and continuously been in occupation for a period of 49 years, hence the respondents was barred from recovering the said portion of the suit



property by virtue of the *Limitations of Actions Act* Chapter 22 of Laws of Kenya; her title thereto extinguished; that the applicant and her late sibling Andronico be registered as the proprietors of the said parcel; to facilitate the transfer and registration of the suit land in favour of the applicant, the Deputy Registrar and/or the Executive Officer of the High Court be directed to execute the relevant transfer instruments and all attendant documents; and costs of the originating summons be borne by the respondent.

3. Subsequently, upon the matter being heard, judgment was entered in favour of the applicant as against Sophia on 7<sup>th</sup> March 2023. Aggrieved by the outcome, a Notice of Appeal dated 7<sup>th</sup> March 2023, was filed by Sophia in court on 9<sup>th</sup> March 2023; and served on the applicant's counsel on 10<sup>th</sup> March 2023. The respondents herein, who were never parties in the suit before the High Court, also lodged Notice of Appeal on 9<sup>th</sup> March 2023.
4. The applicant's contention is that the respondents, never having been parties to the suit in the subordinate court nor having been enjoined as interested parties, lack audience before this court; nor did the respondents obtain leave to be enjoined as parties in the subordinate court before lodging the notice of appeal and as such the said notice is incompetent.
5. The applicant maintains that in the circumstances, the Notice of Appeal herein and the attendant Intended appeal, if any, constitute abuse of the due process of Court; that no amount of redemption, can resuscitate the notice of appeal filed by the respondents; and it is imperative that the instant application be allowed. It is emphasized that the instant application has been lodged within the statutory 30 days pursuant to rule 86 of the *Court of Appeal Rules, 2022* in so far as the notice of appeal, was served.
6. It is basically the respondent's case that the Notice of Appeal dated 7<sup>th</sup> March 2023 is correctly lodged as per Rule 77 of this *court's Rules*; and that since they were not parties to Homa Bay *ELC No. 47 of 2021(O.S)* and upon judgment on the 7<sup>th</sup> March 2023, there was no suit that they could be enjoined as parties hence Order 9 rule 9 of the *Civil Procedure Rules* does not apply to them.

#### **Has the applicant satisfied the requirements for striking out the notice of appeal?**

7. The applicant points out that the Notice of Appeal was served on the applicant on the 10<sup>th</sup> March 2023 vide electronic service; and that pursuant to Rule 86 of the *Court's rules* which prescribe that an application to strike out the notice of appeal or appeal must be lodged within thirty (30) days after the date of service of the document of either the notices or record of appeal; that in the instant case therefore, the applicant had until the 11<sup>th</sup> of April 2023 to lodge the instant application; which in any event was lodged on 6<sup>th</sup> April 2023 hence within the timelines set by the rules.
8. It is trite law 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 its exercised based on the peculiar circumstance of each case.
9. The main issue for this Court to deal with in this application is on the competency of the appeal.
10. Rule 86 is instructive on the basis upon for striking out a notice or record of appeal. It provides:  

“.... provided that an application to strike out a 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.”



11. The applicant filed this application on 5<sup>th</sup> April 2023 whereas the notice of appeal was served on 7<sup>th</sup> March 2023, and as such has fulfilled the proviso of rule 86 of this Court's Rules and as such the application is competently before this Court.

12. Rule 86 also provides:

“A person affected by an appeal may at any time, either before or after the institution of an appeal, apply to the court to strike out the notice of appeal, as the case may be, on the ground that no appeal lies or some essential step in the proceedings that has not been taken within the prescribed time,”

13. The relevance of this proviso has received considerable deliberation and in particular its import. In Joyce Bochere Nyamweya v. 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 renders the application defective. See also Salama Beach Hotel Limited & 4 Others v. Kenyariri & Associates Advocates & 4 Others [2016] eKLR, Pickwell Properties Limited v. Kenya Commercial Bank Ltd [2016] eKLR, and Michael Mwalo v. Board of Trustees of National Security Fund [2014] eKLR.

14. This court is therefore satisfied that the applicant has fulfilled the proviso of rule 84 of this Court's Rules and as such the application is competently before this Court.

15. Having determined that the instant application is competently before the court, the next matter for determination would then be whether the notice of appeal filed by the respondents is properly before this Court, the applicant having raised the issue that the respondents have no locus to lodge the said appeal.

16. The applicant suggests that there is a real possibility of mischief, as it was discovered during the hearing of the suit before the ELC, that the respondents herein had benefitted from a fraudulent amendment of the Registry Index Map which the Land Registrar, Rachuonyo North/South Sub-Countries had confirmed when he visited the suit property, yet the respondents herein waited until the 7<sup>th</sup> March 2023, the same day the judgment was read and the same date the defendant in the Environment and Land Court (ELC) prepared her notice of appeal, that they too swiftly filed and served their notice of appeal. In the applicant's words:

“Indeed, it is strange that a party that did not participate in the proceedings would swiftly lodge Notice of Appeal in the manner in which they did.”

17. To fortify this alleged mischief, the applicant argues that as a matter of fact, there was a visitation by the Land Registrar to the land on 12<sup>th</sup> July 2021, and the report that was produced in the proceedings before the ELC is a clear demonstration that the respondents were aware that the exercise was being done on the parcel of land on which a school had been constructed and was operational; that if all along, the respondents were aware of the suit, as demonstrated by their swift moves post judgment, then the question that arises is, how is it that they never filed an application to be enjoined in the suit. Referring to rule 77 (1) of the Court of Appeal Rules which prescribes that:

“...a person who desires to appeal to the court shall give notice in writing, which Notice shall be lodged in two copies with the Registrar of the Superior Court...”.

The applicant contends that this provision envisages a scenario where only those who were parties to the proceedings that gave rise to the decree and order; that it behooved the respondents to lodge an application to be enjoined as Interested Parties in the suit at the Superior Court first then upon being



parties in the said proceedings, lodge the notice of appeal; and then seek for orders of stay of execution of the said decree. In this regard, the applicant urges us to consider rule 2 of the [Court of Appeal Rules](#) which provides that:

“...an interested party means a person or entity that has an identifiable stake, legal interest or duty in the proceedings before the court but is not a party to the proceedings, or may not be directly involved in the litigation but has been allowed by the court upon application to appear as an interested party to address it in respect of a matter of law or fact...”

18. Drawing from the decision in [Mohamed Shally Sese \(Shah Sese\) v. Fulson Company Ltd & Another](#) (2006) eKLR, the applicant urges us to find that the impugned Notice of Appeal has been filed by strangers to the suit, and it ought to be struck out.
19. The respondents reiterate that their parcels of land were Central Kasipul/Kamuma/8974 and 8975, which did not form part of the subject of litigation; however, what stirred them into action was when by the judgment of the ELC (Ongondo, J.) directed them to surrender their title documents for cancellation, hence the lodging of the notice of appeal complained hereof. The respondents see themselves neatly within the ambit of rule 77(1) of this [Courts Rules](#), which they say is meant to cure a mischief where a party can lose everything just because he was not a party to the proceedings in the trial court. In support of their position, the respondents refer to the decisions in Kisumu HCC No. 196 of 1996 [Ayub Odhiambo Migwalla v. John Oloo Onyuka](#), where John Aloo Onyuka died during the pendency of the case, then Helida Atieno Onyuka took over the proceedings. After judgment by Wambiliyanga, J, Elly Odhiambo Onyuka lodged a notice of appeal as a person affected by the judgment hence the suit in Civil Appeal No. 81 of 2002 [Elly Odhiambo Onyuka v. Ayub Odhiambo Migwalla](#), which then proceeded to full hearing and the court duly noted that Elly Odhiambo was a person directly affected by the Judgment; and could lodge an appeal.
20. Does the respondent have locus to file an appeal before this court? This court in [Alfred Njau & 5 Others v. City Council of Nairobi](#) [1983] eKLR defined locus as:

“.... a right to appear in court...to say that a person has no locus standi means that a person has no right to appear or be heard in proceedings...to say that a person has no *locus standi* means that he cannot be heard even on whether or not he has a case worth listening to.”
21. This Court notes that the respondent on the grounds of opposition filed before this court admits that they were not parties to the suit in the subordinate court suit Homa Bay [ELC No. 47 of 2021](#), as there was no pending suit for the respondents to be enjoined in as, judgment had been delivered.
22. With great respect to counsel for the respondents, either she is out to deliberately mislead us by the decisions cited in [Ayub Odhiambo Migwalla v. John Oloo Onyuka](#) (*supra*) and [Elly Odhiambo Onyuka v. Ayub Odhiambo Migwalla](#) (*supra*), or she did not read those decisions, where the parties replaced had died; and family members nominated the replacement, who died, then his step brother stepped in as a beneficiary of the estate directly affected by the judgment. That is totally different from the scenario obtaining here, where parties, though aware that there was a dispute touching on their physical property sat pretty, basking in the glory that the numbers were different, yet it was the same parcel; and a physical visit was even made. In our view, the respondents are simply attempting to spin a technicolored sob story. It is indeed strange that a party that did not participate in the hearing in the ELC Court would lodge the notice of appeal just 2 days after the impugned judgment was read, and on the same day the defendant filed her notice. That clearly demonstrates that the respondents were keeping tabs and/or were aware of the proceedings in the ELC Court. It is also on record that there was a visitation of the suit property, where a school was built; and a report prepared by the Land Registrar, and the



respondents were aware, and so that any activity affecting the land, would be of critical concern. This clearly shows in the mind of a reasonable man that something was afoot with the said property. The question then is why did the respondents not apply to be enjoined as an interested party? It is trite that the court may at any stage of the proceedings order that the name of any party whose presence may be necessary to enable the court properly adjudicate on a matter be enjoined.

23. This Court also agrees with the applicant's submission that rule 77 of the *Court's Rules* did not envisage a situation where anyone could just come up and file an appeal to this court. Of course, we recognize that there may be instances where a party's rights are affected by a decision to which they are totally oblivious; in which case, the remedy lies in first seeking leave to be enjoined to the matter at the appellate stage. In our view the respondents adopted a lackluster approach and is not deserving of any indulgence. It is this court's view therefore that the application before it is merited. Consequently, the applicant's motion is granted and the respondent's notice of appeal dated 7<sup>th</sup> March 2023 is struck out.

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

**HANNAH OKWENGU**

.....

**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**

