



**Ladha & another v Ladha) & 3 others (Civil Appeal (Application)  
E020 of 2023) [2024] KECA 643 (KLR) (7 June 2024) (Ruling)**

Neutral citation: [2024] KECA 643 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) E020 OF 2023  
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA  
JUNE 7, 2024**

**BETWEEN**

**KHAIRUNISSA HUSSEIN HAJI LADHA ..... 1<sup>ST</sup> APPLICANT**

**SHENAZ HUSSEIN HAJI LADHA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MOHAMED KHALID ISMAIL (AS ADMINISTRATOR OF THE ESTATE OF  
ESMAIL HALL SULEIMAN HAJI LADHA) ..... 1<sup>ST</sup> RESPONDENT**

**NIZAR ALI MOHAMED (AS ADMINISTRATOR OF THE ESTATE OF  
AYSHABHAI ALL MOHAMED HAJI) ..... 2<sup>ND</sup> RESPONDENT**

**SALIM HAJI ESSAK ..... 3<sup>RD</sup> RESPONDENT**

**BILQIS SALIM SULEIMAN ..... 4<sup>TH</sup> RESPONDENT**

*(Being an application to strike out the Notice of Appeal against the  
Judgment of the Environment and Land Court at Mombasa (C. K.  
Yano, J.) delivered on the 3rd June 2021 in Civil Suit No. E 282 of 2008)*

**RULING**

1. By a Notice of Motion dated 11<sup>th</sup> July 2023 brought pursuant to rules 84 and 90 of the Court of Appeal Rules, 2010 (current rules 86 and 92(1) of the Court of Appeal rules, 2022), sections 3, 3A and 3B of the *Appellate Jurisdiction Act*, the applicants seek orders that: (i) the Notice of appeal dated 17<sup>th</sup> June 2021 and filed on 18<sup>th</sup> June 2021, and the Record of appeal dated 9<sup>th</sup> February 2023 and filed on 20<sup>th</sup> February 2023 and served on 23<sup>rd</sup> June 2023 be struck out; and (ii) that the Costs be provided for.
2. The applicant's Motion is premised on several grounds and supported by the affidavit of Shehnaz Hussein Haji Ladhia sworn on 11<sup>th</sup> July 2023 in which it was contended that the Record of appeal



- was filed on 20<sup>th</sup> February 2023 and served on 23<sup>rd</sup> June 2023, which service was more than the seven 7.days prescribed by the law; that the respondents/appellants violated the mandatory timelines of this Court so that the appeal was not properly before the Court and, therefore, there is no appeal for determination by this Court. It was contended that, on this basis, the appeal should be struck out.
3. In a replying affidavit sworn on 16<sup>th</sup> October 2023, Elijah Gathu, Counsel for the respondents/appellants opposed the application and deposed that the appeal was filed on 20<sup>th</sup> February 2023, which was within the timelines for filing the appeal; that there was a delay in filing the Record of appeal pursuant to which a Certificate of Delay was issued on 8<sup>th</sup> February 2023; that, shortly thereafter, the appellant underwent a restructuring of the firm from Muthee Kihiko Soni & Associates LLP to Muthee Kihiko & Associates LLP, and that several of its files were misplaced, which occasioned delay in the service of the Record of appeal, which was properly filed; that the respondents/appellants have since served the Record of appeal prior to the appeal being fixed for hearing, and hence no prejudice has been occasioned to the applicants. Counsel contended that the respondents/appellants are desirous of pursuing their appeal, which is merited, and pray that their right to be heard on appeal should not be defeated on account of mistake of counsel; that, furthermore, time should be enlarged under rule 4 of the Court of Appeal rules to deem the appeal as properly filed and served so that the ends of justice can be served.
  4. As a brief background to the application before us, the applicants filed a suit by way of amended originating summons seeking a determination that they are entitled to the property known as Plot No. Mombasa/Block XII/155 (*the suit property*), and that they are entitled to be duly registered as the proprietors of the suit property by way of adverse possession. They claim to have lived on the suit property for a period exceeding twelve (12) years ranging between 1953 to 2008 preceding the summons and that, therefore, they have acquired prescriptive rights over the property. They claimed that they were the daughters of Hussein Haji Ladha (deceased), and that the deceased bought the suit property and registered it in the names of his brothers and business partners, Suleiman Abdulrehman (the 1<sup>st</sup> appellant), Ismael Haji Ladha (father to the 3<sup>rd</sup> appellant) and Ali Mohamed Ladha (father to the 2<sup>nd</sup> appellant); that the partnership was dissolved in 1981 and the partnership property was distributed with the suit property to have been transferred into his name; that the transfer was not effected, and that their late father adversely took possession of the property and they have since enjoyed quiet possession of the same without any interruption; that they have been paying the rates to the defunct Municipal Council of Mombasa; that the 3<sup>rd</sup> respondent/appellant sold the suit property to First Burton Development Limited, who then sold it to the 4<sup>th</sup> and 5<sup>th</sup> appellants during the pendency of this suit; and that they have sought to have them vacate the suit property.
  5. The 1<sup>st</sup> to 3<sup>rd</sup> respondents/appellants opposed the originating summons and, to a large extent, reiterated the facts set out by the applicants. They further claimed that the suit property was put up for sale, and that the applicants were given priority to buy it; and that, instead, they filed a suit claiming adverse possession. They denied that the applicants had stayed in the house for more than 12 years. The 4<sup>th</sup> and 5<sup>th</sup> respondents/appellants also opposed the applicants suit and claimed that they bought the property, which was duly transferred to them as lawful purchasers, and that they have since been issued with a title deed. The trial Judge, upon considering the dispute, allowed the applicants claim and held that they were entitled to be registered as proprietors of the suit property by virtue of adverse possession.
  6. It is this Judgment against which the respondents/appellants have filed an appeal, the subject of the application now before us.
  7. Both parties filed written submissions. When the application came up for hearing on a virtual platform, learned counsel, Ms. Aluvisa holding brief for Mr. Khatib for the applicant, submitted that the Record



of appeal was filed on 20<sup>th</sup> February 2023 and served on 23<sup>rd</sup> June 2023, which was more than three (3) months after expiry of the statutory period; that in the replying affidavit, the respondent/appellants deponed that the delay in service of the Record of appeal was occasioned by the restructuring of the respondents/appellants counsel's office, but nothing was said of the misplaced file, or of the manner in which counsel's mistake led to the delay.

8. Learned counsel, Mr. Okongo holding brief for Mr. Gathu for the respondents/appellants, submitted that the Record of appeal was filed within time, and that the failure to serve was unintentional and occasioned by a mistake on the part of counsel, which should not be visited upon the respondents/appellants. Counsel further submitted that the appeal is arguable, and that the respondents/appellants will be seriously prejudiced if the appeal is dismissed.
9. The motion before us seeks to strike out the respondents/appellants appeal for having been filed out of time in disregard of the rules of this Court. It is now a settled principle that the power of this Court to strike out an appeal is discretionary, and is exercised based on the peculiar circumstances of each case. See *Standard Ltd & another v Onchicku* (Civil Application 134 of 2019) [2023] KECA 1275 (KLR).
10. In the case of *Mukenya Ndunda v Crater Automobiles Limited* [2015] eKLR, this Court observed:

“The power to strike out an appeal or notice of appeal on account of failure by an appellant to follow the rules of procedure requires to be exercised carefully and only in cases where it is shown that the party at fault flagrantly or deliberately or flippantly or recklessly failed to follow the rules.”

Rule 84 specifies:

A person affected by 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.”

11. This is an application for orders to strike out the Notice and Record of appeal. Before proceeding to consider whether the appeal should be struck out, it is necessary to begin by ascertaining whether the applicants have complied with the requirement to file the motion within 30 days of service of the notice or record of appeal as mandated under the Rules. The Record of appeal was served on 23<sup>rd</sup> June 2023. This application is dated 11<sup>th</sup> July 2023, meaning that it was filed 19 days after the record was filed. Since the application was filed within the 30-day period, it is competent.
12. From the record, it is evident that the respondents/appellants filed the Notice of appeal in time, but admit to having served it late. It was stated that the late service was as a result of an error on the part of counsel caused by what they term as a firm restructuring. The delay in service of the record of appeal is about 3 months.

Rule 90 provides that:

- (1) The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies thereof on each respondent who has complied with the requirements of rule 79.



2. The appellant shall also serve copies of the memorandum of appeal and the record of appeal on such other parties to the original proceedings as the Court may at any time on application or of its own motion direct and within such time as the Court may appoint.”
13. This Court when faced with a similar application in the case of *Mulama v Ethics & Anti-Corruption Commission* (Civil Application E186 of 2021) [2023] KECA 582 (KLR) struck out a record of appeal because it was served out of time, the Court having held that rule 92 (1) is couched in mandatory terms and, as read together with rule 86(b) of the Rules, the inevitable result was that the record of appeal be struck out.
14. Similarly, the respondents/appellants in the instant application having failed to adhere to the required timelines specified by rule 84, and having exceeded the time prescribed for service of the record of appeal by two months, and having failed to undertake the necessary remedial steps prior to this motion, the Record of appeal dated 9<sup>th</sup> February 2023 and filed on 20<sup>th</sup> February 2023 and the Notice of appeal dated 17<sup>th</sup> June 2021 and filed on 18<sup>th</sup> June 2021 in respect of this appeal are accordingly struck out with costs to the applicants.

It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JUNE, 2024.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA C.Arb, FCIArb.**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

