



REPUBLIC OF KENYA



KENYA LAW
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**Agola v Musungu (Civil Appeal (Application) 75 of 2019)
[2024] KECA 877 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 877 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL (APPLICATION) 75 OF 2019
MA WARSAME, JW LESSIT & WK KORIR, JJA
JULY 26, 2024**

BETWEEN

LILIAN SAYO AGOLA APPLICANT

AND

JACOB WAFULA MUSUNGU RESPONDENT

(An application to strike out the appeal from the Judgment of the Environment and Land Court at Kitale (Njoroge, J.) delivered on 31st July, 2018 in E.L.C Case No. 77 of 2009)

RULING

1. In a Ruling delivered on 31st July, 2018 Njoroge, J. dismissed the respondent's application dated 18/6/2018 which sought inter alia, stay of execution of the judgment delivered on 31st July, 2018 and set aside the said judgment in E.L.C Case No. 77 of 2009 so that the respondent's case can be heard on merit.
2. Aggrieved, by the decision, the respondent lodged a notice of appeal on 6th August, 2018. He also requested for certified copies of the proceedings on 5th August, 2018. A certificate of delay was issued on 1st March 2019, stating that the period of delay was 5th August 2018 to 30th December 2018 and that the respondents received the proceedings on 31st December 2018. The record of appeal was subsequently filed on 30th April, 2019.
3. The applicant therefore challenges the appeal as being incompetent because as far as she is concerned, the Record of Appeal had been filed out of time without leave of the Court as the time expired on 1st March 2019.
4. In response, the respondent through a replying affidavit dated 9th July, 2024 admitted that the appeal was indeed filed out of time. He however explained that after receiving the proceedings on 30th December 2018, his advocates closed for Christmas. On resuming operations on 15th January 2019,



they discovered the court file was misplaced and it took a long time for them to get copies of the pleadings and to arrange the necessary documents. The certificate of delay was signed on 1st March 2019 when the file was traced. The record was subsequently presented for filing on 6th April 2019 but the court's officers manning the registry advised his Advocates to leave the record and await directions from the registrar since the record was out of time.

5. When the matter came up before us for hearing, the applicant was represented by learned counsel Mr. Kiarie and Learned Counsel Mr. Teti represented the respondent. Both counsel relied on their submissions.
6. We have considered the application, the replying affidavit, submissions by the appellant and the respondents counsel as well as the law. It is common ground that an appellant is required to file the Record of Appeal within 60 days of lodging the Notice of Appeal. See Rule 84(1) of the *Court of Appeal Rules* (the Rules). Equally, it is not in dispute that the proviso to Rule 84 stipulates the exclusion of any period certified by the Registrar of the court as having been expended to prepare and deliver proceedings to the appellant in computation of such time.
7. In this case, the proceedings were ready on 30th December, 2018 which was during the Court's vacation and as such, time begun to run from 13th January, 2019 after the said vacation ended on 12th January, 2019. Consequently, the appellant should have filed the Record on or before 14th March, 2019. It is therefore, without doubt that the Record of Appeal which was filed on 30th April 2019 was out of time. Equally, it is not in dispute that the appellant had not sought leave of this Court to file the same out of time. What is the consequence thereof?
8. The foregoing question was succinctly addressed by this Court in *Patrick Kiruja Kithinji v Victor Mugira Marete* [2015] eKLR as follows:

“In our view whether or not an appeal is filed on time goes to the jurisdiction of this Court. It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. Consequently, we find that an appeal filed out of time is not curable under Article 159.”

9. In our view, the appellant has not laid a proper basis for failing to file the record of appeal on time. There is no affidavit on record sworn by registry staff confirming that the file was lost by the registry or a letter addressing the refusal of the registry staff refused to file the record on 6th April 2019 pending directions by the Registrar of the High Court. As a result, the undeniable fate of the Record which was filed out of time without leave of the Court is to be struck out with costs. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 26TH DAY OF JULY, 2024.

M. WARSAME

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

W. K. KORIR

.....



JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

