



REPUBLIC OF KENYA



**Kibui v Njoroge & 3 others (Civil Application 18 of 2017)
[2024] KECA 1008 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 1008 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 18 OF 2017
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
JULY 26, 2024**

BETWEEN

NANCY WAIRIMU KIBUI APPLICANT

AND

MICHAEL GACHIRI NJOROGE 1ST RESPONDENT

PETER WACHIRA NJOROGE 2ND RESPONDENT

JAMES WACHIRA WAMBUGU 3RD RESPONDENT

JULIUS KIRUTU GACHIRI 4TH RESPONDENT

(An application for striking out the notice of appeal dated 29th March, 2016 from the judgment of the High Court of Kenya at Nyeri (Ombwayo, J.) dated and delivered on 23rd March, 2016 in E.L.C. No. 141 of 2008)

RULING

1. The applicant, Nancy Wairimu Kibui, has made an application pursuant to Rule 58 (3) of the Court of Appeal Rules seeking orders from this Court that:

- “1. ... spent.
2. That the Honourable Court do set aside and review its orders of 9th July 2021, striking out the Notice of Appeal.
3. That this Honourable Court be pleased to hear the motion dated 23rd February 2017 on its merits and make such further or other directions as it may deem fit.”



2. The application is supported by the grounds stated on its face and the supporting affidavit of the applicant and her advocate Messrs. Charles Muchemi Karweru. The application is opposed. One of the respondents, Peter Wachira Njoroge, swore a replying affidavit in opposition to the application.
3. Both the applicant's and the respondents' respective counsel filed written submissions in support of their respective positions. The facts that form the basis of this application are rather straightforward. The applicant was aggrieved by the decision delivered on 23rd March, 2016 by Ombwayo, J., of Environment and Land Court (ELC). She filed the notice of appeal within time. However, she did not serve the respondents within the requisite seven (7) days as provided under Rule 79 (1) of the Court of Appeal Rules. She made an application to this Court seeking an extension of time so that the late service of the Notice of Appeal she had effected on the respondents be deemed to have been made on time.
2. The application was heard by S. ole Kantai, J.A. who in a Ruling delivered on 21st February 2018 allowed the applicant's application. The service she had effected upon the respondents' counsel out of time was deemed to have been properly served. 5. During this period, however, a rival application was filed by the respondents under then Rule 84 (now Rule 86) of the Court of Appeal Rules seeking to strike out the applicant's notice of appeal on the grounds that it was not served upon the respondents. The application was listed for hearing before this Court on 9th July, 2021. The respondents' counsel was present. The applicant's counsel was absent. The Court struck out the notice of appeal lodged by the applicant on the grounds that it had not been served upon the respondents in time.
6. In the present application, Mr. Karweru, the applicant's advocate explained the reason for his failure to attend court on the particular day the respondents' notice of motion was listed for hearing before this Court. He states that the email address used by the court to send him the hearing notice was a wrong one.
Instead of sending the email through the email address karweruadvocate@gmail.com, the email address used was karweruadvocates@gmail.com.
6. The critical difference in the two email addresses is the additional letter "s" in the wrong address. The Deputy Registrar of this Court, indeed, confirmed that the wrong email address was used. This explained the applicant's advocates absence in Court on the day that the respondents' application was scheduled for hearing. They were not in Court because they were not aware that the application had been scheduled to be heard on that particular day.
7. Although the respondents vehemently opposed the application, in our considered opinion, the applicant made a case for this Court to review its decision rendered on 9th July 2021, in the absence of the applicant's counsel. Their absence was due to an inadvertent mistake by the court registry when it sent the hearing notice to the wrong email address.
6. The application is allowed as a result of which the order issued on 9th July 2021, striking out the applicant's notice of appeal is hereby set aside in its entirety. The respondents' notice of motion dated 23rd February, 2017 shall be relisted for hearing afresh so that it can be determined on its merits. Since none of the parties is to blame for the mistake by court, there shall be no order as to costs.

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

W. KARANJA

.....

JUDGE OF APPEAL

L. KIMARU



.....
JUDGE OF APPEAL

A. O. MUCHELULE

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

