



REPUBLIC OF KENYA



**JOP v AKM (Civil Application E093 of 2023) [2024] KECA 1922 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KECA 1922 (KLR)

**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL AT MOMBASA**  
**CIVIL APPLICATION E093 OF 2023**  
**SG KAIRU, AK MURGOR & KI LAIBUTA, JJA**  
**JULY 12, 2024**

**BETWEEN**

**JOP ..... APPLICANT**

**AND**

**AKM ..... RESPONDENT**

*(Being an application to strike out the Notice of Appeal from the Judgment and Decree of the High Court of Kenya at Mombasa (J. N. Onyiego, J.) delivered on 12th May 2023 in O.S No. 5 of 2019)*

**RULING**

1. Before us is a Notice of Motion dated 6<sup>th</sup> October 2023 by which the applicant, JOP, sought orders: that the Court be pleased to strike out the respondent's notice of appeal lodged on 12<sup>th</sup> June 2023; that the notice of appeal dated 9<sup>th</sup> June 2023 be deemed as having been withdrawn; and that the costs of and incidental to the application be borne by the respondent.
2. The applicant's Motion is supported by the annexed affidavit of Jamila Ali Mbwana, learned counsel for the applicant, sworn on 6<sup>th</sup> October 2023 essentially deposing to the grounds on which the Motion is anchored, namely: that, on 12<sup>th</sup> May 2023, J. N. Onyiego, J. delivered a judgment in the High Court of Kenya at Mombasa in OS No. 5 of 2019; that, dissatisfied with part of the impugned decision, the respondent lodged a notice of appeal on 12<sup>th</sup> June 2023, way after 14 days from the date of the decision; that the notice of appeal was served upon the applicant on 17<sup>th</sup> July 2023, which was way after 7 days from the date of lodging the notice; that no appeal was filed within 60 days from the date the notice was lodged; that the respondent failed to take essential steps as necessary and required in filing her appeal; and that it is only just and fair that the applicant's Motion be allowed and the notice of appeal struck out with costs or, in the alternative, the notice of appeal be deemed as having been withdrawn.
3. In support of the applicant's Motion, learned counsel, M/s. CM Advocates LLP, filed written submissions, a list of authorities and a case digest dated 5<sup>th</sup> March 2024 citing the cases of John Mutai



Mwangi & 26 Others vs. Mwenja Ngure & 4 Others [2016] eKLR for the proposition that, where a party has lodged a notice of appeal, an appeal must subsequently be filed within 60 days failure to which the Court on its own motion or on application may deem such a notice of appeal as withdrawn;

and Spenco (K) Limited vs. Hema Investments Ltd & Another [2021] eKLR, submitting that the Court of Appeal has discretionary powers to strike out notices of appeal not followed by a record of appeal within the prescribed timelines.

4. It is noteworthy that the respondent did not file any affidavit in reply to the applicant's Motion. However, learned counsel for the respondent, M/s. Omondi Waweru & Company, filed grounds of opposition dated 7<sup>th</sup> March 2024 along with their written submissions of even date citing the case of Tome & Another vs. the Attorney General & 2 Others [2021] KECA 150 (KLR), submitting that this Court has held on several occasions that parties are bound by the mandatory proviso to rule 84 (now rule 86 of the 2022 Rules), and that failure to comply therewith renders the instant application fatally defective.
5. According to learned counsel, the applicant's Motion is fatally defective for failure to comply with the proviso to rule 86 of the Court of Appeal Rules; and that the respondent has since instituted Civil Appeal No. E038 of 2024 between AKM and JOP. However, the date on which the appeal is alleged to have been filed is not disclosed.
6. Rule 79(1) of this Court's Rules requires that a notice of appeal be served before or within 7 days from the date on which it is lodged. That rule reads:

79.

- (1) An intended appellant shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal:

7. Where the notice is served out of time, the Court has power to strike it out on such application as is before us pursuant to rule 86 of the Rules of this Court, which reads:

86. 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 a notice of appeal or an appeal shall not be brought after the expiry of thirty days after the date of service of the notice of appeal or record of appeal, as the case may be.

8. In MAE Properties Limited vs. Joseph Kibe & Another [2017] eKLR, this Court had this to say on the timelines prescribed under the Rules:

“We have said on numerous occasions that the Rules of Court exist for the purpose of orderly administration of justice before this Court. The timelines for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals that come before us. The Rules are expressed in clear and unambiguous terms and they command obedience...



Failure to comply with the timelines set invites sure consequences.”

9. We take to mind the fact that the respondent’s notice of appeal dated 9<sup>th</sup> June 2023 was lodged on 12<sup>th</sup> June 2023, which was 30 days after the date of the impugned judgment. In effect, it was lodged 16 days out of time and served on 17<sup>th</sup> July 2023, 28 days out of time, all without leave of this Court. On the other hand, the applicant’s Motion, having been filed more than 30 days after service on the applicant of the notice of appeal, does not satisfy the proviso to rule 86 of this Court’s Rules in as far as the applicant seeks, in prayer 1 of the application, to have the notice of appeal struck out.
10. We form this view on the basis of the fact that, even though the exact date the Motion was filed is not ascertainable from the record, it is clear to us that it must have been on or about 6<sup>th</sup> October 2023, the date on which it was executed. Consequently, we find that the prayer 1 of Motion is incompetent and cannot be granted.
11. Turning to the propriety of the respondent’s notice of appeal, which was filed and served out of time in contravention of rules 77(2) and 79(1) of this Court’s Rules, we take to mind the Court’s power under rule 85(1) (under which the application is also brought) pursuant to which the Court may deem such a notice as having been withdrawn.
12. Having considered the applicant’s Motion, the affidavit in support, the ground on which it is anchored, the written and oral submissions of counsel, the cited authorities and the Rules, we allow prayer 2 of the application with the result that the respondent’s notice of appeal dated 9<sup>th</sup> June 2023 is hereby deemed as having been withdrawn pursuant to rule 85(1) as read with rules 77(2) and 79(1) of the Rules of this Court. The applicant shall have the costs of the Motion. Orders accordingly.

**DATED AND DELIVERED AT THIS 12<sup>TH</sup> DAY OF JULY, 2024.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

