



**Otwala & another v Leo (Sued in His Capacity as Personal Representative
of the Estate of Paskalia Awuor Omondi) (Civil Appeal (Application)
E113 of 2023) [2024] KECA 789 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KECA 789 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) E113 OF 2023
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
JULY 5, 2024**

BETWEEN

OTIKE OTWALA 1ST APPLICANT

JAMES OWINO AKUMU 2ND APPLICANT

AND

**JOHN ODHIAMBO LEO (SUED IN HIS CAPACITY AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF PASKALIA AWUOR
OMONDI) RESPONDENT**

*(Being an application to strike out the Notice of Appeal from the Judgment of the Environmental
and Land Court at Migori (Kullow, J.) dated 23rd March 2022 in Case No. 602 of 2017 (O.S.))*

RULING

1. The Notice of Motion application dated 5th September 2023, brought pursuant to rules 77, 82 and 84 of the *Court of Appeal Rules* 2010 (now Rules 79,84 and 86 of 2022 COA Rules), seeks that the notice of appeal dated 25th March 2022 be struck out. The grounds upon which the prayer is based is that the notice of appeal has never been served upon the applicant who only learnt about it on being served with an application in the Migori ELC 602 of 2017 (OS) where the impugned notice of appeal was annexed; the said notice of appeal was filed on 4th April 2022 beyond the prescribed 7 day period prescribed under Rule 77(1) of this Court's rules; it has been over a year since the filing of the Notice and no steps have been taken to file and serve the record of appeal.
2. The application is supported by an affidavit of even date, sworn by Ezra Odondi Awino, the advocate on record for the applicants.



3. The genesis of this matter is that the applicants had filed a suit against the respondent at the Environment and Land Court in Migori ELC No. 602 of 2017 (O.S.), and judgment was entered against him. Aggrieved by the outcome, he intended to appeal against the decision, and filed a notice of appeal dated 25th March 2022, lodged in court on 4th April 2022, but not served on the applicants, who only became aware of the existence of the notice, when they were served with an application to which the notice was annexed.
4. In opposing the application by a replying affidavit dated 25th January 2024, sworn by John Odhiambo Leo, the respondent, he points out that notice of appeal dated 25th March 2022 was lodged on 4th April 2022 together with the letter bespeaking proceedings by the firm of Oguttu Mboya & Company Advocates; that he personally collected the notice from his advocate's office, and was directed to deliver it to the office of the applicant's counsel, along Gilly-KCB Road in Migori town. However, having failed to locate the offices, he sent the notice via EMS, to the last known address reflected on the same notice of appeal. He maintains that the notice was properly served on the applicants.
5. He explains that M/s Tom Mboya & Company Advocates, the firm of advocates who took over from M/s Oguttu Mboya & Company Advocates then filed an application for stay, which attached the notice of appeal as well as the letter bespeaking proceedings, which application was never opposed, and no issue of service raised.
6. The applicants filed written submissions reiterating the provisions of rule 77 of the Court's Rules, which are described as mandatory. There are no written submissions filed by the respondent. Has the applicant satisfied the requirements for striking out notice of appeal? It is a position generally acknowledged 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 circumstances of each case. The main issue for this Court to deal with in this application is the competency of the appeal, bearing in mind that, indeed, there is a certificate of posting availed to us to support the position that the notice was eventually sent via EMS courier services.
7. Rule 86 is instructive on the basis upon which an application for striking out a notice or record of appeal can be founded. It provides:

“...provided that an application to strike out 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.”
8. This Court has held on several occasions that parties are bound by the mandatory proviso to Rule 84 that the failure to comply with the same renders an application filed thereunder defective. See Civil Application 35 of 2017 *Total Kenya Limited vs. Rueben Mulwa Kioko* [2018] eKLR.
9. This Court in *Esther Onyango Ochieng vs. Transmara Sugar Company* [2020] eKLR quoting this Court's decision in the case of *Salama Beach Hotel Limited & 4 Others vs. Kenyariri & Associates Advocates & 4 Others* [2016] eKLR stated ‘in *Joyce Bochere Nyamweya vs. Jemima Nyaboke Nyamweya & Another* [2016] eKLR this Court held that parties are bound by the mandatory nature of the proviso to Rule 84 of the *Court of Appeal Rules*. An application seeking to strike out a notice of appeal must be filed within thirty (30) days of service of the notice of appeal, or the filing of the appeal ought to be struck off. The failure to do so renders such an application fatally defective and liable to be struck out.”
10. Similarly, in *William Mwangi Ngaruki vs. Barclays Bank of Kenya Ltd* [2014] eKLR, this Court held that an application to strike out a notice of appeal that is brought after 30 days from the date of service of the notice of appeal is incompetent unless leave is sought and obtained to file the application out of time. See also *Michael Mwalo vs. Board of Trustees of National Social Security Fund* [2014] eKLR.



11. The applicants filed the instant application on 5th September 2023 whereas the respondent alleges that the notice of appeal was served on 19th June 2023 together with the application for stay in the ELC. If this Court was to go by these timelines, then clearly the applicants are in violation of Rule 86 of this Court's rules. The applicants admit that the Notice of Appeal was indeed attached to the application for stay dated 19th June 2023. Why then did the respondent wait until 5th September 2023 to file this application?

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 has not been taken or that 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.

The question before this Court would, therefore, be is the instant application competent before court? Was the application filed within the requisite time frame?

13. We need not belabor the matter. From the history of activities, we are satisfied that the applicants have not fulfilled the proviso to Rule 86 of this Court's Rules, and as such the application is a non-starter both technically and on merit.

See *Tome & Another vs. Attorney General & 2 Others* (Miscellaneous Civil Application No. 185 of 2019) [2021] KECA 150 (KLR). The upshot is that the application is dismissed. Costs off the application shall abide the appeal.

DATED AND DELIVERED AT KISUMU THIS 5TH DAY OF JULY, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

