



**Njeru & another (The Legal Representatives of the Estate of Simeon Njeru Difatha) v Wanjuki & 2 others (Civil Appeal (Application) 82 of 2019) [2024] KECA 1313 (KLR) (27 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1313 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL (APPLICATION) 82 OF 2019  
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA  
SEPTEMBER 27, 2024**

**BETWEEN**

**ELIAS MUGENDI NJERU ..... 1<sup>ST</sup> APPLICANT**

**CATHERINE MARIGU ..... 2<sup>ND</sup> APPLICANT**

**THE LEGAL REPRESENTATIVES OF THE ESTATE OF SIMEON NJERU  
DIFATHA**

**AND**

**LAURENZIA WANJUKI ..... 1<sup>ST</sup> RESPONDENT**

**FLORENCE MARIGU MWANIKI ..... 2<sup>ND</sup> RESPONDENT**

**VIRGINIA RWAMBA NJOKA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application to strike out the Notice of Appeal dated 25th November 2018 and the Record of Appeal dated 18th April 2019 from the judgment of the Environment and Land Court at Embu (Y.M. Angima, J.) dated 25th November 2018 in ELC No. 151 of 2014)*

**RULING**

1. The 1<sup>st</sup> and 2<sup>nd</sup> applicants are the respondents in the substantive appeal. They have, by way of a Notice of Motion dated 20<sup>th</sup> May, 2019 moved this Court under sections 3, 3A and 3B of the [Appellate Jurisdiction Act](#) and rules 82, 83 and 84 of the [Court of Appeal Rules](#) (2010), for orders to strike out the Notice of Appeal dated 25<sup>th</sup> November, 2018 and filed on 26<sup>th</sup> November, 2018 and they have further prayed that the appeal dated 18<sup>th</sup> April, 2019 and filed on 24<sup>th</sup> April, 2019 be struck out.



2. The motion is premised on the grounds on its face and supported by an affidavit sworn by Betty Kiai, learned counsel for the applicants. The gist of the application is that the appeal was filed out of time and it is, therefore, incompetent and it should be struck out.
3. In her affidavit, Betty Kiai, deposes, *inter alia*, that the judgment was delivered on 22<sup>nd</sup> November, 2018 and the appellants filed an application for a stay of execution and a notice of appeal on 26<sup>th</sup> November, 2018.
4. She further deposes that orders for stay of execution were granted on 13<sup>th</sup> March, 2019 and that the appeal was filed on 24<sup>th</sup> April, 2019 out of time; that the appellants went to slumber after they were granted stay of execution; that the appellants were issued with the typed copies of proceedings on 17<sup>th</sup> January 2019 and that the delay cannot be attributed to the trial court as there was no certificate of delay issued. She avers that the appellants have been indolent in instituting the appeal and that the same having been filed over four months after the typed copies were availed and certified the Record of Appeal and Notice of Appeal ought to be struck out. Further that the appellants did not seek leave to file the appeal out of time.
5. In response to the notice of motion, Laurenzia Wanjuki, the 1<sup>st</sup> respondent and on behalf of the other respondents herein swore a replying affidavit on 31<sup>st</sup> July, 2019. She avers that a notice of appeal was filed on 26<sup>th</sup> November, 2018 together with an application for stay of execution which application was heard and a ruling delivered on 13<sup>th</sup> March, 2019 whereby the trial Judge gave orders of stay of execution for a period of two years or pending the hearing and determination of the intended appeal whichever came first and that the trial Judge also gave an order that the appellants be issued with typed proceedings within 45 days from the date of the said ruling. She avers that from the said ruling the appeal was filed on 24<sup>th</sup> April, 2019 which was within the 45 days stipulated by the trial court and that it is not true that the proceedings were certified on 17<sup>th</sup> January, 2019 as this was a mere preparation awaiting the outcome of the appellants application for stay of execution.
6. During the plenary hearing of the application, learned counsel Mr. Kathungu appeared for the applicants. There was no appearance for the respondents despite being notified by the Court of the hearing date. The applicants urged the Court to allow the application on the basis of their application and the written submissions.
7. In the present application, it was clear to the Court that the respondents, after lodging the Notice of Appeal under rule 77(1) of the [Court of Appeal Rules](#) were required to institute the appeal by filing the Record of Appeal within sixty days thereof as provided under rule 84 (1) of the [Rules](#).
8. There is no contestation that the appeal was filed almost 5 months after the Notice of Appeal was filed. There is also no doubt that the respondents did not have the leave of this Court to file and serve the appeal out of time. The respondents seem to hold the erroneous view that they were required to file the record within the timelines given by the Environment and Land Court (ELC). Once the Notice of Appeal was filed before this Court, the ELC was divested of jurisdiction to hear this matter and it was not within the trial court's remit to extend time. The timelines that were applicable are the ones set by the Court of Appeal Rules.
9. Clearly, the appeal was filed out of time and without leave of the Court. The same ought to be struck out.



10. Rule 85 of the *Court of Appeal Rules*, 2022 provides thus:

- “(1) If a party who has lodged a notice of appeal fails to institute appeal within the appointed time, that party shall be deemed to have withdrawn the notice of appeal and the court may, on its motion or on application by any other party, make such order.
- (2) The party in default under sub-rule (1) shall be liable to pay the costs arising therefrom of any persons whom the notice of appeal was served.”

11. Consequently, we allow the Notice of Motion and hereby deem the Notice of Appeal dated 25<sup>th</sup> November, 2018 and filed on 26<sup>th</sup> November, 2018 to have been withdrawn and the Record of Appeal dated 18<sup>th</sup> April, 2019 and dated 24<sup>th</sup> April, 2019 is hereby struck out.

12. The respondents shall pay the costs of the notice of motion to the applicants.

**DATED AND DELIVERED AT NAKURU THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**

**A.O. MUCHELULE**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

