



Gitson Energy Limited v Kochale & 14 others (As Representatives of the Residents of Loiyangalani District, Marsabit County) (Civil Appeal (Application) E042 of 2023) [2024] KECA 1260 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KECA 1260 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) E042 OF 2023
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
SEPTEMBER 20, 2024**

BETWEEN

GITSON ENERGY LIMITED APPELLANT

AND

MOHAMUD ILTARAKWA KOCHALE 1ST RESPONDENT

KOCHALE SOMO JALE 2ND RESPONDENT

ISSA JITEWE GAMBARE 3RD RESPONDENT

DAVID TAMASOT ARAKHOLE 4TH RESPONDENT

SEKOTEY SEYE (SUING FOR AND ON BEHALF OF THE RESIDENTS OF LAISAMIS CONSTITUENCY AND KARARE WARD OF MARSABIT COUNTY) 5TH RESPONDENT

LAKE TURKANA WIND POWER LIMITED 6TH RESPONDENT

MARSABIT COUNTY GOVERNMENT 7TH RESPONDENT

THE ATTORNEY GENERAL 8TH RESPONDENT

CHIEF LAND REGISTRAR 9TH RESPONDENT

THE NATIONAL LAND COMMISSION 10TH RESPONDENT

AARON ILETELE LESIANTAM 11TH RESPONDENT

HENRY PARASSIAN SAKALPO 12TH RESPONDENT

STEPHEN NAKENO 13TH RESPONDENT

JOB LMALASIAN LENGUYAP 14TH RESPONDENT

DAIR LENTIPAN 15TH RESPONDENT



**AS REPRESENTATIVES OF THE RESIDENTS OF LOIYANGALANI DISTRICT,
MARSABIT COUNTY**

(Being an application to strike out the record of appeal filed on 9th May 2023 against the ruling of the Environment and Land Court of Kenya at Isiolo (Y. Angima, J.) on 16th January 2023 in ELC Case No. 1563 of 2014)

RULING

1. In the impugned ruling of the Environment and Land Court of Kenya at Isiolo (Y. Angima, J.) on 16th January 2023, it was found that the court had become functus officio, and therefore without jurisdiction, as it could not revisit the judgment delivered on 19th October 2021 for the purpose of issuing the substantive orders sought in the application dated 5th May 2022. The application had sought the joinder of the applicant/appellant, Gitson Energy Limited, into the dispute that had begun through a plaint dated 14th October 2014 between the 1st to 5th respondents and the 6th to 10th respondents.
2. The dispute was over suit land IR No. 6395/1 (LR 28031) and LR No. 18031/2 which the 1st to 5th respondents claimed was ancestral land which the 7th, 9th and 10th respondents had unlawfully and unconstitutionally alienated to the 6th respondent for the purpose of setting up a wind power project in Loiyangalani. It was alleged that due process had not been followed to alienate the suit land and that there had been no compensation to the affected people. The court found that the alienation had been irregular, unlawful and unconstitutional. The respondents were given one year to regularize the setting aside and alienation failing which the titles would be cancelled.
3. In the motion subject by the impugned ruling, the applicant sought to be joined in the suit and to be allowed to build its windfarm as was the case for the 6th respondent as the setting apart of the land was in progress.
4. The applicant was aggrieved by the ruling and filed a notice of appeal and subsequently the record of appeal in which there was a memorandum of appeal. The record of appeal was dated 10th March 2023.
5. In the instant application dated 12th April 2023 presented under sections 3A and 3B of the *Appellate Jurisdiction Act* and Rules 77(3), 86 and 88(1) of the Court of Appeal Rules, 2022, the 6th respondent sought the striking out of the applicant's record of appeal on the basis that it was fatally defective for contravening the mandatory provisions of the Rules as cited above. The applicant's case was that the notice of appeal did not specify the part of the decision complained of thus failing to disclose the intended cause of action and/or appeal; failed to set forth the memorandum of appeal concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifically the points which are alleged to have been wrongly decided; the memorandum of appeal had set forth lengthy, long-winded arguments and narratives, which were equivalent to written submissions rather than grounds of objection to the decision rendering the appeal unascertainable, obscure and indeterminable.
6. Philippus Leferink is the Chief Executive Officer of the 6th respondent. He swore an affidavit to support the application.
7. James Gitau, the Chief Executive Officer of the applicant, swore a replying affidavit dated 22nd April 2024 in which he admitted that there was a discrepancy in the memorandum of appeal which included



additions inappropriate for a memorandum of appeal. He stated that the inappropriate memorandum of appeal was filed inadvertently at the time of lodging the record of appeal. He stated that the discrepancy in the memorandum of appeal documents arose from the editing of the original by the applicant's director to exclude additions that were not appropriate; the advocate on record rectified the mistake, but inadvertently ended up uploading the incorrect memorandum of appeal. It was pleaded that his was an honest mistake, and that counsel on record had since taken steps to rectify the error by seeking leave to file an amended memorandum of appeal. It was asked that the appeal ought to be heard on merit and not dismissed on technicalities; that incurable damage will be occasioned to the applicant if the appeal is struck out at this stage. Indeed, there is a notice of motion dated 3rd September 2023, seeking leave to amend the memorandum of appeal that the applicant annexed to the replying affidavit. It was submitted by Ms. Kiunga for Mr. Theuri for the applicant that, despite the deficiency in the impugned memorandum of appeal, the parts being appealed against had been delineated thereby giving clarity and coherence to the applicant's grounds of appeal. She urged this Court not to be technical in dealing with this application.

8. The 8th, 9th, 11th to 15th respondents did not oppose the application.
9. Mr. Wairoto for the 6th respondent pointed out, and this was admitted, that the annexed application seeking leave to amend the impugned memorandum of appeal had not been served. Counsel submitted that the memorandum of appeal was a candidate for striking out as it was fatally defective on account of mandatory omissions and gaps; it was a generalized appeal which did not give notice to the respondents or to the Court as to the grievances which the applicant was seeking this Court to settle; that it contained longwinded arguments and narratives and it was difficult for the Court to ascertain what was being appealed against.
10. We have considered the application, the response and the rival submissions.
11. In the case of *Mukenya Ndunda -vs- Crater Automobile Limited* [2015]eKLR this Court emphasized that:

“The power to strike out an appeal on account of failure by an appellant to follow the rules of procedure requires to be exercised carefully and only in cases where it is shown that the party has flagrantly or deliberately or recklessly failed to follow the rules.”
12. In *Abdirahman Muhumed Abdi -vs- Safi Petroleum Products Ltd & 6 Others* [2017], the notice of appeal was served out of time without leave of the Court. The Court was asked to strike out the appeal. In declining to strike out the appeal, the Court noted that the delay in service of the notice of appeal was not inordinate, the explanation by the appellant's advocate was reasonable and no prejudice had been occasioned to the respondents by the delay. It was noted that the overriding objective under sections 3A and 3B of the *Appellate Jurisdiction Act* and the provisions of Article 159(2)(d) of *the Constitution* had changed the policy of the Court towards obviating hardship, expense and delay and to focus on substantial justice.
13. Similarly, the Supreme Court in *Nicholas Kiptoo Arap Korir Salat -vs- IEBC & 6 Others* [2013]eKLR had reiterated that –

“Deviations from and lapses in form and procedure which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances,



the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings...”

14. The common principle when dealing with an application to strike out is that, the court is called upon to exercise its discretion while considering the peculiar facts of each case. (See *Tonie & Another -vs- Attorney General & 2 Others* [2021]KECA 150). The power to strike out is draconian, and that the case or appeal should be saved unless the offending party has been flagrant, deliberate or reckless in his failure to do the correct thing.
15. Lastly, rules of procedure ought to be adhered to strictly because they are intended to achieve justice, but should not be used as hurdles to obstruct justice. The Court should at all times endeavor to enable parties to litigate the merits of a case for justice to be seen to have been done.
16. It is noted that under Rule 77(3) of the Rules it was required for the applicant to indicate whether it was appealing against the whole or part of the decision. Where it intended to appeal against part of the decision, the notice of appeal was required to indicate and specify the part complained of. It was conceded that the notice of appeal in this case, although indicating that the intention was to appeal against part of the decision, it did not specify the part complained of.
17. Regarding the impugned record of appeal, it was stated that an incorrect memorandum of appeal had been inadvertently filed, and that it had discrepancies which did not meet the requirements of Rule 88(1) of the Rules. It was lengthy with longwinded arguments and narratives akin to written submissions. The applicant’s explanation was that the document had been worked on by the Chief Executive Officer of the company and that it was required to be corrected by the firm’s counsel before being filed, but had been filed with the mistakes. The applicant’s counsel submitted that, despite the defects on the memorandum of appeal, the Court would still glean grounds on which the decision of the superior court was being challenged.
18. Usually, where an appellant notices, or it is brought to its attention, that there is a defect in the notice or record of appeal, the Rules allow for an application to amend. In this case, the applicant, after it was clear that it had a defective notice and record of appeal, applied for leave to amend. The application was filed on 3rd September 2023, about five months after the application to strike out was filed. By the time the application to strike out came for hearing on 29th April 2024, about seven months later, the application for leave to amend had not been served. When counsel for the applicant was asked why she had not served, she had no clear answer.
19. The Court would have been prepared to indulge the applicant, but both it and its counsel have shown a level of flagrancy and lack of diligence that cannot save the situation. A little effort would have saved the notice and record of appeal, but they both went to sleep, as it were. It would be unfair, unjust and prejudicial to sustain the notice and record of appeal.
20. Consequently, we allow the 6th respondent’s application and hereby strike out the notice of appeal dated 24th January 2023 and the record of appeal dated 10th March 2023. The applicant will pay costs of this application to the 6th respondent.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU



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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

