



**Gituro v Maki & 3 others (Civil Appeal (Application) E050 of 2023)
[2024] KECA 1204 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1204 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) E050 OF 2023
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
SEPTEMBER 20, 2024**

BETWEEN

RUTH MUNDA GITURO APPLICANT

AND

DAVID MEITIKINI MAKI 1ST RESPONDENT

GLADYS NARILKULMURAN WUAPARI 2ND RESPONDENT

**THE DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER,
TRANSMARA DISTRICT 3RD RESPONDENT**

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

*(Being an Application to strike out and/or expunge the Notice of Appeal
in an intended appeal from the Judgment and Decree of the Environment
and Land Court at Kilgoris (Washe, J.) dated 7th March, 2023)*

RULING

1. The applicant was the 1st respondent in Kilgoris ELC Appeal No. E001 of 2021. The 1st and 2nd respondents herein were the appellants in the appeal, while the 3rd and 4th respondents herein were the applicant's co-respondents in the appeal. The appeal had stemmed from a suit the applicant filed in the subordinate court, to wit, Kisii ELC Case No. 10 of 2017 vide a plaint dated 19th October, 2016. The suit was against all the respondents herein. It sought the following reliefs:
 - a. A declaration that the purported objection proceedings touching on and/or concerning Plot. No. 758, Nkararo Adjudication Section was fraudulent, illegal, null and void.
 - b. An order cancelling and nullifying the entries arising from and/or occasioned by the fraudulent proceedings carried out and/or commissioned by the 1st defendant in collusion with and/or



connivance of the 3rd defendant herein and reinstatement of the name of the plaintiff as the legitimate owner of Plot. No. 758, Nkararo Adjudication Section.

- c. An order of eviction against the 1st and 2nd defendants, their agents and/or servants from Plot. No. 758, Nkararo Adjudication Section.
 - d. A permanent injunction restraining the 1st and 2nd defendants either by themselves, agents, servants and/or anyone claiming under the said defendants from entering upon, re-entering, taking possession, trespassing onto, cultivating, grazing on, building structure, interfering with and/or in any other manner, dealing with Plot No. 758, Nkararo Adjudication Section and/or any portion(s) thereof.
 - e. General damages for trespass.
 - f. Costs of the suit be borne by the defendants.
 - g. Such further and/or other reliefs as the Honourable Court may deem fit and expedient so to grant.
2. The plaint was duly served on all the defendants therein but only the 1st and 2nd respondents (who were 1st and 2nd defendants in the suit) filed their statement of defence on 15th May, 2017.
 3. Subsequently, the trial took place and, in a judgement dated 1st April, 2021, the learned magistrate entered judgment in favour of the applicant.
 4. The 1st and 2nd respondents herein were aggrieved by the decision of the lower court and filed an appeal against the whole judgment before the Environment and Land Court at Kilgoris.
 5. The Environment and Land Court (E.M. Washe, J.), in a judgment dated 7th March, 2023, dismissed the appeal in its entirety, and affirmed the subordinate court's judgment.
 6. The 1st and 2nd respondents were, again, dissatisfied with the judgment of the Environment and Land Court, and filed a notice of appeal and an application for stay of execution dated 24th March, 2023, and 14th April, 2023, respectively.
 7. The applicant has now filed the present application praying for the striking out of the Notice of Appeal and intended appeal on two grounds:
 - a. Firstly, the applicant contends that even though the notice of appeal is dated 24th March, 2023, the record shows that it was lodged at the registry on 27th March, 2023, which was outside the stipulated timeline provided for under Rule 77(2) of the Court of Appeal Rules, 2022.
 - b. Secondly, the applicant contends that the appeal was filed by "strangers", as the 1st and 2nd respondents' advocates who filed the notice of appeal are not properly on record. This is because, the applicant argues, the notice of appeal was lodged by the firm of M/s R. Miruka Company Advocates whereas the 1st and 2nd respondents were represented by the firm of M/s O.M. Otieno & Company Advocates at the Environment and Land Court. Yet, the applicant points out, no leave was sought, nor was there consent issued to the said firm of M/s R. Miruka Company Advocates to come on record after judgment.
 8. The 1st and 2nd respondents oppose the application. However, they did not file any replying affidavit in response. Instead, they filed submissions in reply to the submissions filed by the applicant. Neither they nor their advocate appeared during the plenary hearing to highlight those submissions. Ms. Ochwal, learned counsel, appeared for the applicant and made brief oral highlights of the submissions filed.



9. The application is straightforward. It seeks for the striking out of the notice of appeal on the two grounds outlined above. It is economical to analyze each as argued, and the responses the 1st and 2nd respondents provided to them in seriatim.

10. First, however, we provide the context to the application. The application is brought under Rule 86 of the *Court of Appeal Rules, 2022* which provides that:

“86. Application to strike out notice of appeal or appeal

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 from the date of service of the notice of appeal or record of appeal as the case may be.”

11. Under this rule, an applicant must file an application to strike out within thirty days from the date of service of the notice of appeal. In the present case, the applicant has deponed, without contestation, that she was served with the Notice of Appeal on 30th March, 2023 through electronic mail. Her application to strike out is dated 26th April, 2023 and was filed on 28th April, 2023. As such, the application was timeously filed.

12. Having confirmed that the application was timeously filed and, hence, fit for consideration on its merits, we will now consider the two grounds upon which it is founded.

13. First, the applicant submits that the notice of appeal should be struck out because it was filed out of time; and without the leave of the Court. She submits that judgment in the ELC was delivered on 7th March, 2023; yet the notice of appeal was filed on 27th March, 2023.

14. Rule 77 of the *Court of Appeal rules* reads as follows:

1. A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.
2. Each notice under sub-rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.”

15. In their written submissions, the 1st and 2nd respondents submit that the notice of appeal dated 24th March, 2023 was filed timeously. They argue that the fact that the Deputy Registrar signed the notice of appeal on 27th March, 2023, does not derogate from the fact that the same “was filed on time”, since litigants have no control over the court’s administrative matters. In any event, they submit that the 1st and 2nd respondents cannot be held responsible for the Deputy Registrar’s late action. They cite the decision in *Sacco Societies Regulatory Authority v Biashara Sacco Society Ltd* [2013] eKLR, in support of their submission.



16. It is eminently obvious that the notice of appeal was filed out of time by dint of Rule 77(2). Since the judgment of the ELC subject of the intended appeal was delivered on 7th March 2023, the fourteen days prescribed by the Rules expired on 21st March, 2023. The stamp and endorsement on the notice of appeal, however, indicates that it was filed on 27th March, 2023. It is a tad difficult to understand the 1st and 2nd respondents' insistence that their notice of appeal, which is explicitly dated 24th March, 2023, was timeously filed. As aforesaid, the last day for filing by dint of Rule 77(2) of the [Court of Appeal Rules](#), was 21st March, 2023. It is not possible that the 1st and 2nd respondents post-dated their notice of appeal. This leads to the inevitable conclusion that the notice of appeal was filed out of time; and without the leave of the Court. The position is exacerbated by the fact that though dated 24th March, 2023, the notice of appeal was actually received and endorsed in the ELC registry by the Honourable Deputy Registrar on 27th March, 2023. This is, therefore, the official date of lodgement of the notice of appeal. It is not a satisfactory answer for a party to baldly claim, in submissions, that a document was lodged on a given date but the Deputy Registrar erred in endorsing it on a later date. The 1st and 2nd respondents would have had to make such a claim through a sworn affidavit; and certainly not through written submissions by their advocates. In any event, even if that were the case, the party who has fallen victim to such an error would still have to make an appropriate application for extension of time under Rule 4 of the [Court of Appeal Rules](#). In the present case, this is moot anyway because the notice of appeal was unmistakably lodged out of time anyway as betrayed by the date on its face: it is dated 24th March, 2023 yet the last date for filing the notice of appeal was Tuesday, 21st March, 2023.
17. A notice of appeal filed out of time bereaves this Court of jurisdiction to entertain the appeal and must suffer only one fate: striking out. On this score alone, the notice of appeal dated 24th March, 2023 filed in this appeal is one for striking out.
18. Yet, there is a second reason to striking out the notice of appeal herein. It is that, as the applicant has correctly submitted, the notice of appeal was filed by a firm of advocates – R. Miruka & Co. Advocates – who were not on record for the 1st and 2nd respondents in the superior court – yet, it was so filed without the leave of the Court. The record is clear, and it is not denied, that the 1st and 2nd respondents were represented by the firm of O.M. Otieno & Co. Advocates throughout the proceedings at the ELC. Order 9, Rule 9 of the [Civil Procedure Rules](#) provides that after judgment has been entered in a matter, a new advocate can only come on record for a party either with the consent of the advocate previously on record; or with the leave of the court.
19. In the present case, R. Miruka & Co. Advocates came on record for the 1st and 2nd respondents without filing either a consent by the previous advocates or obtaining the leave of this or the superior court to do so. This is what has led the applicant to term them “strangers” to the case.
20. In response to this line of legal attack, the 1st and 2nd respondents submit that failure to seek leave to come on record was not deliberate but was due to an inadvertent mistake made by their advocate. They submit that such an error of the advocate ought not be visited upon the client by denying them an opportunity to canvass their appeal on merit. In this regard, the 1st and 2nd respondents argue that the omission, which they term as a procedural technicality, is curable under Article 159(2)(d) of the [Constitution](#) ; on the ground that the Court is obliged under rules of natural justice and, in particular, Article 50 of the [Constitution](#) , to determine each case on its merits. For this proposition, the 1st and 2nd respondents cite [Phillip Chemwolo & Another vs. Augustine Kubede](#) [1982-88] KLR 103 at 1040 where Apaloo, JA remarked that: “Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit.”



- 21. The 1st and 2nd respondents further submit that courts are constitutionally obligated to adopt an approach which prefers determination of cases on merits as opposed to procedural technicalities. Hence, they urged that their notice of appeal be treated as regularized and the 1st and 2nd respondents be accorded an opportunity to prosecute their appeal on merit.
- 22. It is true that courts, and, in particular, this Court has a policy preference for determining matters on their merits where possible. It is also true, however, that that policy preference is not licence writ-large for litigants to ignore well-established rules of the game – especially where those rules serve substantive policy goals. As this Court has recently stated, the rule stipulated in Order 9 Rule 9 of the Civil Procedure Rules has substantive and sound policy rationale: to protect an advocate from a litigant who may choose to avoid paying legal fees by instructing another advocate. It also has an inbuilt protection for the litigant against an unreasonable advocate by allowing the court to give leave – of course, subject to the conditions that the court places. (See Municipal Council of Kisumu v Gulf Fabricators Limited & Another (Kisumu Civ. Application No. E103 of 2023). It is, therefore, not enough for the 1st and 2nd respondents to ponderously cite Article 159(2)(c). It behooved them to demonstrate that the deficiency in adhering to the rules of procedure were merely technical. They failed to do so. Indeed, as we have shown, the rule they failed to comply with serves a substantive goal and is not merely formalistic. Besides, the 1st and 2nd respondents had a chance to, but failed to move this Court to grant leave to remedy the various defects in the appeal. The cumulative impact of these defects is to render the appeal still-born.
- 23. In the circumstances, the application dated 26th April, 2023, is allowed. The notice of appeal dated 24th March, 2023 is hereby struck out with costs to the applicant.
- 24. Orders accordingly.

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

HANNAH OKWENGU

JUDGE OF APPEAL

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H. A. OMONDI

JUDGE OF APPEAL

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JOEL NGUGI

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

