



Otene v Kenya School of Law; Orina & 39 others (Interested Parties) (Civil Application E158 of 2021) [2024] KECA 1463 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KECA 1463 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E158 OF 2021
S OLE KANTAI, F TUIYOTT & PM GACHOKA, JJA
OCTOBER 25, 2024**

BETWEEN

RICHARD AKOMO OTENE APPLICANT

AND

KENYA SCHOOL OF LAW RESPONDENT

AND

GERTRUDE MORAA ORINA INTERESTED PARTY

ESTHER WANJIKU KIMANI INTERESTED PARTY

FIONA BOSIBORI MIGIRO INTERESTED PARTY

WAMBUA ANDREW MUTURI INTERESTED PARTY

MUMALI FAITH OSIMBO INTERESTED PARTY

KAHIROO S HALAHALA INTERESTED PARTY

BII VIOLA CHEPKIRUI INTERESTED PARTY

KIMITI GEORGE NJOROHE INTERESTED PARTY

KIRERU JOHN NJENGA INTERESTED PARTY

MUTIGA DICKSON MWENDA INTERESTED PARTY

PARIAT ENOCH LEKHISON INTERESTED PARTY

MWANGI NJOKI MILKAH INTERESTED PARTY

NYAMBANE C OGETO INTERESTED PARTY

JANE NJERI NJOGU INTERESTED PARTY

FRIDAH AKISHA MAKENA INTERESTED PARTY

OMIA GLORIA ADHIAMBO INTERESTED PARTY



THUO RUTH WAIRIMU	INTERESTED PARTY
WOKABI VIVIAN MURINGI	INTERESTED PARTY
NJAAGA NAOMI WAIRIMU	INTERESTED PARTY
MWAURA SARA NJOKI	INTERESTED PARTY
MILDRED KAMENE MUSAU	INTERESTED PARTY
MULI DENNIS MUINDE	INTERESTED PARTY
KENNEDY KERUBO	INTERESTED PARTY
DIBON GITURWA	INTERESTED PARTY
AUMA LAUREEN APONDO	INTERESTED PARTY
OLINDO I MMBONE	INTERESTED PARTY
MOHAMMED AHMED ALI	INTERESTED PARTY
KABOGO R NYAGUTHI	INTERESTED PARTY
ANNE KEMUNTO MORARA	INTERESTED PARTY
MOSES GATHAIYA MBURU	INTERESTED PARTY
LUCY A ODERA	INTERESTED PARTY
MUKONG T MERCY	INTERESTED PARTY
SHARON P OTIENO	INTERESTED PARTY
GEORGE MOGIRE	INTERESTED PARTY
DAVIS WEHESA	INTERESTED PARTY
HANS KIMANI	INTERESTED PARTY
TERRY KARANJA	INTERESTED PARTY
NICHOLAS OTIENO	INTERESTED PARTY
SAMUEL MWANZIA	INTERESTED PARTY
MARTIN K'ONYANGO	INTERESTED PARTY

(Being an application arising from a Notice of Appeal dated 31st August, 2020 against the Ruling and Orders of the High Court of Kenya at Nairobi (Mativo, J.) delivered on 28th August 2020 in Judicial Review Application No. 20 of 2020 Consolidated with Judicial Review Application Nos. 7 of 2020, 8 of 2020, 13 of 2020, and 21 of 2020)

RULING

1. In a decree issued by the High Court of Kenya, Judicial Review Division in Judicial Review Application No. 20 of 2020 (Consolidated with Misc. Civil Application No. 26 of 2020) Mativo, J. (as he then was) ordered and decreed that Kenya School of Law (KSL as 1st respondent) decision declining each applicants admission into the Advocates Training Program) ('ATP') was a gross violation of the applicants' constitutionally guaranteed rights to education provided under Article 43 (1)(f) of the



- Constitution; an order of certiorari was issued quashing the decision of KSL declining each and every individual applicants application into admission into ATP for the 2020/2021 academic year and or for any other academic year period; an order of mandamus was issued compelling the KSL to admit all the applicants into the ATP at KSL and each party was ordered to pay their own costs.
2. KSL appealed that decision by Notice of Appeal dated 31st August, 2020 and applied for stay of execution of the judgment pending appeal. In a ruling of this Court delivered on 7th May, 2021 that judgment was stayed pending hearing and determination of appeal, it being further ordered that the appeal be filed and heard on the basis of priority.
 3. The applicant, Richard Okomo Otene has moved us by Motion on notice said to be brought under rules 83 and 84 of the Court of Appeal Rules praying in the main that Notice of Appeal lodged by the respondent on 2nd September, 2020 be struck out or that, in the alternative and without prejudice, the Notice of Appeal be deemed as withdrawn by operation of law. In grounds in support of the application it is said, *inter alia*, that the applicant is being prevented from taking up his studies because the judgment has been stayed and essential steps have not been taken within the prescribed timelines thus rendering the intended appeal incompetent in law; that Notice of Appeal has not been served on the applicant and all persons affected by the appeal within the prescribed time; that the respondent has not lodged a record of appeal within time prescribed by law and the proviso to rule 82 is not available to the respondent. Those matters are repeated in a supporting affidavit of the applicant who says in addition that the Notice of Appeal served through email on 2nd September, 2020 was neither signed nor sealed; that court documents showed that the respondent paid for the Notice of Appeal on 1st September, 2020; that the respondent filed an application at the High Court for extension of time which application was dismissed; that there is no valid letter bespeaking proceedings; that the 60 days period for filing an appeal have expired; that it is in the interests of justice that the Notice of Appeal be struck out or be deemed as withdrawn.
 4. In a replying affidavit Fredrick Muhia, KSL Academic Services Manager, confirms their intention to appeal the judgment of the High Court; that they requested for proceedings after filing the Notice of Appeal; that they had made follow-ups on proceedings by writing emails to court and making visits to the registry; that those visits had however been hampered by outbreak of Covid-19 where physical presence at the registry was stopped; that the High Court had on 20th December, 2020 determined that Notice of Appeal had been properly lodged and served; that the respondent has been diligent in follow-up of proceedings at the High Court "...but has no control over the registry operations and has not abandoned the intended appeal"; that the application before us is an attempt by the applicant to defeat the orders of stay of execution given "...thus creating a shortcut to gain admission to ATP"; that rules of procedure are hand maids of justice and justice ought to be dispensed without undue regard to technicalities.
 5. When the application came up for hearing before us on 13th May, 2024 the applicant was represented by learned counsel Miss Joy Mdivo but there was no appearance either for the respondent or the intended parties. We allowed the Motion to be urged because we were satisfied that those absent parties had been served with a hearing notice for the day. The appellants had filed written submissions as had the respondent and counsel for the applicant fully relied on written submissions without finding it necessary to give an oral highlight. The applicant, in written submissions, repeats the history of the dispute (which we have set out) stating that Notice of Appeal has not been served contrary to rule 77(1) of the Court of Appeal Rules. The applicant cites the case of Daniel Nkirimpa Monirei v. Sayialele ole Koilele & 4 Others [2016] eKLR for the proposition that the said rule is couched in mandatory terms to ensure that all parties concerned know that the legal dispute is not yet settled to prepare for the next course of action. Several cases are cited in support of the position taken by the applicant that the



court has jurisdiction to strike out a notice of appeal where it is not served on all parties concerned. It is submitted that the letter bespeaking proceedings was not copied to the applicant or the interested parties. It is further submitted for the applicant that replying affidavit by Fredrick Muhia is defective for lack of a date or signature of the deponent and for all these notice of appeal should be struck out.

6. The respondent's written submissions start with a rendition of authors Bullen & Leake and Jacobs *Precedents of Pleading* (12th Edition) on what amounts to a frivolous speculative, vexatious pleading:

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense.”

7. The respondent says that it filed notice of appeal on time; that Civil Appeal No. 472 of 2021 has since been filed; the case of *Kiranga Estates Limited v. National Bank of Kenya* [2017] eKLR is cited on the need for the court to do substantive justice and for litigants to ensure that overriding objectives in civil litigation and appeals are obtained; we are asked to dismiss the application.

8. We have considered the Motion, the rival affidavits and submissions made by the parties.

9. The Motion is brought under the old rules 83 and 84 of the *Court of Appeal Rules* which have since been replaced by the *Court of Appeal Rules*, 2022. Under today's rule 85 a party who has lodged a notice of appeal but fails to lodge the appeal within specified time shall be deemed to have withdrawn the notice of appeal.

10. A person affected by an appeal may, under rule 86, at any time either before or after institution of an appeal apply to the Court to strike out notice of appeal or appeal, as the case may be, on stated grounds:

“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.”

11. The applicant states in the Motion and supporting affidavit that by email dated 2nd September, 2020 at 5.03 p.m.

“...the respondent's counsel purported to serve my advocate with a document purporting to be “Notice of Appeal.”

The Notice of Appeal is dated 31st August, 2020.

12. The Motion before us is dated 18th May, 2021 which is a period way out of the 30 days contemplated by rule 86 of the *Court of Appeal Rules*. The applicant insists on a technical computation of timelines but has not brought himself within the period prescribed by the rule that provides for striking out a notice of appeal. We think therefore that the application has no merit.

13. We are also told by the respondent that Civil Appeal No. 472 of 2021 was filed and is pending before this Court. For that reason the notice of appeal cannot be deemed as withdrawn under rule 83 of the *old rules* (now Rule 85). Considering the issues involved in the dispute we think that it will serve public policy that the appeal be heard and determined on merits.

14. The application has no merit and we dismiss it. Considering the history of the matter let each party meet its own costs of the Motion.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024.



S. OLE KANTAI

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

M. GACHOKA C. Arb., FCIArb.

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JUDGE OF APPEAL

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

signed

DEPUTY REGISTRAR

