



**Kimani v Kimani (Civil Application 170 of 2019)
[2024] KECA 1372 (KLR) (4 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1372 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 170 OF 2019
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
OCTOBER 4, 2024**

BETWEEN

MARTIN F KANG'ARA KIMANI APPLICANT

AND

SAMUEL MACHARIA KIMANI RESPONDENT

*(An application to strike out notice of appeal dated 23rd October, 2019
against the judgement of the Environment and Land Court at Murang'a
(J. G. Kemei, J.) dated 3rd October 2019 in ELC Appeal No. 23 of 2018)*

RULING

Background

1. Before us is an application dated 31st October, 2019 brought by Martin F. Kang'ara Kimani (the applicant) expressed to be brought under Rules 75 and 84 of the Court of Appeal Rules, 2010 (now Rules 77 and 86 of Court of Appeal Rules, 2022) (this Court's Rules) where the applicant seeks for orders:
 1. That this Court be pleased to strike out the notice of appeal dated 23rd October, 2019 filed by the respondent on 23/10/2019 in Murang'a ELCA No. 23 of 2018;
 2. That the costs of this application be borne by the respondent.Samuel Macharia Kimani is the respondent herein.
2. The application is premised on the grounds on the face thereof to wit: that the applicant was the appellant in Murang'a ELCA No. 23 of 2018 against the respondent and by a judgment delivered on 3rd October, 2019 the applicant's appeal was allowed with costs setting aside the lower court judgment in Civil Case No. 98 of 2011 at Murang'a filed by the respondent; that on 23rd October, 2019 the respondent filed a notice of appeal under Rule 75 of this Court's Rules, 2010 against the judgment



of the ELC; that the said notice of appeal was filed out of time contrary to Rule 75(2) of this Court's Rules, 2010 and without any application for extension of time making it amenable for striking out under Rule 84 of this Court's Rules, 2010.

3. The application is supported by an affidavit sworn by counsel for the applicant on record, Mr. J. N. Kirubi, reiterating the grounds in the application.
4. The respondent despite having been duly served with a hearing notice filed no reply. The application is therefore unopposed. We shall however proceed to consider the application on its merits.

Submissions by Counsel

5. During the hearing of the application, neither the applicant's counsel nor the respondent was present. The Court noted that the applicant, represented by the firm of Kirubi, Mwangi Ben & Co Advocates, had filed his written submissions on 2nd March, 2021. The applicant's counsel submitted that the 14-day period within which the respondent was to file the notice of appeal expired on 17th October, 2019; and that the respondent filed the notice of appeal on 23rd October, 2019 way out of time without invoking Rule 4 of this Court's Rules for extension of time. Counsel further submitted that the notice of appeal was served upon them on 30th October, 2019 as per their receiving stamp; that the instant application was filed on 1st November, 2019 well within the 30-day period stipulated under Rule 84 of this Court's Rules, 2010 and the instant application is therefore properly before this Court. Counsel further submitted that the applicant should be allowed to enjoy the fruits of his judgment. Counsel urged this Court to allow the instant application and strike out the notice of appeal.

Determination

6. The Court has carefully considered the application, the grounds and affidavit in support thereof, written submissions, the authorities cited and the law. The discretion sought by the applicant is anchored on Rule 86 read as read together with Rule 77 of this Court's Rules which provide as follows:

“77(1) Any person who desires to appeal to the Court of Appeal shall give notice in writing, which notice shall be lodged in two copies, with the Registrar of the Superior Court.”

- (2) Every such notice under sub-rule (1) shall, subject to Rules 84 and 97, be lodged within fourteen days of the date of decision against which the decision for which the appeal lodged.”

86. 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 notice of 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.”



7. In the case of *Tome & Another v Attorney General & 2 Others* [2021] KECA 150 (KLR) this Court stated that:

“It is now a settled principle that striking out a pleading is a draconian act, which may only be resorted to in plain and outright instances. The power of this court to strike out an appeal is discretionary and is exercised based on the peculiar circumstances of each case.”

8. The impugned judgment was delivered on 3rd October, 2019. In compliance with Rule 75(2) of this Court’s rule, the notice of appeal against the said judgment ought to have been filed by 17th October, 2019. The notice of appeal is dated 23rd October 2019, which is outside the 14-day period required by the law. The respondent despite being served with the instant application chose not to oppose the same or offer any explanation for the delay and the non-compliance with Rule 77(2), and neither did he state why the notice of appeal should not be struck out under Rule 84 (now Rule 86 of this Court’s Rules).

9. In the case of *Patrick Kiruja Kithinji v Victor Mugira Marete* [2015] eKLR this Court held that:

“... It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court.”

10. The instant application was filed on 1st November, 2019 after service of the notice of appeal on 30th October, 2019. We therefore find that the application is compliant with the proviso under Rule 86 of this Court’s Rules as it was filed within 30 days from the date of service of the notice of appeal.

11. In view of the foregoing, we find that the respondent’s notice of appeal dated 23rd October, 2019 was filed out of time in disregard of this Court’s Rules and without leave of this Court. Accordingly, we find that the application seeking to strike out the notice of appeal is merited. We therefore order that the notice of appeal dated 23rd October, 2019 be and is hereby struck out with costs to the applicant. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF OCTOBER, 2024.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

