



REPUBLIC OF KENYA



KENYA LAW
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**Maitha v Mutie (Civil Appeal (Application) 66 of 2020)
[2024] KECA 1634 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1634 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 66 OF 2020
DK MUSINGA, JW LESSIT & LA ACHODE, JJA
NOVEMBER 8, 2024**

BETWEEN

JEREMIAH KIILU MAITHA APPLICANT

AND

AGNES NGEKI MUTIE RESPONDENT

(Being an application to strike out the notice of appeal and the record of appeal from the judgment of the Environment and Land Court of Kenya at Machakos (Angote, J.) dated 19th October 2018 in ELC Cause No. 215 of 2007)

RULING

1. By way of a notice of motion dated 1st December 2020 which is brought under rule 84 of the Rules of this Court, the applicant seeks an order striking out of the notice of appeal dated 10th February 2020, and the record of appeal dated 20th February 2020.
2. The grounds in support of the application are laid down on the face thereof and in the affidavit in support sworn by the applicant. It is contended the respondent filed an application before this Court, to wit, Civil Application No. 32 of 2019, seeking extension of time to file the notice of appeal from the judgment and order of the Environment and Land Court at Machakos in ELC Appeal No. 215 of 2007. Warsame, JA. vide a ruling dated 6th February 2020 allowed the application and directed that the notice of appeal be filed and served within 14 days from the date thereof. The respondent was also directed to pay the applicant costs of Kshs.20,000/- within 7 days from the date of the ruling.
3. It is contended that save for filing and serving the notice of appeal within the prescribed timeline, the respondent neglected and/or declined to comply within the second limb of the order requiring her to pay costs of Kshs.20,000/- to the applicant within 7 days of the ruling. According to the applicant, the respondent did not have the liberty to obey the orders partially. She was required to fully comply with the orders in order for her notice of appeal and the subsequent record of appeal to be deemed to be



properly on record. On that basis, we were urged to find that the notice of appeal dated 10th February 2020 and the record of appeal dated 20th February 2020 are improperly on record, incompetent and proceed to strike them out with costs.

4. The application was opposed by way of a replying affidavit sworn by the respondent. It was averred that the application is unmeritorious ab initio and ought to be dismissed in limine for failure to comply with the provisions of rule 84 of the Rules of this Court. As regards the failure to pay the costs of Kshs.20,000/-, the respondent avers that her advocates wrote a letter dated 4th June 2020 to the advocates of the applicant forwarding a cheque but inadvertently failed to attach the cheque to the said letter. The respondent, peculiarly, blames the applicant for failing to follow up on the said payment and avers that he was equally indiligent.
5. The respondent further avers that upon being served with the application, her advocate called for mode of payment details from the applicant's advocate, which have not been availed so far. She avers that rather than filing the application, the applicant ought to have requested for the payment of the outstanding amount. On that basis, therefore, it was averred that the application is premature, a non-starter and frivolous.
6. In sum, she contends that this application is incompetent for its failure to comply with the provisions of rule 84 of the Rules of this Court; that the balance of convenience tilts in favour of allowing her the right to be heard in the main appeal; that this application has been brought with undue and unexplained delay; and that she is ready and willing to pay thrown away costs in the event the applicant shares the mode of payment.
7. At the hearing hereof, learned counsel Mr. Kilonzi held brief for Mr. Mutinda on behalf of the applicant. There was no appearance on behalf of the respondent, despite service of the hearing notice upon the respondent's advocate. Counsel for the applicant elected to rely entirely on his client's written submissions. Responding to a question by the Court regarding the competence of the application, counsel stated that it had been filed within 30 days of service of the record of appeal as per the proviso to rule 84 of the rules of this Court (2010).
8. We have given due consideration to this application, the replying affidavit, the submissions and the applicable law. It is clear from the ruling of Warsame, JA. that the respondent was required to file and serve the notice of appeal upon the respondent within 14 days of the said ruling. The ruling also directed the respondent to pay costs of Kshs. 20,000/- to the applicant within 7 days thereof. Whereas the respondent complied with the order directing the filing and service of the notice of appeal, she did not comply with the order on payment of costs to the applicant.
9. We agree with the views expressed by the applicant that the respondent was required to fully comply with the orders issued by Warsame, JA. within the stipulated timelines. The failure to pay costs of Kshs. 20,000/- to the respondent in our view, constitutes a disobedience of an order of the Court, which would constitute a sufficient ground for the challenge of both the notice and record of appeal so filed by the respondent.
10. However, and without prejudice to the foregoing, a challenge has been raised by the respondent on the competence of this application. This application is premised on, inter alia, the provisions of rule 84 of the Rules of this Court (2010) which state as follows:

“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 that no appeal lies or 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.” [Emphasis added]

11. Our reading and appreciation of the provisions of rule 84 is that an application seeking to strike out a notice or record of appeal must be filed not later than 30 days from the date of service of the notice or record of appeal. Indeed, Kiage, JA in the decision *Esther Anyango Ochieng vs Transmara Sugar Company (Civil Application No. 62 of 2019)* [2020] KEHC8404 (KLR) 13 January 2020) (Ruling) was of a similar view as this Court. In that matter, the Judge expressed himself thus:

“... I have no doubt in my mind that the application to strike out the notice of appeal on the grounds that it was served out of time and that it was not followed by the filing of the record of appeal is incompetent. It is incompetent because, while it seeks to enforce timelines as against the respondent, it is itself violative of the proviso to Rule 84 which mandatorily requires that it be filed within 30 days. It was not so filed and leave to file it out of time not having been sought and given, the notice of motion should be for striking out. I can do no better than quote what this Court stated in SALAMA BEACH (Supra);

“This Court has in the past had occasion to decide the fate of applications made under Rule 84, but which had been filed out of time. In *Joyce Bochere Nyamweya v Jemima Nyaboke Nyamweya & another* [2016] eKLR, this Court held that parties are bound by the mandatory nature of the proviso to Rule 84 of this Court’s Rules. An application seeking to strike out a notice of appeal or an appeal must be made within thirty (30) days of service of the notice of appeal or the appeal sought to be struck out.

That failure to do so renders such an application fatally defective and liable to be struck out. As was held in the *Joyce Bochere* case (supra), stipulations on time frames within which acts should be done in law are of essence and must be strictly observed. In the event that a party finds itself caught up by the lapse of time as was in this case, the proper thing to do is to file an application for extension of time under Rule 4 of this Court’s Rules. Similarly, in *William Mwangi Nguruki v Barclays Bank of Kenya Ltd* [2014] eKLR, the Court held that an application to strike out a notice of appeal that is brought after 30 days from the date of service of the notice of appeal is incompetent unless leave is sought and obtained to file the application out of time. See also *Michael Mwalo v Board of Trustees of National Social Security Fund* [2014] eKLR.”

12. The notice of appeal and the record of appeal which the applicant seeks to be struck out are dated 10th February 2020 and 20th February 2020 respectively. The respondent avers that the said record of appeal was served upon the applicant on 21st February 2020. The issue of service is not contested by the applicant and we thus take it that service of the record of appeal upon the applicant took place on 21st February 2020. The instant application is dated 1st December 2020. By dint of the proviso to rule 84, this application was supposed to be filed within 30 days from 21st February 2020. It was not, and therefore, by dint of the proviso to rule 84 it is incompetent. In addition, leave of this Court to file the application out time was not sought before filing it. In essence, therefore, this application is incompetent and incurably defective. It must invariably suffer the singular fate of being struck out.
13. In the upshot, the notice of motion dated 1st December 2020 is hereby struck out. We make no orders as to costs of the application.



DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER 2024.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

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

SIGNED

DEPUTY REGISTRAR.

