



**Getonto v Bichage (Civil Application E132 of 2023)
[2024] KECA 1842 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KECA 1842 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E132 OF 2023
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
DECEMBER 20, 2024**

BETWEEN

JOSEPH OINDI GETONTO APPLICANT

AND

LAWRENCE MIRONGA BICHAGE RESPONDENT

*((Being an application to strike out the notice of appeal filed
against the judgment of the Environment and Land Court at Kisii))*

RULING

1. From the scanty record placed before the Court in this application, we are unable to discern the background to the dispute the subject of this application, which was brought by way of a Notice of Motion dated 25th October, 2023 under Rules 79(1) and 86 of the Court of Appeal Rules, 2022. It seeks to have the Notice of Appeal dated 2nd March, 2023 struck out.
2. The Motion was supported by the applicant's affidavit sworn on 25th October, 2023. According to him, the impugned judgment was delivered on 9th March, 2023 at the Environment and Land Court in his favour. That on 28th September, 2023 the respondent served him with a Notice of appeal dated 2nd March, 2023 intending to appeal against the whole judgment. The said Notice was contrary to the mandatory provisions of Rule 79(1) of the Court of Appeal Rules, 2022 as it was served outside the mandatory period of 7 days after lodging a notice of appeal and the instant application has been brought timely and thus ought to be allowed, as prayed.
3. In response to the application, the respondent filed his replying affidavit sworn on 11th December, 2023 in which he averred that upon filing the notice of appeal dated 2nd March, 2023, the same was duly served upon the applicant.



4. That upon lodging the notice of appeal, a letter bespeaking typed proceedings was filed and paid for. However, to date, the respondent has never been supplied with the proceedings to enable him to file the record of appeal.
5. At the plenary hearing, neither the applicant nor the respondent was present though properly served. However, the Court noted that both parties had filed their written submissions hence its reliance on them.
6. To support the application, the applicant submits that Rule 79(1) of the Court of Appeal Rules mandatorily provides that service should be effected within 7 days of lodging. The notice of appeal was filed on 9th March 2023 and was served upon the applicant on 28th September 2023 six months after it was lodged.
7. That under Rule 84(1) of this Court's rules, the respondent ought to have instituted his appeal within 60 days after its lodging which has not been done. Similarly, a letter bespeaking typed proceedings has neither been filed nor served upon the applicants.
8. It is further submitted that the instant application has been timely filed as it is within the 30-day timeframe as stipulated under Rule 86(b) of the Court of Appeal Rules, 2022. In support, the applicants rely on the case of Kenya Industrial Estates Limited vs. Anne Chepsiror and 4 Others (2018) eKLR.
9. In reply, the respondent submits that striking out the notice of appeal will be a very drastic measure as it will remove the respondent from the seat of justice yet he is desirous of appealing against the impugned orders. That the mere failure or default to serve the same within time is an issue that can be remedied at the appropriate moment, if the respondent files the record of appeal with the intent of prosecuting the same.
10. With regard to the failure to apply for proceedings, the respondent submits that on 2nd March, 2023 a letter bespeaking proceedings was filed and paid for, and the respondent is yet to be supplied with the same for purposes of compiling the record of appeal.
11. Having considered the Motion, the affidavits in support of and in opposition to the Motion as well as the submissions made by and on behalf of the parties, the main issue for determination is whether there was service of the notice of appeal upon the applicant by the respondent, as required by Rule 79 of the Rules and, secondly, whether the Notice of Appeal dated 2nd March, 2023 should be struck out.
12. Rule 79 gives the timelines for filing and service of the Notice of Appeal and provides:
79(1) "An intended appellant shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal:
Provided that the Court may, on application which may be made ex parte, within seven days after the lodging of the notice of appeal, direct that service need not be effected on any person who did not take part in the proceedings in the superior court."
13. In the instant case, the respondent lodged the Notice of Appeal on the 9th March, 2023, and served it on the 28th September 2023. There was a delay in the service of the Notice.
14. The applicant has invoked Rule 86 of the Rules to invite the court to strike out the respondent's Notice of Appeal for being filed out of time without leave. Rule 86 speaks to the action that can be taken in case of delay in filing or service or failure to take an essential step, and it provides:



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 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.”

15. From the replying affidavit filed, the respondent maintains that the applicant was served on time. However, nothing has been placed before the Court to ascertain the proof of service. The applicant has annexed a copy of the notice of appeal served and received on 28th September, 2023

16. This Court has, on several occasions, pronounced itself on the consequences of noncompliance with the timelines prescribed under the Court’s Rules. In *John Mutai Mwangi & 26 Others vs. Mwenja Ngure & 4 Others* [2016] eKLR this Court appreciated that strict timelines:

“...is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispense justice in a timely, just, efficient and cost-effective manner.”

17. Similarly, the Supreme Court in *Hamida Yaroi Shek Nuri vs. Faith Tumaini Kombe & 2 Others* [2019] eKLR had occasion to explain the importance of the Notice of Appeal by holding that:

“Being such an important document, the law provides on when it should be filed and served. We agree with the 3rd respondent that service of a Notice of Appeal is crucial as this Court noted in the case of *Zacharia Okoth Obado vs. Edward Akong’o Oyugi & 2 Others* [2014] eKLR thus: “[37] Service of a notice of appeal is crucial. Kiage, JA in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 6 others* [2013] eKLR states:

‘... I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain, and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goalposts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty, and clarity where issues of rules and their application are concerned...’(38). We are persuaded by this dictum



of the learned judge. The notice of appeal ought to be served as provided by the law and all subsequent legal procedures followed.”

18. The rationale for strict adherence to rules of practice and procedure was likewise explained in *Chelashaw vs. Attorney General & Another* [2005] 1 EA 33, where it was held that without rules of practice and procedure, the application and enforcement of the law and the administration of justice would be

chaotic and impossible, and their absence or non-adherence would lead to uncertainty of the law and total confusion since laws serve a purpose and they enhance the rule of law. That enforcement of such rules is imperative was emphasized by this Court in *Onjula Enterprises Ltd vs. Sumaria* [1986] KLR 651, where it was held that:

“The rules of the court must be adhered to strictly and if hardship or inconvenience is thereby caused, it would be that easier to seek an amendment to the particular rule. It would be wrong to regard the rules of the court as of no substance. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to disregard of the principle involved. See *London Association for the Protection of Trade & Another vs. Greenlands Limited* [1916] 2 AC 15 at 38.”

19. It is common ground that the Notice of Appeal was served out of time, 6 months after it was filed. In his response, the respondent has not given a plausible explanation as to why the notice of appeal was served outside time, but has pegged his submissions on the reasons why he failed to file and serve the record of appeal on time. Further, the respondent has not demonstrated why he argues that the service of the notice of appeal was within time.
20. There has been an inordinate delay in effecting service of the notice of appeal, and there has been no attempt made by the respondent to seek any orders which could regularize the default. Accordingly, there is merit in the application herein and it is allowed with costs to be borne by the respondent.

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

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

