



REPUBLIC OF KENYA



**Khamis & 2 others v Kalume & 19 others (Civil Appeal (Application)
E057 of 2021) [2023] KECA 347 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KECA 347 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL (APPLICATION) E057 OF 2021
SG KAIRU, JW LESSIT & GV ODUNGA, JJA
MARCH 31, 2023**

BETWEEN

**ABDULHAKIM ABEID KHAMIS 1ST APPELLANT
JAMAL ABEID KHAMIS 2ND APPELLANT
MOHAMED ABEID KHAMIS 3RD APPELLANT**

AND

**KAHINDI CHARO KALUME 1ST RESPONDENT
WILSON NDORO MWANYUNI 2ND RESPONDENT
MGANDI YAWA 3RD RESPONDENT
MAMBO NZURI 4TH RESPONDENT
FATUMA MAZERA 5TH RESPONDENT
BANDIKA NGAO NYERENYERE 6TH RESPONDENT
RASHID ALI DUTO 7TH RESPONDENT
MWAMTA NGALE BESAHA 8TH RESPONDENT
RASHID KOMBO MYUGO 9TH RESPONDENT
MWANAJUMA NYOTA 10TH RESPONDENT
JUMAA RUWA 11TH RESPONDENT
JEPHASON CHIRINGA KOMBO 12TH RESPONDENT
ALI MBAJI MWINYI 13TH RESPONDENT
KAKONO MKAUMA 14TH RESPONDENT
ANNE MLONGO RUMBA 15TH RESPONDENT**



CHITSESO CHITOJA 16TH RESPONDENT
KOKOI MRINZI 17TH RESPONDENT
THE LEGAL REPRESENTATIVES OF CASSAM SULEIMAN & HAJI DADA
KUMBER EXECUTORS OF THE ESTATE OF HAJI SULEIMAN SUMAR
KHAMISA 18TH RESPONDENT
HAKIKA TRANSPORT SERVICES LTD 19TH RESPONDENT
MUNICIPAL COUNCIL OF MOMBASA 20TH RESPONDENT

(Being an application to strike out the Respondent's record of appeal dated 15th July 2021 from the ruling of the Environment and Land Court of Kenya at Mombasa delivered by the Hon. Munyao Sila, J. on 17th May 2021 in ELC Case No 194 of 2010)

RULING

1. The Applicants in this application are the Respondents in the appeal [hereinafter the Respondents]. The application is dated December 16, 2021, and has been brought pursuant to Rule 84 of the [Court of Appeal Rules 2010](#) [now Rule 86 of the 2022 Rules]. It seeks to have the Appellants Record of Appeal dated July 15, 2021, struck out. The grounds for the application are that the Appellants failed to take essential steps in that, despite lodging the Record of Appeal on July 16, 2021, the Appellants served the same on the November 26, 2021, outside the stipulated time of 7 days and without leave of the Court. The Respondents, invoking Rule 92 (1) of this [Court's Rules](#), urged that five months delay in service of the Record of Appeal disentitle the Appellants from being heard on the appeal, and urged us to strike the Record of Appeal with costs to the Respondents.
2. The background to the appeal is that the 1st to 17th Respondents sued the 18th to 20th Respondents claiming entitlement to 162 acres of the land Plot 387 (Original 280/2 V/MN) and Title CR 8813, [hereinafter the suit land] registered in the names of Cassman Suleiman Sumar and Haji Osman Dada Kumber, by way of adverse possession. The court vide judgement rendered on October 30, 2014, found that the 1st to 17th Respondents were entitled to only 132 out of the 162 acres of the suit land.
3. The Appellants filed an application dated August 27, 2020 before the same Court seeking to be enjoined as defendants, and also seeking to have the judgement dated October 30, 2014 set aside. The grounds of that application was that the Appellants parcels of land MN/V/240 and MN/V/2618, came from the subdivision of the suit land. The court vide ruling rendered on May 17, 2021 found no merit in the application and dismissed it. The Appellants were dissatisfied with the impugned decision and filed the subject appeal.
4. The application was heard on the virtual platform on October 31, 2022. Learned counsel; Mr. Martin Tindi for the 1st to 17th Respondents, Mr. Gift Mwangunya holding brief for Mr. Robinson Malombo for the Appellants and Ms. Oruta for the 20th Respondent were present. There was no appearance for the 18th Respondent despite service upon the counsel on record made through email on October 7, 2022. The suit as against the 19th Respondent was withdrawn.
5. Mr. Tindi relied on his submissions dated October 26, 2022, filed in support of the application. Placing reliance on the case of [Total Kenya Limited v Reuben Mulwa Kioko](#) (2018) eKLR, the Respondents urged that the delay in service of the Record of Appeal as well as the timeous filing of the instant application seeking to strike out that record entitled the Respondents to the orders sought.



6. Mr. Mwangunya relied on the replying affidavit sworn by Robinson Malombo dated September 28, 2022 together with the written submissions dated October 28, 2022 filed alongside the list of authorities. The Appellants' position was that since the Record of Appeal was filed electronically, the Court also served the Respondents automatically, as part of the service provided by the Court. It was contended that the Respondents did not comply with Rule 81 of this Court's Rules by failing to lodge a notice of full and sufficient address for service.
7. We have considered this application. Recently, in the case of *Borderless Tracking Limited vs Thigah* (Civil Application E035 of 2021) [2022] KECA 38 this Court reiterated that the timelines provided by the Rules for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals and the same command obedience.
8. The Appellants have acknowledged that they lodged the Record of Appeal on July 16, 2021, and served the Respondents on the November 26, 2021. It is acknowledged that this was way out of the prescribed timelines under the Rules. The Appellants excuse was that in line of the Covid-19 Directions by the Judiciary they expected the Court to serve the Respondents once the Record of Appeal was filed through the e-filing system. The Appellants urged upon filing of the Record of Appeal through e-filing, they provided the email address of the Respondents and paid for the service fee. The payment receipt is annexure ROM-1 in the replying affidavit of Robinson Onyango Malombo, and among payments made was service fees as contended. The Appellants, through the replying affidavit deposed that Case Management for the hearing of the main appeal took place on April 12, 2022, and that the parties have already filed submissions in readiness for the appeal.
9. We have noted that the Respondents have not denied that the email address used to serve the Record of Appeal was not theirs. The Respondents have not denied that they did not file a full and sufficient address of service as required under Rule 81 of the Court of Appeal Rules [hereinafter the Rules]. We agree with the Appellants that in light of the provisions of Rule 92, which requires an Appellant to service the Memorandum and Record of Appeal on each Respondent who has complied with Rule 81, the Respondents cannot rely on the physical non-service of the Record of Appeal in support of the instant application.
10. We also take judicial notice of the outbreak of the COVID 19 Pandemic and the unprecedented challenges it visited on the administration of justice, which largely interfered with normal court operations for the better part of 2020 and sometimes in 2021. We are aware of the directions that issued by the Judiciary regarding the administration of justice during the pandemic especially as regards filing and service of pleadings and court processes. In the circumstances, we find that the in light of the Covid-19 directions failure to effect physical service upon the Respondents was not fatal.
11. We have come to the conclusion that the Respondents were electronically served with the Record of Appeal, and that the said service sufficed, given the Covid-19 directions by the Judiciary that were in place at the time. We find that the application dated December 16, 2021 has no merit and is accordingly dismissed with costs to the Appellants.

Dated and Delivered in Mombasa this 31st day of March 2023

S. GATEMBU KAIRU (FCI Arb.)

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

