



Muthui v Kenya Rural Roads Authority (KERRA) (Civil Application E520 of 2022) [2023] KECA 331 (KLR) (17 March 2023) (Ruling)

Neutral citation: [2023] KECA 331 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E520 OF 2022
AK MURGOR, JA
MARCH 17, 2023**

BETWEEN

MARGARET WANJA MUTHUI APPLICANT

AND

KENYA RURAL ROADS AUTHORITY (KERRA) RESPONDENT

(Being an application for extension of time within which to file an application to strike out the record of appeal and memorandum of appeal)

RULING

(Being an application for extension of time within which to file an application to strike out the record of appeal and memorandum of appeal)

Ruling

1. By a Notice of Motion dated October 3, 2022, brought pursuant to rule 4 and rule 86 of the [Court of Appeal rules 2022](#), the applicant, Margaret Wanja Muthui seeks an extension of time within which to file an application to strike out the record of appeal and memorandum of appeal filed by the Kenya Rural Roads Authority (KERRA), the appellant/respondent.
2. The motion is brought pursuant to the grounds on its face and an affidavit in support sworn by the applicant, where it was contended that the record and memorandum of appeal were filed and served on August 22, 2022; that on September 26, 2022, the appellant/respondent's advocates filed a notice of withdrawal of the notice of appeal in Nairobi ELRC Petition No E210 of 2021 which notice of appeal was filed on June 30, 2022; that the notice of appeal having been withdrawn on September 26, 2022, no appeal can lie in this matter; that it is for this reason, she has sought leave to extend time to file an application to strike out the memorandum and record of appeal.



3. The applicant's case was that rule 86 of this Court's rules requires an application to strike out the record of appeal to be made within 30 days of service of the record of appeal; that the record of appeal was filed on August 22, 2022 and therefore, she ought to have filed the application to strike out the memorandum and record of appeal on or before September 21, 2022; that subsequently thereto, the respondent had filed a notice of withdrawal of the notice appeal on September 26, 2022 which was outside the 30 days period which had given rise to the need to extend time to file an application to strike out the record.
4. In a replying affidavit sworn on October 28, 2022, CPA Dan Manyasi the Director of Corporate Services of the respondent opposed the application and contended that the respondent was aggrieved by the judgment delivered on June 30, 2022, and lodged a Notice of appeal and served it upon the applicant on the same day; that simultaneously, the applicant requested for certified copies of the proceedings, the judgment and decree; that while filing the Notice of appeal, a typographical error was made in the case number whereby, instead of specifying the case number as Civil Appeal No E210 of 2021, counsel erroneously indicated it as Civil Appeal No E027 of 2021; It was deposed that the application seeking leave to amend the erroneous Notice of appeal is pending before the trial court, and that the respondent had opposed the application for the reason that it was filed without leave of court to amend or serve it out of time, and that in any event, a Notice of appeal already existed on the record.
5. It was further averred that the applicant is seeking to have the respondent denied justice on the basis of procedural technicalities and has not demonstrated what irreparable harm she will suffer if the appeal is determined on merit; that the application should be dismissed since the Notice of appeal filed through the Supplementary record of appeal preserves the appeal pending an application before the trial court to amend the typographical error in the Notice of appeal.
6. In their submissions on behalf of the applicant, Messrs NO Sumba & Co Advocates submitted that the notice of appeal having been withdrawn on September 26, 2022, no appeal can lie in this Court; since the notice of appeal anchoring its foundation was withdrawn, hence the need to file the intended application for striking out the notice of appeal and memorandum of appeal. Citing the case of *Kuwinda Rurinja & Company Ltd vs Kuwinda Holdings Ltd & 3 others*, Civil Application Nai No 243 of 1998 in support of the proposition advanced, I was urged to allow the application. Finally, it was submitted that the application has been filed timeously without any delay and that it would be in the interest of justice to extend time as sought.
7. In their submissions, the State submitted that the applicant's application is anchored on a procedural technicality that runs counter to the tenets of Article 159 of *the Constitution*; that the respondent's hidden intention is to deny the respondent substantive justice; that the respondent should await the outcome of the application before the trial court seeking to amend the typographical error in the notice of appeal; That she will not suffer any irreparable harm or prejudice were she to await the hearing and determination of that application.
8. In determining the instant application, I am fully cognisant of that fact it does not seek to challenge the competence of the notice of appeal or the record of appeal, but is one that is seeking leave to extend time within which to file an application to challenge the competence of the appeal pending before this Court. Hence, my jurisdiction as a single judge is specifically limited to the question of extension of the 30 days period prescribed by rule 86 of this *Court's rules*.
9. The record of appeal was filed on August 22, 2022. The time limit for filing the application would have lapsed on September 21, 2022. Thereafter, on September 30, 2022, the respondent withdrew the notice of appeal pertaining to the record of appeal after the time prescribed of 30 days had already lapsed. According to the applicant, the withdrawal of the notice rendered the appeal incompetent and



liable to be struck out, hence the need to extend time for filing the intended application to strike out the appeal.

Rule 4 of the rules of this Court allows me unfettered discretion on whether to extend time or not. However, that discretion has to be exercised judiciously, and in accordance with the principles set out in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – Civil Application No Nai 251 of 1997 where this Court stated:

“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are first the length of the delay. Secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

8. Notwithstanding that the principles set out above relate to applications to extend time for filing an appeal, they do apply equally to other applications under the rules where the Court is being asked to exercise its discretion to extend time, such as this application before me.
9. I have taken due consideration of all the factors indicated above, and consider that the applicant has raised a prima facie ground on which to canvass an application to strike out the record of appeal, and for this reason should be given an opportunity to be heard on this ground. It is on this basis alone that I am inclined to allow the application.
10. As such, I exercise my discretion to extend the time for lodging an application for striking out the appeal and order the intended application be filed within the next fourteen (14) days from the date of this order.

The costs of this application shall be in the intended application.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original

Signed

DEPUTY REGISTRAR

