



**Attorney General v Musembi & 3 others (Civil Application
E063 of 2021) [2023] KECA 467 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KECA 467 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E063 OF 2021
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
APRIL 28, 2023**

BETWEEN

THE HON. ATTORNEY GENERAL APPELLANT

AND

MIRIAM MUENI MUSEMBI 1ST APPLICANT

TIMOTHY MUCHINA CHEGE WILSON 2ND APPLICANT

GACHANJA ALFRED CHERWON 3RD APPLICANT

JAMES RAYMOND NJENGA 4TH APPLICANT

*(Being an Appeal from the ruling of the High Court at Malindi (Hon. J.O Olola)
dated 30th April, 2021 in Environmental and Land Court Suit No. 102 of 2008)*

RULING

1. The Applicants in this application are Respondents in Civil Appeal No E079 of 2021 while the Respondent herein, the Attorney General, is the Appellant in the said Appeal.
2. By their Motion dated December 17, 2021, expressed to be anchored on Section 3A and 3B of the *Appellate Jurisdiction Act*, Rules 42, 43, 75(2) and 83 of the *Court of Appeal Rules*, 2010, the Applicants seek that this Court strikes out the Respondent's Notice of Appeal dated May 13, 2021 and lodged on May 17, 2021 in Malindi ELC Case No 102 of 2008 for being filed out of time.
3. According to the Applicants, the ruling sought to be appealed against was delivered on April 30, 2021. Being aggrieved by the said decision, the Respondent filed a Notice of Appeal dated May 13, 2021 and concurrently applied for the typed and certified copies of proceedings by way of a letter of the same day. However, the said letter was never served upon the Applicants.



4. According to the Applicants, the said Notice of Appeal infringes Rule 75(2) of the *Court of Appeal Rules*, 2010 which mandates, subject to Rules 84 and 97, that the Notice be lodged within 14 days of the date of the decision against which it is desired to appeal. It was further averred that the Respondent's said Notice of Appeal was lodged on the May 17, 2021 and filed on May 19, 2021 (sic), 4 days and 6 days respectively out of time prescribed under the *Rules*.
5. In the Applicants' view, the said Notice is by law deemed to have been withdrawn. Notwithstanding the foregoing, the Respondent filed the Record of Appeal dated September 14, 2021, on September 15, 2021 way outside the 60 days from the date it lodged its Notice of Appeal hence violating Rule 82 of the said *Rules*. It was therefore averred that both the Notice of Appeal and the Record of Appeal were filed out of time without the Court's leave.
6. According to the Applicants, the delay in prosecuting the appeal is extremely prejudicial to them since judgement was entered in their favour on the September 25, 2015 and the decree was adjusted by consent and issued on January 25, 2019. In their case, it is only fair and just that this Court allows this application.
7. In opposing the application, the Respondent averred that both the Notice of appeal and the Request for typed proceedings were dated May 13, 2021 and were filed in the High Court on the May 19, 2021. The letter bespeaking proceedings was also copied to the respondents therein and the Notice of Appeal was also served on the said respondents on the May 19, 2021. Since the Notice of Appeal and the letter requesting for typed proceedings accompanied each other, it was averred that it was an excusable mistake that the letter requesting the proceedings was not stamped by the Respondent's advocates. However, the letter requesting for Certified typed proceedings was copied to the Applicant herein and bore their full address and particulars of the firm of Michira Messah & Co Advocates.
8. According to the Respondent, this Court has discretion under rule 4 of the *Court of Appeal Rules* to admit the Notice of Appeal out of time and that the 5-day delay is attributable in part to the fact that Friday May 14, 2021 was a public holiday to celebrate Eid al-Fitr with the next official working day being May 17, 2021, when the Appellant successfully lodged the Notice of Appeal. However, the Advocate in charge of the matter was stationed at the Attorney General Chambers Mombasa while the matter was filed and proceeded at the Environment and Land Court in Malindi. Accordingly, part of the delay for filing the Notice of Appeal can be attributed to delays in transmitting and receipt of instructions from the client ministry. In the Respondent's view, the delay involved is not so inordinate as to disentitle the applicant to the relief sought and prejudice them.
9. It was further averred that the delay in filing the record of appeal was occasioned by the delay in the supply of certified copies of proceedings and the ruling. From the certificate of delay dated 9th September, the Court took the period between May 13, 2021 to July 29, 2021 to prepare, certify and supply the proceedings to the appellant. Accordingly, under the proviso to rule 82 of the *Court of Appeal Rules*, any period certified by the Registrar of the court as having been expended to prepare and deliver proceedings to the appellant is excluded in computation of such time. It was therefore averred that the time for submitting the record of appeal began to run on the July 29, 2021 and as such the record of appeal which was filed on the September 15, 2021, was filed within the prescribed 60 days period after the typed proceedings were collected, as prescribed under Rule 82 of the *Court of Appeal Rules*.
10. It was noted that the Respondent has moved this Court through Rule 83 of the Court of Appeal which only provides for withdrawal of the Notice of Appeal, where the appellant has failed to lodge the appeal within the appointed time. Having filed the appeal within time, the Respondent's application is defective in law.



11. The Respondent averred that the Appeal is arguable and has high chances of success as it involves the Principal Secretary, Ministry of Lands who has been found in contempt without fair hearing and should that decision stand, the Respondent would be occasioned the great injustice. Further, the Appeal concerns colossal amounts of money and a great public interest regarding due process to be followed in accordance with the [Public Finance Management Act, 2012](#).
12. The parties filed submissions which substantially mirror the averments contained in the respective affidavits. When the matter was called out for hearing on virtual platform on November 28, 2022, Learned Counsel, Ms Mary Mulwa held brief for Mr Kilonzo for the Applicants while Ms Opiio appeared for the Respondent.

Analysis And Determination

13. We have considered the application, the affidavits in support of and in opposition to the application, as well as the submissions filed and authorities relied upon.
14. As indicated at the beginning of this ruling this application is brought under Section 3A and 3B of the [Appellate Jurisdiction Act](#), Rules 42, 43, 75(2) and 83 of the [Court of Appeal Rules](#), 2010. Apart from Rule 83 of the [Rules](#), none of the other rules cited expressly donate the power to this Court to strike out a Notice of Appeal or an appeal. Rule 83 of the 2020 Rules (now Rule 85 of the 2022 version of the Rules), though intended to halt the process of appeal by deeming the Notice as having been withdrawn, applies where a party who has lodged a notice of appeal fails to institute an appeal within the appointed time. In this case, it is contended that the Notice and Record of Appeal were filed out of time. We shall come back to this issue later in this ruling.
15. We have perused the record of this application and find that the ruling intended to be appealed against was delivered on April 30, 2021. The Respondent had 14 days to file the Notice of Appeal. From our computation of time based on Rule 3 of the [Rules](#), the last day for doing so ought to have been May 14, 2021. The Respondent contends, which contention is not challenged that May 14, 2021, a Friday, fell on a public holiday to celebrate Eid al-fitr hence the next working day was Monday, May 17, 2021 when the Notice of Appeal was filed. Although the said Notice was endorsed by the Deputy Registrar as having been lodged on May 17, 2021, Rule 79(1) of the [Rules](#) provides as follows:

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.
16. Our view of that Rule is that what an intended applicant is required to do is to file the Notice of Appeal within 14 days of the decision sought to be appealed from. Since he has no control over the endorsement of the same by the Deputy Registrar, he cannot be penalised for the delay in having the same is lodged by way of endorsement by the Deputy Registrar. Once he files the Notice, he then is at liberty to serve the same even before it is lodged, which lodgement is signified by the endorsement thereon by the Deputy Registrar.
17. It is therefore our view and we find that the Notice of Appeal was filed within the prescribed time.
18. As regards the Record of Appeal, Rule 86 of the [Rules](#) provides that:

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.

19. Since the Applicants are seeking to strike out both the Notice of Appeal and the Record of Appeal, this was the proper Rule to have been invoked by the Applicants. However, to successfully invoke it, the Applicants were required to bring their application before the expiry of thirty days from the date of service of the Notice of Appeal or Record of Appeal. In this case the Notice of Appeal was filed on May 17, 2021 and was served on May 19, 2021. From the annexure “E” to the application, the Record of Appeal was served on September 21, 2021

“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.” The instant application is therefore clearly incompetent, as it is filed out of time in violation of the proviso to Rule 84, having been lodged on April 14, 2021, after almost two years since the Applicant was served with the Notice of Appeal on June 6, 2019. The Applicant did not bring any evidence of having been granted extension of time to file the said application, and it is therefore amenable for striking out.”

20. Accordingly, the application under Rule 86 was in the circumstances out of time and could not be entertained unless the time for bringing it was enlarged. The reason why the said proviso was introduced was to avoid late applications for striking out Notices and Records of Appeal when the matter is ripe for hearing.
21. It is therefore not surprising that the Applicants sought refuge under Rule 83 of the 2020 Rules (now Rule 85 of the 2022 version of the *Rules*), a Rule that was clearly not relevant to the grounds upon which the application was brought.
22. Having considered the application, we find that the same is both incompetent having been unprocedurally brought, and unmerited as the Notice of Appeal was filed within time. Consequently, we dismiss the Motion dated December 17, 2021 with costs to the Respondent.
23. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF APRIL 2023.



P. NYAMWEYA

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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

