



**Ndirangu & 3 others v Isosho (Civil Application E038 of 2021)  
[2023] KECA 433 (KLR) (14 April 2023) (Ruling)**

Neutral citation: [2023] KECA 433 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E038 OF 2021  
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA  
APRIL 14, 2023**

**BETWEEN**

**GEORGE NDIRANGU ..... 1<sup>ST</sup> APPLICANT  
GEORGE KING'ORI GATHOGO ..... 2<sup>ND</sup> APPLICANT  
ANNE NYAMBURA NDERITU ..... 3<sup>RD</sup> APPLICANT  
ATHI-LAMU SELF HELP GROUP ..... 4<sup>TH</sup> APPLICANT**

**AND**

**HAWRITA BUCHETE ISOSHO ..... RESPONDENT**

*(Being an application to strike out the respondent's record of appeal dated 2nd March 2020 from the judgement of the Environment and Land Court of Kenya at Malindi delivered by the Hon Mr Justice J.O. Olola on 19th July 2018 in ELC Case No 117 of 2012)*

**RULING**

1. The Applicants herein moved this court by way of Notice of Motion dated November 12, 2020, expressed to be brought under Rule 84, 82(1) and (2), 83 of the [Court of Appeal Rules](#) seeking that that this Court be pleased to strike out the Respondent's Record of Appeal in Malindi Civil Appeal No 31 of 2020 dated March 2, 2020 and filed on March 5, 2020. They also sought an order that the costs of the application be borne by the Respondent.
2. The application was supported by an affidavit sworn by Gicharu Kimani, learned counsel having the personal conduct of this matter on behalf of the Applicants. According to the deponent, the Respondent filed a notice of appeal on 2<sup>nd</sup> of August 2018 which was served upon the Applicants on August 15, 2018. However, there was a delay in the time taken to type, proof read, and certify the proceedings thus necessitating the issuance of a Certificate of Delay on January 23, 2020 to the Respondent which granted the Respondent Ninety Three (93) days from the July 24, 2018 to October



- 25, 2019. The Respondent however, filed her Record of Appeal on the March 5, 2020 over three (3) months later when the prescribed statutory period of sixty (60) days had lapsed.
3. Based on Rules 83 and 84 [now Rules 85 and 86 respectively] of the *Court of Appeal Rules*, it was deposed that the Record of appeal filed on March 2, 2020 should be dismissed and/or struck out.
  4. The application was not opposed as the Respondent neither filed a replying affidavit nor submissions despite having been notified to do so.
  5. When the matter was called out for virtual hearing on October 24, 2022, none of the parties to the application was represented despite having been duly notified of the hearing date. However, the Applicants had filed their submissions in which they relied on Rule 82 [now Rule 84] of *Court of Appeal Rules* that prescribes the period of instituting an appeal as being within sixty days of the date when the Notice of Appeal was lodged. In support of their submissions, the Applicants relied on *Munir Abubakar Masoud (As member of Tawheed Muslim Association) v Ali Abdalla Salim & another* [2018] eKLR, and *Tropicana Hotels Limited v SBM Bank (Kenya) Limited (formerly known as Fidelity Commercial Bank Ltd* [2020] eKLR. It was submitted that and submitted that the Respondent having collected the Certified copies of proceedings on October 25, 2019 and filed their Record of Appeal on March 5, 2020, effected service upon the Applicants on August 3, 2020 which is Four (4) months later. To buttress their case, the Applicants cited *Patrick Kiruja Kithinji vs Victor Mugira Marete* [2015] eKLR and urged that as the Record of Appeal was not filed within the statutory period, the Respondent's Record of Appeal ought to be struck out as an essential procedural step was not taken or was not taken within the prescribed time.
  6. We have perused the record of appeal and confirmed that the judgement was delivered on July 19, 2018. The letter requesting for proceedings was dated July 24, 2018. On January 23, 2020 the Deputy Registrar of the High Court issued a certificate to the effect that the time taken to type, proof read and certify the proceedings was from July 24, 2018 to October 25, 2019, a total of 93 days. It was further confirmed in the same certificate that the typed certified copies were collected on January 16, 2020. This appeal was filed on March 5, 2020.
  7. Rule 84 of the *Court of Appeal Rules*, 2022 provides as follows:
    - (1) Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged—
      - (a) a memorandum of appeal, in four copies;
      - (b) the record of appeal, in four copies;
      - (c) the prescribed fee; and
      - (d) security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.



- (2) An appellant shall not be entitled to rely on the proviso to sub- rule (1) unless the appellant’s application for such copy was in writing and a copy of the application was served upon the respondent.
- (3) The period specified in sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction.

- 8 It is clear from the said rule that the excluded period is such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy. In this case judgement having been delivered on July 19, 2018, pursuant to Rule 83(1) of the *Court of Appeal Rules*, time, for the purposes of the instituting an appeal, was supposed to start running after lodging of the notice of appeal which was August 2, 2018. However, the Respondents had applied for a copy of the proceedings on July 24, 2018, before the Notice of Appeal was lodged. Since the 60 days prescribed for instituting an appeal can only start running after a Notice of Appeal has been lodged and since the Respondents also have the benefit of the proviso to Rule 84(1), it follows that in this case the time taken by the Respondents before applying for the proceedings cannot be taken into account since that period was covered by the grace period prescribed for lodging the Notice of Appeal.
9. It therefore follows that in computing time for the purposes of filing of the Record of Appeal, the only period to be taken into account is the period after January 16, 2020 when the proceedings were collected and not October 25, 2019 when the proceedings were ready. This must be so since the period to be excluded not only includes the period required to type the proceedings but also the time when the proceedings were delivered or when the party applying for the same was notified that they were ready for delivery. In this case, the Applicants have not contended that they were not served with the letter requesting for the proceedings as required under Rule 84(2) so as to deny the Respondents the benefit of the proviso to Rule 84(1) of the Rules of this Court. On the face of it, the letter requesting for a copy of the proceedings was copied to the Applicant’s advocates.
10. We do not have any evidence that the Respondents were notified that the proceedings were ready on a date earlier than January 16, 2020 when they were collected. It follows that the appeal which was filed on March 5, 2020 was filed about 48 days after collection of the proceedings was instituted within time.
11. We further note that though the record of appeal was filed on March 5, 2020, the instant application was filed on April 30, 2021. In this case there was no averment in the supporting affidavit as to when the Record of Appeal was served. In their submissions, the Applicants contended that service of the Record was affected on March 5, 2020, over three months after it was filed. We cannot take such submissions seriously.
12. First, that being a factual matter ought to be averred in the supporting affidavit rather than being raised in the submissions. Secondly, assuming that was true, then the Applicants would be barred from taking an issue regarding the competency of the appeal in the manner they did because pursuant to the proviso to Rule 86 of the *Rules* of this Court, such an application can only be brought before the expiry of thirty days after date of service of the Notice or Record of Appeal as the case may be.
13. It follows that the Notice of Motion dated November 12, 2020 is both incompetent and devoid of merits. It is dismissed but with no order as to costs as the Respondent did not respond to the application.
14. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 14<sup>TH</sup> DAY OF APRIL 2023.**



**S. GATEMBU KAIRU (FCI Arb.)**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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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**

