



REPUBLIC OF KENYA



**Yusuf & another v Kikuvi & another (Civil Application
E001 of 2022) [2023] KECA 689 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KECA 689 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E001 OF 2022
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
MAY 26, 2023**

BETWEEN

ALI IBIDO YUSUF 1ST APPLICANT

MOHAMED BUTE GALGALO 2ND APPLICANT

AND

JEREMIAH MUSEMBI KIKUVI 1ST RESPONDENT

DISTRICT LAND REGISTRAR 2ND RESPONDENT

(An application to strike out the Notice of Appeal, Memorandum of Appeal and Record of Appeal against the judgment of the Environment and Land Court at Malindi (Angote J.) delivered on 15th April 2016 in Malindi Environment and Land Court Case No 164 of 2011)

RULING

1. Ali Ibido Yusuf and Mohamed Bute Galgalo, the Applicants herein and the 1st and 2nd Respondents in the substantive Appeal, have filed a Notice of Motion application dated 25th January 2022, in which they are seeking orders that the Memorandum and Record of Appeal filed by the 1st Respondent herein in the substantive Appeal being Jeremiah Musembi Kikuvi vs Ali Ibido Yusuf & 2 others, Malindi Civil Appeal No 57 of 2021, together with the Notice of Appeal be struck out. The said application is supported by an affidavit sworn on 25th January 2022 by the 1st Applicant.
2. The main grounds for the application are that the Notice of Appeal, Memorandum of Appeal, and Record of Appeal were filed and served out of time without leave of Court. According to the Applicants, judgment was delivered by the Environment and Land Court in Jeremiah Musembi Kikuvi vs Ali Ibido Yusuf & 2 Others, Malindi ELC Case No 164 of 2011 on 15th April 2016 dismissing the 1st Respondent's suit, and the 1st Respondent subsequently lodged a Notice of Appeal on 15th April 2016 and served the Applicants on 20th June 2016 out of time. Further, that the 1st Respondent



subsequently applied for copies and certified proceedings vide a letter dated 28th April 2016 which was not served on the Applicants, and obtained a certificate of delay dated 10th November 2016 indicating that the proceedings were prepared from 28th April 2014 to 17th August 2016. That the 1st Respondent thereupon took no action in the appeal until 10th January 2022 when he served the Applicants with a Record of Appeal lodged in Court on 9th December 2021.

3. The Applicants aver that the Record of Appeal having been lodged on 9th December 2021, ought to have been served on 16th December 2021 but was delayed up to 10th January 2022. In addition, that the period from the date of filing the Notice of Appeal on 15th April 2016 to date of service of the Record of Appeal on 10th January 2022 was 69 months; that the Record of Appeal was due to be filed on 15th June 2016, and there was thus a delay of 67 months in doing so. Furthermore, that even if the time required for preparation of proceedings by the Court was considered and the time excluded by the certificate of delay was factored in, the time for lodging the Memorandum and Record of Appeal lapsed on 17th October 2016, which meant there was a delay of 62 months by the time the said documents were lodged on 9th December 2021. Further, the 1st Respondent had not bothered to obtain the Court's leave to comply with the Rules. Lastly, that the delay in filing the memorandum and record of appeal and their service was inordinate, and as justice delayed is justice denied, was prejudicial to the Applicants.
4. The Respondents did not file any pleadings in response to the application, and during the virtual hearing of the application held on 6th February 2023, learned counsel Mr. Jengo appeared for the Applicants, while there was no appearance for the Respondents, despite their advocates having been duly served with the hearing notice. Mr. Jengo relied on his submissions dated 30th December 2022 in which the averments hereinabove were reiterated. It was submitted that the Notice of Appeal was served 2 months after its filing, while the Memorandum and Record of Appeal were filed on 9th December 2021, 68 months after the Notice of Appeal was filed, and served 31 days from the date of filing, that is on 10th January 2022, without seeking leave for extension of time.
5. The counsel urged that the delay and malfeasance was a characteristic of a party that who was not interested in their case and was only intent at delaying the judicial process. Reliance was placed on the decision in *Martin Kabaya vs David Mungania Kiambi*, Nyeri Civil Application No 12 of 2015 where the Court pronounced itself on the reasons why judicial proceedings require to be concluded in a timely fashion. Also cited were the decision in the case of *Mae Properties Limited vs Joseph Kibe & another* [2017] eKLR that a notice of appeal dies a natural death after the expiry of 60 days unless its life is extended by operation of the proviso to Rule 82(1) or an order extending time for the lodging of the appeal; and the decision in *Mistry Premji Ganji (Investment) Limited vs Kenya National Highways Authority* [2019] eKLR, that a Record of Appeal founded on a defective Notice of Appeal cannot stand.
6. Rule 75 of the Court of Appeal Rules of 2010 which were then applicable, specified the period within which the notice of appeal should be filed as 14 days, while Rule 77(1) provided that an intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal. Similar provisions are now provided in Rules 77 and 79 of the Court of Appeal Rules of 2022. The impugned notice of appeal dated and lodged on 15th April 2016 was lodged within the requisite fourteen days of the judgment delivered by the ELC on 15th April 2016. The Respondents however do not contest that the said Notice of Appeal was served on 20th June 2016 outside the seven days prescribed by the Rules.
7. This Court has severally held that the timelines for the taking of certain steps are indispensable to the proper adjudication of the appeals that come before us, and that the Rules are expressed in clear and unambiguous terms and command obedience. See the decisions in *Salama Beach Hotel Limited & 4*



Others vs Kenyariri & Associated Advocates & 4 Others (2016) eKLR and *Joyce Bochere Nyamweya vs Jemima Nyaboke Nyamweya & Another* [2016] eKLR. In the case of *Daniel Nkirimpa Monirei vS Sayialel Ole Koilel & 4 others* [2016] eKLR, this Court (Karanja, Okwengu & Azangalala JJ.A) held as follows on the timelines for service of the Notice of Appeal:

“The purpose of service of a Notice of Appeal is to alert the parties being served that the case in question has not been concluded yet as the same has been escalated to another level. This enables the party to prepare and get ready for another fight, be it by way of gathering resources or just getting mentally prepared for defending the intended appeal. Failure to serve a party with a Notice of Appeal within the time prescribed by law gives a party false belief that the matter has been concluded, only to be ambushed later with the record of appeal in which the said notice is tucked away somewhere in the record. That occasions prejudice to the ambushed party, and it is in our view a habit that should not be countenanced in any fair and just process. That would explain why Rule 77(1) of the Court of Appeal Rules is couched in mandatory terms.”

8. It is also not contested that the 1st Respondent filed and served the Memorandum of Appeal and the Record of Appeal out of time, and that the 1st Respondent has not made any application for extension of time, nor given any reasons for the delay. Under the then applicable Rule 82 of the Court of Appeal Rules of 2010, an appeal was instituted by lodging a Memorandum of Appeal and Record of Appeal in the appropriate registry, within sixty (60) days of the date when the Notice of Appeal was lodged. The proviso to Rule 82 (1) 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 the copy of the proceedings, where an application for the proceedings was made within thirty (30) days of the date of the decision intended to be appealed against. Rule 82 (2) in addition provided that an Appellant shall not be entitled to rely on the proviso unless the application for the copy of the proceedings was in writing and a copy of it served on the Respondent. similar provisions are now found in Rule 84 of the Court of Appeal Rules, 2022.
9. Under Rule 84 of the 2010 Court of Appeal Rules, any person affected by an appeal may apply to strike out Notice of Appeal or Appeal on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. The proviso to Rule 84 required such an application to be brought before the expiry of thirty (30) days from the date of service of the Notice of Appeal or record of Appeal as the case may be. Similar provisions are now found in Rule 86 of the 2022 Rules. In this regard, it is notable that the application to strike out the Memorandum and Record of appeal was lodged on 25th January 2022, within the 30 days of service, since it was not contested that the 1st Respondent served the Applicants with the said pleadings on 10th January 2022. As regards the Notice of Appeal, the application was out of time as the said Notice was served on the Applicants on 20th June 2016.
10. This finding notwithstanding, this Court has the power and discretion to deem a Notice of Appeal withdrawn on its own motion as was held in the case of *Mae Properties Limited vs Joseph Kibe & another* [2017] eKLR, where an application to strike out a Notice of Appeal was filed outside the 30 day limit in the Rule 84 proviso, but the Court nevertheless resorted to deeming provision in Rule 83 of the Court of Appeal Rules of 2010 to strike it out. The provisions of Rule 83 of the Court of Appeal Rules, 2010 and Rule 85 of the Court of Appeal Rules 2022 are predicated on the existence of circumstances from which this Court can deem that a Notice of Appeal had been withdrawn, and such circumstances exist in the instant application, given that there has been no application to explain the delay or extend time for serving the Notice of Appeal, or regularize the Record of Appeal.



11. In the circumstances, it is our finding that the Applicants' Notice of Motion application dated 25th January 2022 is merited, and the Notice of Appeal dated and lodged on 15th April 2019, and the Memorandum of Appeal and Record of Appeal both lodged on 9th December 2021 by the 1st Respondent are hereby struck out. There shall be no order as to the costs of the application dated 25th January 2022, and of the struck-out appeal.

12. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF MAY, 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

