



Kenya Revenue Authority v Ojienda t/a Prof Tom Ojienda & Associates (Civil Appeal (Application) 285 of 2018) [2023] KECA 514 (KLR) (12 May 2023) (Ruling)

Neutral citation: [2023] KECA 514 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 285 OF 2018
A ALI-ARONI, JM MATIVO & PM GACHOKA, JJA
MAY 12, 2023**

BETWEEN

KENYA REVENUE AUTHORITY APPLICANT

AND

**TOM ODHIAMBO OJIENDA T/A PROF TOM OJIENDA &
ASSOCIATES RESPONDENT**

((Being an application for striking out the record of appeal from the judgment and decree of the High Court of Kenya at Nairobi (G. V. Odunga, J.) dated 11th May 2018 in High Court Misc. Application No. 471 of 2016))

RULING

1. Before us are two applications dated September 3, 2018 (to strike out the record of appeal dated September 3, 2018) and November 22, 2018 (seeking extension of time for the record of appeal to be admitted out of time.)
2. When the matter was called on the Goto virtual platform, Prof Tom Ojienda and Mr Makhube appeared for the applicant in the application to strike out the record of appeal and for the respondent in the application for extension of time. There was no appearance for Kenya Revenue Authority, the applicant. The court confirmed that Mr David O Ontweka, advocate for Kenya Revenue Authority, was duly served with the hearing notice.
3. Before addressing the two applications, we have to highlight two significant points. Firstly, Prof Ojienda, senior counsel, informed the court that the dispute between the parties has been settled. Therefore, he was pursuing the application to strike out, so that there can be a formal closure to the appeal. This means that if the respondent was present at the hearing to confirm that position, this appeal would have been marked as settled.



4. Secondly, we note that on October 8, 2019, the advocates for the parties appeared before a single judge of this court (F Sichale, JA) and recorded a consent that the two applications, for extension of time and for striking out be heard together. However, we note that an application for extension of time is to be heard by a single judge in accordance with the rule 55 (1) of the [Court of Appeal Rules 2022](#). We shall revisit this issue later in the ruling.
5. Regarding the application for striking out, Prof Ojienda in his supporting affidavit sworn on September 3, 2018 deposes as follows: that judgment was delivered on May 11, 2018 by the High Court (G. V Odunga, J as he then was); that the appellant lodged the notice of appeal on May 17, 2018 and therefore the 60 days' appeal window closed on June 16, 2018 in accordance with rule 82(1) (now rule 84 of the [Court of Appeal Rules 2022](#)); that the appeal was lodged on August 15, 2018 which was 30 days out of time; that there was no evidence on record in the form of certification by the deputy registrar of the High Court; that it took one month for the typed proceedings to be ready; that the appellant did not seek extension of time before lodging the appeal and that if a party who files a notice of appeal fails to file the appeal within time, such a party by dint of rule 85 of the [Court of Appeal Rules, 2022](#) is deemed to have withdrawn the notice of appeal.
6. The averments in the supporting affidavits are recited again in the written submissions dated April 23, 2019; we need not rehash them again.
7. In response, Mr David O Ontweka for the respondent in a replying affidavit sworn on November 2, 2018, deposed as follows: that the notice of appeal was filed on April 17, 2018; that by a letter dated June 16, 2018 which was copied to the applicant, the respondent applied for typed proceedings; that the respondent was notified by the deputy registrar of the High Court that the proceedings were ready on June 29, 2018; that the delay of 51 days is attributed to the time taken by the court to avail the typed proceedings and that the appeal was filed within time.
8. The respondent also filed written submissions dated April 20, 2019, reiterating the averments in the replying affidavits.
9. We have carefully read the application, the rival affidavits and the authorities relied on by the parties.
10. The only issue to determine in this application is whether the appeal was filed within time and whether in the circumstances of this case, there is need for the hearing of the application for extension of time. It is clear from the record that the respondent did not enclose a certificate of delay in the record of appeal to account for the delay in filing the record of appeal outside the 60 days' timeline. Rule 84 (1) of the [Court of Appeal Rules](#) provides that where a party has written to the registrar applying for proceedings, such period taken to prepare the proceedings shall be excluded in the computation of time, provided such letter is copied to the other party.
11. We have perused the record of appeal and we note that the respondent did not include the certificate of delay when it was filing the record of appeal on August 16, 2018. The respondent therefore failed to bring itself within the ambit of rule 84 (1) of the [Court of Appeal Rules](#). We note further that a certificate of delay was introduced through a supplementary record of appeal dated November 2, 2018. This was a kneejerk reaction from the respondent, and it has been done late in the day.
12. From the record before us, it is beyond argument that the appeal was lodged 30 days out of time. The only way the appeal could be saved was by way of extension of time. The application for extension of time ought to have been argued before a single judge. The parties recorded a consent that the two applications be argued together. Though the applicant filed written submissions, which we should consider in line with rule 58 (1) of this [Court's Rules](#), the application serves no useful purpose in view



of the history of the matter and the fact that the applicant has informed the court that the appeal has been compromised and this assertion has not been controverted.

13. In view of the foregoing, and considering the fact that the appeal has been settled, the order that commends itself to us is that the appeal dated August 15, 2018 is hereby struck out and that each party shall bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.

ALI-ARONI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

