



**Kenya Revenue Authority v Ayisi; Nairobi City County Government (Interested Party)
(Civil Appeal (Application) 287 of 2018) [2023] KECA 538 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 538 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 287 OF 2018
A ALI-ARONI, JM MATIVO & PM GACHOKA, JJA
MAY 12, 2023**

BETWEEN

KENYA REVENUE AUTHORITY APPLICANT

AND

ROBERTY AYISI RESPONDENT

AND

NAIROBI CITY COUNTY GOVERNMENT INTERESTED PARTY

(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 16th May 2018 in High Court Petition No. 412 of 2016)

RULING

1. Before us are two applications dated 3rd September 2018 (to strike out the record of appeal dated 16th August 2018) and 22nd November 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 ourselves to the two applications, we were 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 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 8th October 2019, the advocate 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, Dr. Robert Ayisi in his supporting affidavit sworn on 3rd September 2018 deposes as follows: that judgment was delivered on 11th May 2018 by the High Court (G. V. Odunga, J. as he then was); that the appellant lodged the notice of appeal on 17th May 2018 and therefore the 60 days' appeal window closed on 16th June 2018 in accordance with Rule 82(1) (now Rule 84 of the [Court of Appeal Rules 2022](#)); that the appeal was lodged on 15th August 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 23rd April 2019, we need not rehash them again.
 7. In response, Mr. David O. Ontweka for the respondent in a replying affidavit sworn on 2nd November 2018 deposed as follows: that the notice of appeal was filed on 17th April 2018; that by a letter dated 16th June 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 29th June 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 20th April 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 16th August 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 2nd November 2018. This was 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 15th August 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

