



**Mulama v Ethics & Anti-Corruption Commission (Civil Application E186 of 2021) [2023] KECA 582 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 582 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E186 OF 2021  
PO KIAGE, F TUIYOTT & AO MUCHELULE, JJA  
MAY 12, 2023**

**BETWEEN**

**SAMUEL ONGONGA MULAMA ..... APPLICANT**

**AND**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... RESPONDENT**

*(An application to strike out the notice of appeal and the record of appeal from the Judgment of the High Court at Kakamega (Njagi, J.) dated 12th February, 2021 in Constitutional Petition No. 14 of 2019)*

**RULING**

1. By a notice of motion dated June 15, 2022, Samuel Ongonga Mulama, the applicant, seeks to strike out the respondent's notice of appeal filed on February 25, 2021 for being lodged out of time and the record of appeal filed on October 21, 2021 for being served out of time.
2. In the supporting affidavit, the applicant deposed that the judgment was delivered on February 12, 2021. Thereafter the notice of appeal was lodged at the High Court's registry on March 19, 2021 contrary to the provision in rule 77(2) of the Court of Appeal Rules (Rules). Further, the respondents lodged the record of appeal on October 12, 2021 and then served the same upon the applicant's advocate on May 25, 2022. This was more than 5 months after the notice of appeal was filed in clear contravention of the required timelines in the Rules. The applicant avers that this appeal is time-barred and consequently ought to be struck out with costs.
3. The respondent, through Esther Githinji, an advocate at the commission asserted that the notice of appeal was filed within 14 days. She explained that the notice of appeal together with a letter bespeaking the proceedings were lodged at the High Court's registry via email on February 25, 2021. The application was assessed on February 26, 2021, 12 days after the delivery of the judgment, and the fees were settled on even date, via M-pesa. The date on the face of the notice, which reflects when it



was executed by the Deputy Registrar, is March 19, 2021. Therefore, the proper date of lodging was 26<sup>th</sup> of February 2021, which was within the 14 days as required by rule 77(2). The said notice and letter bespeaking the proceedings were served on the respondent via email on the date they were lodged. However, the respondent did not respond to the email.

4. The typed proceedings were ready on September 8, 2021 and the certificate of delay was issued on September 29, 2021. The memorandum and record of appeal were lodged via email on October 7, 2021 and the assessment and payment was consequently done on October 12, 2021. However, the respondent was unable to serve the memorandum and record of appeal as required. The blame was partly placed on the applicant for the failure to file and serve his address of service as per rule 81(1) of the Rules. This failure formed part of the respondent's inability to serve the documents on the applicant within time.
5. Further, during that period, the respondent suffered technical challenges at its offices. These challenges were compounded by the bereavement of the respondent's clerk, who was responsible for the service of court documents. As a result, she inadvertently failed to serve the applicant through the address contained in the High Court petition. We were urged that since the mistake was honest and not occasioned by malice, this court, should, in the interest of justice and public interest, dismiss this application.
6. We have considered the application and the submissions advanced by the parties. We note that the notice of appeal was indeed timely filed. The evidence from the emails proves that the notice was lodged on February 25, 2021, it was accessed and paid for on 26<sup>th</sup> February 2021. This evidence is also contained in the email trail and is further affirmed by the receipt issued by this court's registry. The issue then left for us to consider is the service of the memorandum and record of appeal.
7. Before we delve further into the merits of this application, we need to examine whether this application met the threshold required in Rule 84 which provides that an application to strike out a notice or record of appeal must be filed within 30 days of such service. We are satisfied that the applicant's application as filed on June 15, 2022 was within 30 days after the service of the record of appeal on May 26, 2022.
9. On the substantive issue of service of the record of appeal, it is trite that the timely filing and service of documents is at the heart of this court's jurisdiction to entertain appeals. Rule 92 (1) of the Rules is very clear on the service of the record of appeal;

The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies thereof on each respondent who has complied with the requirements of rule 81. (Emphasis ours)

10. It is not in dispute that the respondents served the applicant with the record nearly 5 months after it was lodged. Further, the Rule 4 application filed by the respondent dated August 1, 2022 which seeks the extension of time to file and serve the memorandum of appeal out of time is in itself a concession that the record was not served within the requisite timelines. Also, the timing of the rule 4 application is an indicator that it was knee jerk reaction to this application and speaks to the indolence of the respondent in seeking to remedy the error.
11. Rule 92 (1) is couched in mandatory terms and as read together with rule 86(b) of the Rules the inevitable end is that the record of appeal is for striking out. As a result, since there is no valid record of appeal on the record, the notice of appeal is deemed withdrawn as per the provision in rule 85 (1) of the



Rules. In conclusion, we reiterate the holding of this court in *Martin Kabaya Vs. David Mungania Kiambi* Nyeri Civil Application 12 of 2015;

The need for judicial proceedings to be concluded in a timely fashion is too plain for argument. It is a desideratum of a rational society. A justice that is too long in coming, encumbered by sloth or inattention on the part of those who seek it, is a pain and a bother. An expensive one at that. A justice that comes too late in the day is a tepid drop on perched lips that quenches no thirst. A justice delayed is a justice denied. Litigants, especially those summoned by plaints, petitions, applications or appeals are vexed when those who summoned them hence go to sleep yet the proceedings and processes they engendered remain alive but comatose, a burden to the mind and to the pocket. And they form part of the dead weight the Judiciary bears as backlog.”

12. Accordingly, this application succeeds and the record of appeal filed on October 12, 2021 is struck out. The notice of appeal filed on February 25, 2021 is deemed withdrawn. The costs shall be to the applicant.

**DATED AND DELIVERED AT KISUMU THIS 12<sup>TH</sup> DAY OF MAY, 2023.**

**P.O KIAGE**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**A. O. MUCHELULE**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

