



REPUBLIC OF KENYA



Mwicigi v Kamande (Civil Appeal E340 of 2022) [2023] KECA 540 (KLR) (12 May 2023) (Ruling)

Neutral citation: [2023] KECA 540 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E340 OF 2022
HA OMONDI, A ALI-ARONI & JM MATIVO, JJA
MAY 12, 2023

BETWEEN

MARGARET NJERI MWICIGI APPELLANT

AND

ROSE NYAMBURA KAMANDE RESPONDENT

*(Being an appeal from the judgement of the High Court of Kenya at Kiambu
(Kasango, J.) dated 25th November, 2021 in Civil Appeal No. 2 of 2018)*

RULING

1. Rose Nyambura Kamande, (the respondent in this appeal), by a notice of motion dated September 30, 2022, brought under rules 77 (1) and 84 (now rule 86) of the *Court of Appeal Rules, 2022* prays that the appellant's memorandum of appeal dated June 7, 2022, and the record of appeal dated June 13, 2022, be struck out. The applicant also seeks for costs of the application.
2. The application is founded on the grounds listed on the face of the application and the supporting affidavit of Rose Nyambura Kamande (the administrator of the estate of Michael Kiarri Njoroge (deceased) sworn on September 30, 2022, together with annexures thereto. The key grounds cited are that; the memorandum of appeal and the record of appeal were filed out of time without leave of the court; that the appeal was served out of time; and, that the record of appeal as filed is incompetent for want of certified proceedings.
3. In opposition to the application, the appellant/respondent filed a notice of preliminary objection dated December 19, 2022, and a replying affidavit of even date sworn by Dominic Njuguna Mbigi, the appellant's counsel. The salient points argued are: (i) the impugned judgment was delivered on November 25, 2021, and the notice of appeal was filed on December 3, 2021, within the timelines provided by the law. (ii) The typed proceedings and judgment were provided by the High Court registry on March 25, 2022. (iii) The failure to adhere to the set timelines was inadvertent. (iv) The record of appeal filed and served is complete.



- (v) The application was filed 6 months late in contravention of rule 84 (now rule 86), and (e) the application is incompetent.
4. In support of the application, counsel for the applicant submitted that the appellant did not intend to prosecute the appeal and that she was only awakened by the execution proceedings initiated in the High Court at Kiambu. Counsel cited this court's decision in *Anthony Burugu & Company Advocates v Electrowatts Limited* (civil appeal (application) E444 of 2021) (2022) KECA 415 (KLR) that:
- “21. Additionally, it has not been explained why after filing the record of appeal on August 9, 2021, without leave the applicant had to wait up to November 16, 2021, to file the instant application for extension of time. I agree with the respondent that the applicant was not intent on pursuing his appeal and was only triggered into action by the respondent's application dated November 2, 2021. I therefore do not find the reasons espoused by the applicant for the delay in filing the record of appeal plausible.”
5. The applicant's counsel submitted that the appeal has abated for want of service and the record of appeal was filed out of time without leave of this court. Consequently, the record of appeal is defective and incapable of prosecution.
6. In rebuttal, counsel for the appellant submitted that the instant application was incompetent having been filed 6 months after service of the notice of appeal. Counsel relied on *Salama Beach Hotel Limited & 4 others v Kenyariri & Associated Advocates & 4 others* (2016) eKLR, where this court held:
- “This court has in the past had occasion to decide the fate of applications made under rule 84, but which had been filed out of time. In *Joyce Bochere Nyamweya v Jemima Nyaboke Nyamweya & another*(2016) eKLR, this Court held that parties are bound by the mandatory nature of the proviso to rule 84 of this Court's Rules. An application seeking to strike out a notice of appeal or an appeal must be made within thirty (30) days of service of the notice of appeal or the appeal sought to be struck out. That failure to do so renders such an application fatally defective and liable to be struck out. As was held in the *Joyce Bochere case* (supra), stipulations on time frames within which acts should be done in law are of essence and must be strictly observed. In the event that a party finds itself caught up by the lapse of time as was in this case, the proper thing to do is to file an application for extension of time under rule 4 of this Court's Rules. Similarly, in *William Mwangi Nguruki v Barclays Bank of Kenya Ltd* (2014) eKLR, the court held that an application to strike out a notice of appeal that is brought after 30 days from the date of service of the notice of appeal is incompetent unless leave is sought and obtained to file the application out of time. See also *Michael Mwalo v Board of Trustees of National Social Security Fund* (2014) eKLR.”
7. The appellant's counsel also submitted that the letter/e-mail dated November 29, 2021, addressed to the Deputy Registrar requesting for typed proceedings was copied to the respondent. To buttress his submissions, counsel cited *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* (2013) eKLR, where it was held that:
- “Deviations from and lapses in form and procedures which do not go to the jurisdiction of the court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach of



striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.”

8. We have carefully considered the application, the grounds in support and in opposition, and the rival submissions by learned counsel. It is unmistakably clear that the competency of both the instant application and the respondent’s memorandum of appeal and record of appeal are both in issue. Rule 84 of this *Court’s Rules* now (rule 86 of the Court of Appeal Rules, 2022) provides:

84. Application to strike out notice of appeal or appeal

A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the court to strike out the notice or the appeal, as the case may be, 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.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.” (emphasis supplied)

9. Regarding the competency of the application, rule 84 allows any person affected by an appeal to apply to the court to strike out the notice of appeal or the appeal because no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. However, the proviso to rule 84 provides that an application to strike out an appeal shall not be brought after the expiry of 30 days from the date of service of the notice of appeal or record of appeal.
10. In the instant application the appellant served the notice of appeal on March 23, 2022, and in fact in her submissions expressly confirms that her notice of appeal although timely lodged on December 3, 2021, the same was served upon the applicant on March 23, 2022. Additionally, the memorandum of appeal was filed on June 7, 2022, and the record of appeal on June 13, 2022. We note that the applicant seeks to have the memorandum of appeal dated June 7, 2022 and the record of appeal dated June 13, 2022 struck out. However, the applicant has left the notice of appeal intact. She has not prayed for the notice of appeal to be struck out. In absence of a specific prayer seeking to strike out the notice of appeal, we are unable to consider striking out the notice of appeal. This is because it is settled that the decision of a case cannot be based on grounds outside the pleadings of the parties but on the case pleaded. Simply put, a court cannot grant a relief not specifically prayed.
11. The other defect in the application is that even though the applicant claims that the memorandum of appeal and the record of appeal were served out of time contrary to rule 84, there is no indication on the exact date the said documents were served. For this court to determine the competency of the instant application two questions must be answered with precision. One, when was the applicant served with the said documents. Two, when was the instant application filed in court.
12. The applicant has made allegations, which she must prove in order to succeed in her application. She claims that the documents sought to be struck out were served outside the 30 days’ period prescribed by the rules. Unfortunately, the both parties and more specifically the applicant did not disclose when the memorandum of appeal dated June 7, 2022 and the record of appeal dated June 13, 2022 were served upon her. Consequently, we are severely constrained for want of the exact date(s) when the said documents were served upon the applicant, for us to determine whether service was effected outside the required period as claimed. This being the position, it is impossible to ascertain whether indeed the



instant application was filed before the expiry of the 30 days after service as provided in the proviso to rule 86. The omission to provide such crucial details militates against the applicant.

13. The jurisdiction to strike out a memorandum of appeal or a record of appeal conferred to this court under rule 86 was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the essential step in the proceedings has not been taken. The essential step alleged not to have been taken must be manifest in the proceedings; and an applicant seeking to invoke such a drastic provision must as of necessity provide specific details to enable the court to correctly compute the time alleged not to have been complied with. In the circumstances, we have no choice but to strike out the motion dated September 30, 2022, in its entirety which we hereby do. We make no orders as to costs.

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

H. A. OMONDI

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

