



Mwadzaya Wachanda Clan Welfare Registered Trustees & 58 others v Petro Oil Kenya Ltd & 6 others (Civil Application E014 of 2022) [2023] KECA 778 (KLR) (23 June 2023) (Ruling)

Neutral citation: [2023] KECA 778 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E014 OF 2022
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
JUNE 23, 2023**

BETWEEN

**MWADZAYA WACHANDA CLAN WELFARE REGISTERED TRUSTEES & 58
OTHERS APPELLANT**

AND

**PETRO OIL KENYA LTD 1ST RESPONDENT
SAID ZEMBE BADI 2ND RESPONDENT
SALAT ABDULLAHI MOHAMED 3RD RESPONDENT
JAVICK & COMPANY 4TH RESPONDENT
THE LAND REGISTRAR, KILIFI 5TH RESPONDENT
THE DIRECTOR OF SURVEYS 6TH RESPONDENT
THE ATTORNEY GENERAL 7TH RESPONDENT**

(An Application for striking out the Record of Appeal dated 14th April 2022 and filed against the Ruling and Order of the Environment and Land Court at Malindi (A. O. Olola J.) on 30th July 2021 in Malindi ELC NO 63 of 2020)

RULING

1. Before us is the Notice of Motion dated November 25, 2021 expressed to be brought pursuant to Rules 42, 47, 82 and 83 of the [Court of Appeal Rules, 2010](#), hereinafter the Rules, seeking to have the Record of Appeal dated April 14, 2022 and filed against the ruling and Decree of the Environment and Land Court at Malindi in ELC Case No 63 of 2020 by Hon Justice Olola on July 30, 2021 struck out. The Motion was brought by the 1st Respondent in the Appeal and the Applicant in this application. It was based on the grounds stated on the face of the application and was supported by an affidavit sworn



- on May 18, 2022 by Gikandi Ngibuini, an advocate having conduct of the matter on behalf of the Applicant.
2. The Applicant's case was that the Ruling sought to be appealed from was delivered in favour of the Applicant on July 30, 2021; that being aggrieved by the said decision the Respondents in this Application who are the Appellants in the main appeal filed their Notice of Appeal dated August 2, 2021 on August 12, 2021 and subsequently filed their application dated August 18, 2021 brought under Rule 5 (2) (b) of the [Court of Appeal Rules, 2010](#), seeking stay of execution pending an appeal; that the said application was determined on March 4, 2022 and the Respondents were required to file and serve the record of appeal within 45 days from the date of the ruling; that the 45 days from March 5, 2022 ended on April 18, 2022; that the record of appeal was, vide an email from Messrs Ondabu & Co Advocates sent to his firm on April 19, 2022 thus not filed within the prescribed timelines; that the Memorandum of Appeal dated April 14, 2022 was not lodged hence the record of Appeal was not properly filed; and that the certified copy of the order and ruling, the Notice of Appeal and the certificate of delay, all parts of the record, were not served as directed by Court.
 3. In a supplementary affidavit sworn on February 17, 2023, the deponent averred that the Record of Appeal that was purportedly filed on April 14, 2022 was served on June 16, 2022 in violation of the ruling of March 4, 2022 by which time the Applicant had already filed and served the present application.
 4. It was explained that on April 19, 2022 the Respondents, via email, served some documents marked 'documents for you records' but which were not indicated as the Record of Appeal. It was not until June 6, 2022 that the Record of Appeal was served.
 5. In opposition to the application, the Respondents relied on the replying affidavit sworn on February 14, 2023 by Mohamed Menza Yama, the 2nd Respondent, who deposed that the application was fatally and incurably defective; and that the Record of Appeal was filed on April 14, 2022 and served upon the Applicant and the other Respondents on April 19, 2022, in compliance with the Court order.
 6. According to the Respondents, pursuant to Rule 3(a)(b) of the Court of Appeal Rules, 2010 the last day to file and serve the record was April 19, 2022 hence there was compliance with the Court order. The Court's attention was drawn to the fact that April 18, 2022, was a public Holiday, being Easter Monday and the Applicant was aware that April 15, 2022 was another public holiday, being Good Friday. They reiterated that the computation of time as provided under Rule 3(a) & (b) of the Court of Appeal Rules, 2010 the days from the happening of an event or doing an act or a thing shall be deemed exclusive of the day in which the event happens or that act or thing is done and further if the last day of the period is a Sunday or a Public Holiday the period shall include the next following day.
 7. According to the Respondents, they filed the Record of Appeal together with the Memorandum of Appeal, the ruling, a certified copy of the order, a copy of the Notice of Appeal, and the certificate of delay together with the Record of Appeal and therefore it was misleading for the Applicant to say that they had not been served. However, the Notice of Appeal was served separately on August 13, 2021. In their view, the Appeal was meritorious and had a high chance of success and we were urged to dismiss the application dated May 18, 2022 with costs to the Respondents.
 8. This Motion was heard on February 20, 2023 vide the Court's virtual platform during which Learned Counsel Mr Gikandi Ngibuini appeared for the Applicant while Mr Jason Ondabu appeared for the Respondents. Both counsels relied on their written submissions which they briefly highlighted.
 9. We have considered the application, the affidavits both in support of and in opposition to the application and the submissions made. In this case, what we are called upon to determine is whether



the Record of Appeal was served within the time prescribed by this Court in its ruling of March 4, 2022. Both Counsel are agreed that the computation of the 45 days limited for filing and service of the Record of Appeal lapsed on April 18, 2022. The Respondents however contend that April 18, 2022 was Easter Monday and by virtue of Rule 3 of this Court's Rules, the next date would then be the last date for filing of the Record. There is no doubt that under Rule 3 of the Rules, in computing time fixed by any decision of the Court for doing of any act or thing the same is deemed to exclude the day on which the event happens or that act or thing is done. However, if the last day of the period is a Sunday or public holiday (referred to as 'excluded days'), the period will include the next following day, not being an excluded day. Therefore, in this case the next following day not being an excluded day would have been April 19, 2022 and if the Record of Appeal was served on that day, then it was within time.

10. However, the Applicant's contention is that what was served that day via email were just some documents which did not include the all documents required to be incorporated in the Record of Appeal and that the email accompanying the documents referred to the said documents as 'documents for your records'. While the Respondents insist that the Record of Appeal was served on April 19, 2022, the email exhibited seems to support the Applicant's position since it states the 'Find the attached documents for your records'. The annexures are then indicated as four. The Respondents' action of serving the Record on June 16, 2022 clearly betrays their earlier inaction. Without offering an explanation as to why it was found necessary to serve a Record of Appeal on June 16, 2022 if service was effected on April 19, 2022, the only plausible explanation is that the earlier email was just a smokescreen by the Respondents for their failure to effect service of the Record of Appeal in time. If the record was available by April 19, 2022, nothing would have been easier than for the Respondents to adduce evidence of filing of the same.
11. Having considered the material placed before us in this application, we come to the inescapable conclusion that service of the Record of Appeal was effected on June 16, 2022 out of time and by then this application had already been filed. In *John Mutai Mwangi & 26 Others vs Mwenja Ngure & 4 Others [2016] eKLR*, it was explained that the strict timelines:

' Is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispense justice in a timely, just, efficient and cost-effective manner.'
12. In our view a person who runs/falls afoul of the law or an order of the court ought to speedily take remedial measures before the other party takes action to have the process nullified. In this case, the Respondent ought to have sought regularization of their action before the Applicant moved this Court. This the Respondents did not do. In fact, upto the time of the hearing of this application no such remedial step had been taken or commenced. To our mind a party who has defaulted in complying with an order prescribing time should not simply tell the Court that his appeal has chances of success when confronted with an application to strike out its processes. This Court in held that:

' In procedural rules that lack clarity, the Court is at liberty to lean on constructions which aid the course of justice but not in clear rules which have been interpreted many times by the Court as to depart from the rule without changing it would be an aberration that would confound and confuse litigants and should not be countenanced even for a solitary unintentional omission.'
13. The Record of Appeal in this appeal having been filed outside the period stipulate by this Court on May 18, 2022, we find the application merited and we strike out the Record of Appeal dated April 14, 2022, filed against the Ruling and Decree of the Environment and Land Court at Malindi in ELC Case No 63 of 2020 by Hon Justice Olola on July 30, 2021.



14. We award the costs both of this application and the appeal to the Applicant/1st Respondent.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF JUNE, 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

