



REPUBLIC OF KENYA



KENYA LAW
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**Kombe & 11 others v Mwebi & 10 others (Civil Appeal (Application)
E65 of 2021) [2023] KECA 980 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 980 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E65 OF 2021
SG KAIRU, JW LESSIT & GV ODUNGA, JJA
JULY 28, 2023**

BETWEEN

**JAMES SAFARI KOMBE 1ST RESPONDENT
ALI KENGA MWAKAMSHA 2ND RESPONDENT
SAMSON KALUME 3RD RESPONDENT
HASHIM LOMA MAKAZI 4TH RESPONDENT
AL HAMISI 5TH RESPONDENT
MATANO KENGA 6TH RESPONDENT
NZAI KOMBE 7TH RESPONDENT
KIPONDA CHOME 8TH RESPONDENT
JAFFERSON CHARO 9TH RESPONDENT
JUMA SAID KENGA 10TH RESPONDENT
NYONDO MAKANGA 11TH RESPONDENT
ELFAS KARISA 12TH RESPONDENT**

AND

**PETER MWEBI 1ST APPLICANT
SALIM SAID BISHER 2ND APPLICANT
MAIMUNA MOHAMED SALIM 3RD APPLICANT
FLORA ADMEBA OYAYA 4TH APPLICANT
CORRINE MUENI MUSINGA 5TH APPLICANT
STEPHEN MUANGE MUTUA 6TH APPLICANT**



CAROLINE NYAKIO KARIMI	7 TH APPLICANT
PHILIP AWITI OLERO	8 TH APPLICANT
AMBASSADORS CHAPEL	9 TH APPLICANT
BRIAN MWACHIRO	10 TH APPLICANT
JABALI CHONDO KAVU	11 TH APPLICANT

(Being an application to strike out the record of appeal in Civil Appeal No E065 of 2021 being an appeal from the ruling and orders of C.K. Yano J delivered on 3rd June 2021 in Msa ELC Suit 299 of 2018)

RULING

1. Before us is the notice of motion dated September 15, 2021 expressed to be brought pursuant to rules 43, 53, 74, 75, 82, 84 and 87 of the Court of Appeal Rules, 2010. The application seeks to have the Record of appeal filed on August 12, 2021 as Civil Appeal No. 65 of 2021 struck out. The motion is supported by an affidavit sworn by Peter Mwebi, the 1st applicant/respondent on September 15, 2021.
2. The background of this matter is that vide a ruling rendered on June 3, 2021, the Environment and Land Court at Mombasa dismissed the Respondent’s application dated January 20, 2021 which sought to set aside the ex parte judgement entered on October 16, 2021. Aggrieved by the said decision the respondents, on June 7, 2021 filed a Notice of Appeal dated June 3, 2021.
3. According to the applicants, the said notice of appeal was filed without the accompanying letter requesting for typed proceedings and hence the Record of Appeal was filed out of time; that the said Notice of Appeal wrongly indicated the applicants as the appellants; that the notice of appeal contains an incorrect applicants’ address; that the Notice of Appeal was wrongly lodged in Malindi instead of Mombasa; and that the Record of Appeal was filed without leave to amend the defective Notice of Appeal. The affidavit in support of the application reiterated the grounds contained in the notice of motion.
4. In response to the Motion, the Respondents relied on the replying affidavit sworn by Richard Otara, their advocate, who deposed that he filed the Notice of Appeal which was acknowledged by the Deputy Registrar, Mombasa Environment and Land Court. However, out of human error and as a result of common computer practice of copy and paste, while amending the document to suit this appeal, it escaped his attention to change the Plaintiffs to read Defendants. It was his view that the error can be cured through an amendment which he has sought to do by filing a Notice of Motion dated 13th May, 2022. It was his position that the Record of Appeal was filed and served within time, a demonstration of the Appellants’ interest in having their appeal heard by the Court and that the error should not deny the Appellants a chance of being heard on merits.
5. The Motion was heard vide the Court’s virtual platform on 21st February, 2023 when Learned Counsel Mr Mayieka appeared for the Applicants while Mr Otara appeared for the respondents. In their submissions, it was urged on the part of the Applicants, while placing reliance on rule 84 and 89 of the rules of this court as well as the case of Mae Properties Limited v Joseph Kibe & another [2017] eKLR that there was no certified copy of the ruling on the record of appeal. It was pointed out that the Notice of Appeal names the appellants as the respondents. Further, that the record of appeal was filed out of time on August 12, 2021, instead of being filed on or before 6th August 2021. The submissions of the



Respondents mirrored the averments in the replying affidavit. It was however added in the oral address that the Record of Appeal was filed within time taking into account the fact that the last day for filing the Record fell on long weekend and the same was filed on the next working day.

6. We have considered the application, the affidavits both in support of and in opposition to the application and the submissions made. A consideration of the totality of the Motion, the supporting affidavit and the submissions reveals that the Record of Appeal is impugned on the grounds that the Respondents filed their Notice of Appeal on 4th June, 2021 without the accompanying letter requesting for typed proceedings and hence the Record of Appeal which was filed on 12th August, 2021, was filed out of time since the benefit of Rule the proviso to rule 84(1) of the [Court of Appeal Rules](#), 2022 cannot be invoked to their benefit; that the said Notice of Appeal wrongly indicated the applicants as the appellants; that the notice of appeal was wrongly lodged in Malindi instead of Mombasa; and that the Record of Appeal was filed without leave to amend the defective Notice of Appeal.
7. As regards the issue of the Notice of Appeal having been filed in Malindi as opposed to Mombasa, we note that though the body of the Notice indicates that it was lodged in the High Court at Malindi, the same, from its title and registry stamps clearly show that it was filed in the Environment and Land Court, Mombasa. Accordingly, we find that nothing turns on that issue.
8. According to the Applicants' computation of time, the last day for filing the Record of Appeal was 6th August, 2021 but was filed on 12th August, 2021. The Respondents, on the other hand contend that since the last day fell on a long weekend and the Record was filed on the next working day, the Record of Appeal was filed within time. The Notice of Appeal is indicated to have been received at the Environment and Land Court registry in Mombasa on 4th June, 2021 though the endorsement by the Deputy Registrar, from the stamp appearing at page 2 thereof was done on June 7, 2021. Rule 84(1) and (2) of the [Court of Appeal Rules](#) provides that:

Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged—

- a. a memorandum of appeal, in four copies;
- b. the record of appeal, in four copies;
- c. the prescribed fee; and
- d. security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

- (2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless the appellant's application for such copy was in writing and a copy of the application was served upon the respondent.

9. From our own computation of time, the 60 days from June 7, 2021 excluding the date of the lodging of the Notice of Appeal (June 7, 2021) would run out on 6th August, 2021. The Record of Appeal was however filed on 12th August, 2021. Though we are informed that there was a long weekend, the Respondents have not explained why there was a long weekend and what it was all about. 6th August,



2021 was a Friday while 12th of August, 2021 was the next Thursday. Even if there was a long weekend, we are not satisfied that the long weekend would have spanned from Friday, 6th to Wednesday, 11th August, 2021 so as to justify the filing of the Record of Appeal on Thursday, 12th August, 2021.

10. In the absence of an order having been sought and granted extending the time within which to file the Record of Appeal, we find that the Record of Appeal was filed out of time. Pursuant to Rule 84(1) and (2) of the Court of Appeal Rules, 2022, had the Respondents applied in writing for a copy of the proceedings within 30 days of the decision against which the appeal was intended to be instituted, and copied the said application on the Applicants herein, the Respondents would have been entitled to exclude the period certified by the Registrar of the Court from which the appeal emanates as having been required for the preparation and delivery to the Respondents of such copy. The Applicants averred, which averment was not disputed, that there was no application for a copy of the proceedings. 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.”

11. As expressed by Kiage, JA in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR:

“I am not in the least persuaded that article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.”

12. This court in *Sukwinder Singh Jutley v. Prudential Association Co. of Kenya Ltd & another* Civil Appeal (Application) No. 62 of 2004 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 rationale for strict adherence to rules of practice and procedure was explained in *Chelashaw v Attorney General & another* [2005] 1 EA 33, where it was held that without rules of practice and procedure the application and enforcement of the law and the administration of justice would be chaotic and impossible and their absence or non-adherence would lead to uncertainty of the law and total confusion since laws serve a purpose and they enhance the rule of law. That enforcement of such



rules is imperative was emphasized by this court in Onjula Enterprises Ltd vs. Sumaria [1986] KLR 651, where it was held that:

“The rules of the court must be adhered to strictly and if hardship or inconvenience is thereby caused, it would be that easier to seek an amendment to the particular rule. It would be wrong to regard the rules of the court as of no substance. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to disregard of the principle involved. See London Association for the Protection of Trade & another vs. Greenlands Limited [1916] 2 AC 15 at 38.”

14. This court in Taracisio Githaiga Ruithibo vs. Mbutia Nyongi Civil Appeal No. 21 of 1982; [1984] KLR 505, cautioned that no court, particularly this one, should wish away the Rules of Court so ignobly.
15. In our view, a party in default ought not to seek to justify that default by simply saying that the appeal is merited and that no prejudice will be caused to the other side. Parties to litigation have a legitimate expectation that the rules of the court will be adhered to by all the parties and therefore when one party does not adhere to the Rules and is excused by the court when no such indulgence is properly sought, clearly the other party is placed at a disadvantage by the selective application of the Rules and is hence prejudiced.
16. In the case before us, while we are told that there is an application seeking to have the notice of appeal amended, we have not been told of the remedial step, if any, taken with a view to having the time prescribed for filing and service the record of appeal extended. We have not been told when, if at all, it will ever be taken. In those circumstances can this court simply sit back and wait in the hope that one day the respondents will take that step? in our view, the position adopted by the respondents cannot be a basis for sustaining an otherwise incompetent record of appeal.
17. In light of our findings in respect of this issue, and in the circumstances of this case, we find it unnecessary and inappropriate to deal with the other issues raised by the applicants.
18. In the premises, we find merit in the notice of motion dated September 15, 2021. We hereby strike out the record of appeal in Civil Appeal No. 65 of 2021 with costs to the applicants.
19. It is so ordered.

Dated and Delivered at Mombasa this 28th day of JULY, 2023

S. GATEMBU KAIRU, FCIArb

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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

