



**Otuga v Ouko & another (Civil Appeal (Application)
E298 of 2022) [2023] KECA 842 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KECA 842 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) E298 OF 2022
PO KIAGE, M NGUGI & JM NGUGI, JJA
JULY 7, 2023**

BETWEEN

ENOCK OTIENO OTUGA APPELLANT

AND

MARY AUMA OUKO 1ST RESPONDENT

**ATTORNEY GENERAL (SUED ON BEHALF OF THE MINISTRY OF LAND,
KISUMU LAND REGISTRY) 2ND RESPONDENT**

*(An application to strike out the Record of Appeal dated 30th December
2022 against the judgment of the Environment and Land Court at Kisumu
(Ombwayo, J.) dated 22nd September, 2022 in ELC Case No. 334 of 2013)*

RULING

1. By the motion dated January 18, 2023, brought under an array of legal provisions including, sections 3, 5(2)(g) of the *Appellate Jurisdiction Act*, Chapter 9 of the Laws of Kenya and, rules 42, 74, 82, 83 and 84 of the *Court of Appeal Rules, 2010*, Mary Auma Ouko, the applicant, seeks to strike out the record of appeal dated December 30, 2022.
2. The motion is predicated on grounds on the face of it and the applicant's supporting affidavit sworn on January 18, 2023.
3. The grounds are to the effect that: the appellant lodged a record of appeal out of time without extending time; judgment in the matter having been delivered on September 22, 2022, and the notice of appeal lodged on September 29, 2022, the appeal should have been filed within 60 days from the date therein; the record of appeal was filed and served upon the applicant on December 30, 2022, more than 90 days later; upon service the applicant discovered that the appellant had never requested for proceedings and/or served her with the letter requesting for proceedings and judgment; certified copies of proceedings and judgment were ready on October 28, 2022 but the appellant failed to file the



record of appeal within time and thus; the appeal is incompetent and should be struck out or deemed withdrawn.

4. In response and opposition to the motion, the appellant swore a replying affidavit on February 2, 2023 in which he acknowledged the delay in filing the appeal, but qualified that the delay was minimal. He urged that his right to prosecute his appeal should not be taken away through technicalities. The applicant averred that he had given cogent reasons for the delay in his application for extension of time which he filed in this court on February 1, 2023. The reasons are that he resides in Sweden and rarely comes to Kenya hence he has encountered challenges in communicating with his advocates; his advocates informed him that the impugned judgment was delivered on September 22, 2022 and they applied to be furnished with proceedings and judgment on the same day and later lodged a notice of appeal. On October 28, 2022 his advocates were informed that the proceedings were ready.
5. The appellant further swore; “That the period between October 26, 2022 to December 26, 2023 (sic) I was in the far north of Sweden and my phone had serious issues and I did not therefore see my advocates’ letter dated October 29, 2022 telling (sic) that proceedings are ready I should send them filing fee and fee for preparation of the records. That I only saw the letter when I came back to Stockholm on the December 20, 2022 (sic) and when I saw the letter and I immediately called my Advocate but I couldn’t get him on phone.” The appellant also avers that he reached out to his advocate, Mr Mwamu, who informed him that his office was closed until January 16, 2022 but upon pleading with him he agreed to cut his holiday short and prepare the record of appeal.
6. At the hearing of the motion, learned counsel for the applicants Mr Bagada and his learned counterpart, Mr Mwamu sought to highlight their filed affidavits and submissions. Mr Mwamu indicated that he had filed a further affidavit and submissions but the same are not on record.
7. We enquired of Mr Mwamu whether he had served upon the applicant the letter bespeaking proceedings in view of the clear requirements of the rules of court and he admitted that the letter had not been served upon the applicant. We probed further why he was not willing to concede the instant application to which counsel insisted on still arguing the application contending that conceding it would mean that the appeal would be “knocked out”.
8. We thus proceeded to hear the parties. Mr Bagada for the applicant rehashed the averments in the motion and the supporting affidavit as outlined above. On citing rule 84 (now of the [Court of Appeal Rules](#)), counsel asserted that a party who is affected by an appeal can apply for it to be struck out where essential steps have not been taken within the prescribed time. Accordingly, he maintained that the instant appeal having been lodged out of time without leave it ought to be struck out with costs to the applicant. He noted that the instant application was filed on January 18, 2023 within the prescribed 30 days’ period.
9. Mr Bagada contended that the appellant’s explanation that there had been a communication breakdown between him and his advocates thus causing the delay was unsatisfactory. Counsel deemed the appellant’s excuse unacceptable for reasons that firstly, the applicant had not been served with the letter bespeaking proceedings and secondly, the appellant’s counsel already had instructions to pursue an appeal hence the lodgement of the notice of appeal. He did not therefore require the presence or instructions of the appellant in order to file the record of appeal. To buttress that assertion, counsel cited the Supreme Court’s decision in [County Executive Of Kisumu Vs County Government Of Kisumu & 8 Others](#) [2017] eKLR, rejecting the argument that it was probable that counsel was yet to receive instructions from his client to lodge an appeal despite having filed a notice of appeal; requested and received typed proceedings and a certificate of delay.



10. The appellant’s claim that the delay was minimal was also discounted on grounds that the Rules of the Court are couched in mandatory terms and must be complied with as observed by this court in *Esther Anyango Ochieng Vs Transmara Sugar Company* [2020] eKLR. It was further argued that the appellant’s application for extension of time is an afterthought as it was filed on January 30, 2023, after the applicant was served with the instant application seeking to have the appeal struck out. Counsel urged that the application be allowed.
11. In answer to Mr Bagada’s submissions, Mr Mwamu explained that the appellant’s application for certified copies of the proceedings was made on the day judgment was delivered, in the presence of the applicant’s counsel. Further, it took 40 days to prepare proceedings, a period which if excluded from the time within which they were required to file the record would take them to 12th of January. Counsel argued that if the Christmas holiday break from 21st December to 13th January was added to that period, then it would mean that they were required to lodge the appeal by 22nd of January. To counsel therefore, they filed the appeal within time. Mr Mwamu urged that in the event the Court finds that they were late, there is already an application filed for extension of time. Ultimately, he beseeched us to dismiss this application.
12. We have carefully considered the application before us, the rival affidavits and submissions, the Rules of this Court and the law.
13. There is no dispute that by dint of rule 86 of this court’s rules, where there is default in taking an essential step in the proceedings, a person affected by an appeal may apply to strike out the notice or the appeal itself, if already instituted. It is under this Rule that the applicant has moved us, asserting that the appellant failed to take the essential step of serving her with the letter bespeaking proceedings. Moreover, he lodged his appeal out of time without seeking extension of time from the court.
14. Rule 86 itself has a proviso 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.” The applicant having been served with the record of appeal on December 30, 2022, the same date it was seemingly filed, we are satisfied that the application dated January 18, 2023 was brought within the requisite time.
15. Concerning the matters in contention in this application, we re-state the express provisions of Rule 84 of the *Court of Appeal Rules, 2022*;
 - “(1) 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:
16. 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.

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.” [Emphasis ours]

17. It is undeniable that the appellant did not serve the applicant with a copy of the all-important letter requesting for proceedings. Indeed, Mr Mwamu, admitted that very fact, as he had to. It is also indisputable that there was a delay in lodging the appeal. As a matter of fact, the appellant averred in his replying affidavit that there was a delay but a minimal one. Plainly, the very act of the appellant seeking extension of time to lodge the appeal, as evinced by the record, is a direct concession that there was a delay in instituting the appeal. We repeatedly nudged counsel for the appellant to concede the application in light of incontestable facts on record, with no success.
18. We think, it is always expedient, for counsel to give heed to the guidance of the Court as it may save time and costs but, in the end, counsel chooses his path. It is plain as day that this motion is for allowing and we do allow it.
19. We accordingly strike out the record of appeal. The costs of this motion and of the stricken record shall be paid to the applicant.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF JULY, 2023.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

