



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kuura & 2 others v M’riria & 2 others (Civil Application 151 of 2019)  
[2023] KECA 1611 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KECA 1611 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION 151 OF 2019  
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA  
SEPTEMBER 22, 2023**

**BETWEEN**

**ROYFORD RIUNGU KUURA ..... 1<sup>ST</sup> APPLICANT  
WASHINGTON KIRIMI KUURA ..... 2<sup>ND</sup> APPLICANT  
CHARLES NYAGA KUURA ..... 3<sup>RD</sup> APPLICANT**

**AND**

**TURA KARINGURI ..... 1<sup>ST</sup> RESPONDENT  
MKUURA M’RIRIA ..... 2<sup>ND</sup> RESPONDENT  
ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application to strike out the notice of appeal dated 22nd March, 2018 in the Environment and Land Court at Chuka (P. M. Njoroge, J.) in ELC Cause No. 147 of 2009)*

**RULING**

**Background**

1. By a notice of motion dated 5<sup>th</sup> September, 2019, Royford Riungu Kuura, Washington Kirimi Kuura and Charles Nyaga Kuura (the applicants), seek orders in the main that:
  - a. this Court be pleased to strike out the respondents' notice of appeal dated 22<sup>nd</sup> March, 2018 and filed on 26<sup>th</sup> March, 2018;
  - b. this Court be pleased to strike out the Certificate of Delay dated 20<sup>th</sup> February, 2019; and
  - c. the costs of this application be granted to the applicants.

Mkuura M’Riria, Tura Karinguri & The Attorney General are the 1<sup>st</sup> to 3<sup>rd</sup> respondents herein.



2. The application is expressed to be brought under Rules 42(1), 75, 82(1) and (2), 83 and 84 of the *Court of Appeal Rules*, 2010 (this Court's Rules) and is supported by the affidavit of the 3<sup>rd</sup> applicant on the grounds, *inter alia* that: the respondents' notice of appeal was lodged on 26<sup>th</sup> March, 2018; that a certificate of delay was issued on 20<sup>th</sup> February, 2019 after certified proceedings and judgment were released on 15<sup>th</sup> February 2019, but the respondents have not prosecuted the appeal to date; that sixty (60) days within which to file the intended appeal lapsed on 22<sup>nd</sup> April, 2019; that the respondents have violated Rule 82(1) of the *Court of Appeal Rules*, 2010, (now Rule 84(1) of the *Court of Appeal Rules*, 2022) which would render any intended appeal to this Court a non-starter; that the 1<sup>st</sup> respondent has filed an application dated 5<sup>th</sup> July, 2019 for review of the impugned judgment a clear indication that they are not interested in prosecuting the appeal herein; that the respondents are clearly undertaking a trial and error exercise in an attempt to get a favourable outcome; and that the applicants require closure to what has been a rigorous battle over LR Nos. Muthambi/Gatua/1266 and 503 (the suit property) that begun in 1983.
3. The applicants aver that there is intentional default on the part of the respondents to lodge the record of appeal as per Rule 82(1) (now Rule 84(1)) of this *Court's Rules* within the stipulated timelines. The applicants therefore seek that the notice of appeal dated 22<sup>nd</sup> March, 2018 be struck out.

#### **Submissions by counsel.**

4. At the hearing of the application, there was no appearance by counsel for the applicants or the respondents. The application was disposed of by way of written submissions.
5. The applicants submit that Rule 84 of the *Court of Appeal Rules*, 2022 addresses the institution of appeals and that in the said rule, an appeal should be instituted strictly within 60 days of lodging the notice of appeal and that the only exception to this rule is where an application for typed proceedings is made and served on counsel for the respondents. Reliance was made on the case of *Kenya Ports Authority v Maur Abdalla Bwanamaka* (2018) eKLR in support of this proposition.
6. The applicants further submit that the respondents filed a notice of appeal on 26<sup>th</sup> March, 2018 expressing their dissatisfaction with the impugned judgment delivered in favour of the applicants. Further, that on even date a request for judgment and certified proceedings was made by the respondents and a certified copy of the judgment and proceedings were consequently released on 15<sup>th</sup> February, 2019 and subsequently a certificate of delay was issued on 20<sup>th</sup> February, 2019. It was further submitted that the 60 days within which to file the appeal lapsed on 22<sup>nd</sup> April, 2019 and that the respondents have been sluggish, indolent and lethargic as they have failed to prosecute the appeal three (3) and half years since the 60-day period lapsed hence rendering it a non-starter.
7. The applicants further submitted that they conceded that the application to strike out the notice of appeal is caught up by the proviso under Rule 84 as the application was brought outside the 30 days provided after filing of the notice of appeal but nonetheless, urged this Court on its own motion to deem as withdrawn the notice of appeal dated 22<sup>nd</sup> March, 2018 pursuant to Rule 85 (1) of this *Court's Rules*. Reliance was placed on *Muzaffer Musafe Essajee & Another v Anne Njeri Mwangi* [2021] eKLR.
8. The respondents did not file a response or written submissions despite notice.



## Determination

9. We have considered the application, the submissions, the authorities cited and the law. From the record, the impugned judgment was delivered on 19<sup>th</sup> March, 2018. Dissatisfied with the decision, respondents timeously filed a notice of appeal on 26<sup>th</sup> March, 2018 and served it on the applicants.
10. As correctly contended by the applicants, the respondents ought to have filed the record of appeal within the timelines provided for in Rule 84 of this [Court's Rules](#).

Rule 84 of this [Court's Rules](#) provides as follows:

“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].

11. In [Charles Wanjohi Wathuku v. Githinji Ngure & Another](#) [2016] eKLR, this Court reiterated the position taken in the case of [John Mutai Mwangi & 26 Others v. Mwenja Ngure & 4 Others](#) [2016] eKLR on the intent and purport of Rule 82 (now Rule 84) of the [Court's Rules](#) as follows:

“That timeline is strict and 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. The rule recognizes, however, that there could be delays in the typing and availing of the proceedings at the High Court necessary for the preparation of the record of appeal. The proviso to the rule accordingly provides that where an appellant has bespoken the proceedings within thirty days and served the letter upon the respondent, then the time taken to prepare the copy of the proceedings, duly certified by the registrar of the High Court, shall be excluded in the computation of the 60-day period. A certificate of delay therefore suffices to exclude any delay beyond the prescribed 60 days.”

12. In the instant application, the applicants have produced as an exhibit the Certificate of Delay from the Environment and Land Court (ELC), which they contend has been in the court file since 2019. The respondents have failed to take the necessary procedural steps provided for in Rule 84(1) of this [Court's Rules](#) to progress the appeal process.
13. Having obtained the certified copies of proceedings and judgment on 15<sup>th</sup> February, 2019 the respondents ought to have filed and served the record of appeal within sixty (60) days as stipulated in Rule 84(1).
14. This Court in [Joyce Bochere Nyamweya v Jemima Nyaboke Nyamweya & another \(supra\)](#), held that the proviso under Rule 84 is couched in mandatory terms, and that such applications brought after 30 days of service of the notice of appeal or appeal are incompetent and liable for striking out. A party intending to bring an application under Rule 84 out of time ought to first file an application for extension of time under Rule 4 of this Court's Rules. As was stated in [Salama Beach Hotel Limited & 4 others v Kenyariri & Associates Advocates & 4 others](#) [2016] eKLR:

“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.”

15. The instant application was filed on 17<sup>th</sup> September, 2019 while the notice of appeal was filed on 26<sup>th</sup> March, 2018. The instant application was therefore filed over one (one) year eight (8) months after the notice of appeal was filed. The applicants did not seek an extension of time to file the application out of time as provided under Rule 4 of this [Court's Rules](#).

16. In *Gichuki King'ara & Co Advocates v Al Jalal Enterprises Ltd and Others*, Civil Appl. No. NAI 211 of 2012 (unreported) this Court in reference to Rule 84 succinctly stated as follows:

“The applicant did not file its application within the stipulated period of thirty days. It did so on the 9<sup>th</sup> August 2012 which was about five months outside the limit set by the [Rules](#). It is clear to us that such an omission renders the application before us a non-starter given the logic and rationale of the time-bound provision. The rule is mandatory and an application brought outside the thirty-day period properly qualifies to be seen as an afterthought.”

17. By parity of reasoning, the instant application is incompetent for reason that it was filed outside the stipulated time in the proviso to Rule 84 of this [Court's Rules](#).

18. The applicants have also relied on Rule 83 (now rule 85). Rule 85 of this [Court's Rules](#) provides as follows:

“If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, he shall be deemed to have withdrawn his notice of appeal and the court on its own motion or on an application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.”

19. This Court in *Quicklubes EA Limited v. Kenya Railways Corporation* [2014] eKLR, while discussing the rationale and criteria for a notice of appeal being deemed as withdrawn under the aforementioned rule, succinctly stated in the following terms:

“Rule 83 gives this Court unfettered discretion to deem an appeal as withdrawn if a party files a Notice of Appeal and then goes to slumber, by failing to initiate the other necessary processes to ensure that the appeal is filed and served. That usually happens in some cases where a party gets favourable interim orders as the hearing and determination of an intended appeal is awaited, and particularly when such orders are open ended. An appellant may also lack interest in the appeal, or the parties may even settle the matter out of Court but fail to inform the Court with a view to having the matter struck off the register of pending appeals.



The Rule is meant to stem abuse of the Court process and also promote efficiency in terms of case management. That is why the *Court of Appeal Rules* allow the Court to invoke Rule 83 *suo motu* if the respondent in the intended appeal does not move the Court.”

20. In light of the exposition in the case of *Quicklubes E. A. Limited v. Kenya Railways Corporation* (*supra*), the respondents having obtained the certified copies of proceedings and judgment on 15<sup>th</sup> February, 2019 were obligated to file and serve the record of appeal within sixty (60) days of that date. They failed to do so.
21. This Court must therefore balance the scales of justice between the parties by weighing the applicants’ right to enjoy the fruits of their judgment against the respondents’ right to pursue their right of appeal which to date they have failed to pursue timeously as provided for by this *Court’s Rules*. As the instant application falls squarely within the operation of Rule 85 of this *Court’s Rules*, we find no reason not to apply the Rule.
22. We therefore invoke Rule 85 of this *Court’s Rules* and deem the notice of appeal dated 26<sup>th</sup> March, 2018 as withdrawn. We award costs to the applicants.

**DATED AND DELIVERED AT NYERI THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2023.**

**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**

**L. KIMARU**

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**JUDGE OF APPEAL**

**A. O. MUCHELULE**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

