



**Tarzan Limited v Koima Developers Limited & another (Civil Appeal (Application)  
E011 of 2022) [2023] KECA 1115 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KECA 1115 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPEAL (APPLICATION) E011 OF 2022  
F SICHALE, FA OCHIENG & LA ACHODE, JJA  
SEPTEMBER 22, 2023**

**BETWEEN**

**TARZAN LIMITED ..... APPLICANT**

**AND**

**KOIMA DEVELOPERS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**ELGEYO BORDER INVESTMENTS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(An application to strike out the Notice of Appeal and Record of Appeal arising from the Ruling of the Environment and Land Court at Eldoret, (A. Ombwayo, J.) dated 12th April, 2021 in ELC Case No. 250 of 2016)*

**RULING**

1. Before us is a notice of motion dated September 15, 2022 pursuant to rules 77(1), 82, 83 and 84 of the [Court of Appeal Rules](#), 2010 and Sections 3, 3A and 3B of the [Appellate Jurisdiction Act](#). The application seeks orders that; this honourable Court be pleased to strike out the respondent's notice of appeal dated April 23, 2021 together with the record of appeal dated July 28, 2022; and that the costs of the application be borne by the respondent.
2. The application is premised on the grounds that; the ruling, the subject of the present appeal was delivered on April 21, 2021; a notice of appeal was lodged on April 23, 2021 and served on the 1<sup>st</sup> respondent on May 8, 2021; the said service was contrary to Rule 77(1); the record of appeal dated July 28, 2022 and served on the 1<sup>st</sup> respondent on August 22, 2022 was in breach of Rule 82(1); an appeal shall be instituted within 60 days of the Ruling; the appellant applied for certified copies of proceedings on May 11, 2021
3. The application was supported by the affidavit of David Bett Lang'at, the applicant's director. The affidavit reiterated the grounds on the face of the application.



4. In response, Stephen Yego, the respondent's director, in his replying affidavit stated that; the application had no merit, was frivolous, vexatious and an abuse of the court process; it was aimed at driving the respondent from the seat of justice; the application was filed after commencement of the Court of Appeal Rules, 2022 but the same was filed under a different set of rules; rules 77(1), 82, 83 and 84 of the *Court of Appeal Rules, 2022* do not provide for the striking out of a notice of appeal and Record of Appeal; the application is founded on wrongful provisions of the law; the application was filed after 30 days of service contrary to rule 86; the application was served upon the respondent after 3 days of filing contrary to rule 51; fault was with the firm of Ledishah J. K. Kittony & Company Advocates who failed to serve the notice of appeal within statutory timelines; there was a disagreement between the respondent and the said firm which prompted them to instruct their current advocates on record, on May 5, 2021.
5. He further stated that their advocates effected service of the notice of appeal on 7<sup>th</sup> may, 2021; a request for certified copies of proceedings was made within 30 days of the ruling and the same was copied to the applicant's advocates; the respondent paid court fees for the proceedings; the court delayed in processing the court proceedings which prompted the respondent to write the letter dated May 25, 2022; the respondent received the court proceedings on 31<sup>st</sup> May, 2022 and they were issued with a certificate of delay; the appellant filed the Record of Appeal on 28<sup>th</sup> July, 2022 which was within the 60 days period; service of the record was effected on the applicant, who had not filed and served its address of service under rule 81; the firm of Arusei & Company Advocates is not properly on record; no prejudice will be suffered; and the application seeks to elevate procedural technicalities above substantive justice, contrary to Article 159 of the *Constitution*.
6. In his supplementary affidavit, David Bett Lang'at stated that; the application herein was well grounded in law; the impugned judgment was delivered before the 2022 rules came into effect and therefore the legal regime obtaining in 2021 was the 2010 rules; by virtue of rule 123, the application is not incompetent or bad in law; the application was filed within the timelines provided, having been served with the record of appeal on August 22, 2022; the letter dated May 11, 2021 was never served on the applicant and therefore the respondent cannot rely on the certificate of delay; the record as filed on July 28, 2022 was filed out of time, and without leave of court; there will be no prejudice for failure to file a notice of address of service; the application will only have the effect of removing the applicant from the case and allow the appeal to proceed against the 2<sup>nd</sup> respondent; the respondent can still proceed with the appeal against the remaining party; the applicant was not a necessary party to the proceedings; and the issues raised in the application are not procedural technicalities but points of law.
7. When the application came up for hearing, counsel relied on their respective written submissions.
8. Mr. Arusei, counsel for the applicant conceded to not having filed a notice of address of service. He relied on rule 1 which gives this court power to make orders in the interest of justice. He noted that the supreme court had held that non-compliance with procedural rules should not defeat justice. He maintained that he had filed the application within 30 days.
9. Counsel relied on the provisions of 77(1) and the cases of *Daniel Nkirimpa Monirei v Sayialel Ole Koilel & 4 others* [2016] eKLR and *Stephen Kinoro Kamau v Wanjiku Kinuthia & another* [2005] eKLR in stating that service of a Notice of Appeal must always be effected upon the respondent within 7 days. He contended that the record of appeal was served upon the applicant in breach of Rule 82(1) & (2). He indicated that, a record should be lodged within 60 days of the date of a ruling or judgment as the case may be. He further stated that the last day for filing the appeal was to be 21<sup>st</sup> June, 2021 yet the present appeal was filed on 28<sup>th</sup> July, 2022.



10. Counsel submitted that the respondent could not seek refuge in Rule 82(1) or rely on the certificate of delay dated 15<sup>th</sup> June, 2022 as they were in breach of Rule 82(2) for failure to serve upon the applicant, the application for certified copies of proceedings within 30 days of the ruling. He maintained that the applicant was never served with the letter that was addressed to the registrar of the court.
11. Counsel pointed out that, after 60 days had lapsed from the date of filing the Notice of Appeal, the said notice was deemed to have been withdrawn by dint of Rule 83 and therefore there was no valid notice on record. Relying on the decision in the case of *Waiguru & another v Karua & 2 others* [2021] KESC 38 KLR, counsel stated that the application was not incompetent for having been filed under different rules. Counsel urged that the Notice of Appeal and the Record of Appeal against the applicant be struck out with costs.
12. Mr. Kenei, counsel for the respondent argued that the firm of Arusei & Company Advocates was not properly on record. To his mind, the application regarding the Notice of Appeal had been abandoned. Counsel contended that the application had been filed under non-existent or erroneous provisions of the law. He was of the view that Rule 123 did not offer refuge to the applicant since the rules came into effect on 8<sup>th</sup> July, 2022 while the appeal was filed on 28<sup>th</sup> July, 2022 after the commencement of the said rules. Counsel argued that the application was fatally defective and incompetently before court for relying on the wrong rules. He maintained that the 2022 rules also set out timelines for filing and service of notices of appeal or record of appeal and an application to strike out.
13. Counsel further submitted that the application was filed after the lapse of 30 days of service of the impugned notice of appeal contrary to Rule 86 and also after the lapse of 30 days of filing the record of appeal. He contended that the application was also served out of time contrary to Rule 51 which requires the application to be served within 3 days. He submitted that the respondent was served with the application on 24<sup>th</sup> February, 2023, more than 5 months after the it had been filed, and no explanation has been offered for the delay.
14. Counsel submitted that the delay in service of the notice of appeal warrants the application of Article 159 of the *Constitution* and the oxygen principles for the ends of justice to be met. Counsel stated that the delay was not inordinate, it was for about 7 days and it was occasioned by the inaction of counsel previously on record for the respondent which occasioned the change of advocates. Counsel urged that the mistakes of the previous counsel should not be visited upon the respondent, noting that the respondent diligently sought a mitigation measure by instructing new counsel. Counsel relied on the Supreme Court case of *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others* [2014] eKLR to buttress this submission.
15. Counsel conceded that the appeal was filed more than 60 days after the filing of the notice of appeal. He however, maintained that the delay could not be attributed to the respondent as the delay was occasioned in processing court proceedings. Counsel maintained that the delay was occasioned by the court. He stated that the respondent took all the necessary steps to procure the court proceedings as was confirmed when they were issued with a certificate of delay. Counsel urged that the application be dismissed with costs.
16. We have carefully considered the application, affidavits in support, replying affidavit, submissions by counsel, authorities cited and the law. The issues that arise for determination are whether the application is competently before this court and whether the said application has merit.
17. It is not in dispute that the impugned ruling was delivered on 21<sup>st</sup> April, 2021. The respondent being dissatisfied with the said ruling, timeously filed a Notice of Appeal dated 23<sup>rd</sup> April, 2021. However, they served the notice on the applicant on 8<sup>th</sup> May, 2021 which was outside the timelines provided for



under Rule 77(1) of the 2010 Rules and Rule 79(1) of the 2022 Rules. The rule requires service to be effected before or within 7 days after lodging the Notice of Appeal under Rule 77.

18. It is common ground that service of the notice of appeal on the applicant and the filing of the record of appeal was done outside the prescribed statutory timelines. The respondent attributed the delay in service of the notice of appeal on the fact that they had a disagreement with their previous advocates on record, and that they had to instruct new counsel. The respondent attributed the delay in filing the record of appeal to the delay in obtaining certified copies of proceedings from the court. The question we are called upon to answer is whether the statutory delays herein warrant the striking out of the notices as prayed for in the application.
19. But first, we have to determine the issue as to whether the present application is competently before us. The respondent contended that the application had been filed under non-existent or erroneous provisions of the law and also after the lapse of 30 days.
20. It is trite law that striking out pleadings is a draconian act, which may only be resorted to in plain and obvious instances. The power of this court to strike out an appeal is discretionary and is exercised based on the circumstances of each case.

Rule 84 of the 2010 Rules and Rule 86 of the 2022 Rules provides that:

“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 after the date of service of the notice of appeal or record of appeal, as the case may be.”

21. Parties are bound by the mandatory proviso to Rule 84 of the 2010 Rules and Rule 86 of the 2022 Rules, that the failure to comply with the same renders an application filed thereunder defective. (See: [Total Kenya Limited vs Rueben Mulwa Kioko](#) [2018] eKLR).
22. In the case of [Salama Beach Hotel Limited & 4 others vs Kenyariri & Associates Advocates & 4 others](#) [2016] eKLR this Court held that:

“Parties are bound by the mandatory nature of the proviso to Rule 84 of the Court of Appeal Rules. An application seeking to strike out a notice of appeal must be filed within thirty (30) days of service of the notice of appeal, or the filing of the appeal ought to be struck off. The failure to do so renders such an application fatally defective and liable to be struck out.”
23. Similarly, in the case of [William Mwangi Ngaruki vs Barclays Bank of Kenya Ltd](#) [2014] eKLR, this 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.”
24. The instant application is dated 15<sup>th</sup> September, 2022. The applicant was served with the notice of appeal on 8<sup>th</sup> May 2021. Clearly therefore, this application was filed long after the lapse of 30 days, from the date when the notice of appeal was served. Accordingly, the application is fatally defective, and is hereby struck out.



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

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

*Signed*

**DEPUTY REGISTRAR**

