



**Mutiso v Kitonyi & 2 others (Civil Appeal (Application)
E135 of 2019) [2023] KECA 1163 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1163 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E135 OF 2019
HA OMONDI, JM MATIVO & GWN MACHARIA, JJA
OCTOBER 6, 2023**

BETWEEN

PATRICK MUSYOKI MUTISO APPELLANT

AND

KISOI KITONYI 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

COUNTY COMMISSIONER KANGUNDO SUB COUNTY .. 3RD RESPONDENT

*(Being an application to strike out the record of appeal at the Environment
and Land Court, Machakos lodged on 4th April, 2019 and served
on 22nd July, 2019 in Judicial Review Application No.86 of 2017)*

RULING

1. Before us is an application dated August 5, 2019 brought by Kisoï Kitonyi, (the applicant) who is the 1st respondent in this appeal. In the main, he prays that the appellant's record of appeal dated April 4, 2019 filed on April 5, 2019 in Civil Appeal No. 135 of 2019 be struck out. The application is premised on rule 80 of the *Court of Appeal Rules*, 2010. The appellant's appeal is against the judgment of the ELC (Angote, J.) delivered on January 25, 2019 in Machakos ELC Judicial Review Application No. 86 of 2017.
2. The grounds in support of the application are that the record of appeal is incurably defective. In support of this assertion, the applicant states that: (a) the notice of appeal was lodged by the appellant in person contrary to Order 9 rule 9 of the *Civil Procedure Rules* 2010. (b) the Counsel who lodged the record of appeal had no capacity to do so because he failed to place himself on record as required by Order 9 rule 9 of the *Civil Procedure Rules*, 2010. (c) the decree in the record of appeal is not certified and therefore it offends Rule 85 (1) (h) of the Court of Appeal Rules.



- (d) the record of appeal though lodged on April 4, 2019 was served on July 22, 2019 outside the period stipulated under rule 87(1) of the Court of Appeal Rules.
3. In opposition to the application, the appellant filed a replying affidavit sworn on October 14, 2019. The salient averments are:
 - a. the notice of appeal was filed on February 5, 2019 and served upon the applicant on February 6, 2019. (b) to date, the 1st respondent has failed to serve a notice of address of service pursuant to Rule 79 of the Court of Appeal Rules, 2010. (c) a record of appeal was lodged and served upon the applicant herein on July 22, 2019. (d) the instant application and the grounds in support are brought under the wrong provisions of the Court of Appeal Rules (e) Order 9 rule 9 of the *Civil Procedure Rules* does not apply to appeals because an appeal is a new proceeding governed by different rules. (f) a consent for change of representation was entered into between the appellant and his erstwhile advocates. (g) the copy of the decree in the court record is an original, therefore it does not require certification under rule 85 (1) (h) of the *Court of Appeal Rules*. (h) the applicant's advocates are not properly on record having failed to comply with the provisions of rule 79 of the *Court of Appeal Rules* 2010. (i) the instant application is incompetent. (k) the appeal was served on July 22, 2019. (l) the appellant will be prejudiced if the appeal is struck out for late service.
 4. During the virtual hearing of the application on May 31, 2023, learned counsel Mr. Kilonzo appeared for the appellant. Counsel for the applicant did not file written submissions nor did he attend the virtual hearing despite being served with a hearing notice on May 23, 2023 by the Registrar of this court. Consequently, this ruling was written without the benefit of the applicant's submissions.
 5. In opposition to the application, Mr. Kilonzo reiterated the contents of the appellant's affidavit and submitted that the failure to comply with Order 9 rule 9 of the *Civil Procedure Rules* did not go to the root of the appeal or jurisdiction of the court. Further, the failure is of no consequence on the competence of the notice of appeal or the appeal itself. Accordingly, the appellant's notice of appeal is properly on record and therefore competent. Equally competent is the appellant's record of appeal, which, contrary to the 1st respondent's allegations, the appellant's advocates on record had the necessary standing to file the instant appeal. To buttress his submissions, counsel cited this Court's decision in *Tobias M. Wafubwa v Ben Butali* [2017] eKLR which held that a party is at liberty to change his advocate without any order of the court or consent of the advocate on record in the trial court, as required under Order 9 rule 9 of the *Civil Procedure Rules*.
 6. On the need to have the decree in the record of appeal certified, counsel submitted that pursuant to the leave granted by the Deputy Registrar on October 15, 2019, under rule 88 of the *Court of Appeal Rules*, 2010 (now rule 90 of the *Court of Appeal Rules*, 2022, the appellant filed a certified decree as evidenced in the Supplementary Record of Appeal dated November 8, 2019 and filed on November 9, 2019.
 7. It is the appellant's case that the delay in serving the record of appeal is not fatal because rule 90(1) of the 2010 rules (now rule 92 of the 2022 rules) requires service of the record of appeal only to respondents who have filed a notice of address for service under rule 79 of the 2010 rules (now rule 81 of the 2022 rules).
 8. It is also submitted that the delay or failure to serve the 1st respondent in time is a procedural infraction which does not occasion any prejudice or miscarriage of justice to the 1st respondent or to any party to the appeal. Reliance was placed on this court's decision in *Nicholas Kiptoo Arap Korir Salat v Independent v Electoral and Boundaries Commission & 6 others* [2013] eKLR that deviations,



procedural lapses or infractions which do not go to the jurisdiction of the court or which do not occasion prejudice or miscarriage of justice to the opposite party should not have an invalidating effect.

9. We have considered the application, the affidavits and the submissions by the appellant. We note that the motion is for striking out the record of appeal. This remedy has its roots in rule 84 of the [Court of Appeal Rules](#) which provides:

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.

10. The importance of adhering to the set timelines in the process of law cannot be underscored. We emphasize that this Court has unqualified discretion to strike out documents, proceedings, intended appeals, or appeals that fail to comply with the rules of the court. This discretion, like any other judicial discretion, must be exercised judiciously, in accordance with the Constitution and the overriding objective in sections 3A and 3B of the Appellate Jurisdiction Act. The aforementioned provisions place an obligation on this Court to ensure that the manner in which the law is interpreted or discretion is exercised corresponds with the overriding objective of civil litigation, namely the just, quick, proportionate, and affordable resolution of disputes before the court. See *City Chemist (Nbi) & ano v Oriental Commercial Bank Ltd* Civil Application No. NAI 302 of 2008 (UR 199/2008).

11. Before we apply those principles to the application before us, we have to first determine whether M/s S.M Kilonzo & Associate are rightly before this court. The applicant/1st respondent asserted that counsel who lodged the record of appeal had no capacity to do so having failed to place himself on record pursuant to Order 9 Rule 9 of the [Civil Procedure Rules](#), 2010.

12. Order 9 rules 9 of the [Civil Procedure Rules](#) provide as follows;

9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
- a. upon an application with notice to all the parties; or
 - b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

13. This court in [Tobias M. Wafubwa v Ben Butali](#) [*supra*], held;

“...Once a Judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court, where different rules may be applicable, for instance, the Court of Appeal Rules, 2010 or the Supreme Court Rules, 2010. Parties should therefore have the right to choose whether to remain with the same counsel to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.”

The court went further to state;

“As this dispute concerned an appeal from the Principal Magistrate’s Court to the High Court, it involved the commencement of new proceedings, and we are satisfied that the



Respondent’s counsel was entitled to commence them without filing a Notice of Change of seeking the leave of the court to be placed on record.”

14. Guided by the above decision, we find and hold that an application or appeal to the Appellate Court is an independent suit that is not bound by the provisions of Order 9 Rule 9 of the Civil Procedure Rules. Consequently, we hold that the notice of appeal and the record of appeal are competent and therefore properly before this court.
15. We note that although the application before us is for the striking out the record of appeal, granting the application would be a deathblow to the appeal. It is undisputed that the record of appeal was filed on April 5, 2019 within the stipulated time. However, the same was served upon the applicant/1st respondent herein on July 22, 2019, 101 days after the stipulated period. The appellant’s explanation puts the reasons for the delay squarely at the applicant/1st respondent’s doorstep. The explanation for the delay in serving is that the applicant before us failed to comply with Rule 79(1) (a) of this Court’s Rules. As a result, the appellant was unable to serve the record of appeal upon the applicant in accordance with Rule 90 (1) of this Court’s Rules, 2010 because no notice of address for service had been filed as required under Rule 79.
16. Turning to the merits of the application, the applicant’s complaint is that service upon it of the record offends the prerequisites in Rule 90 (1) and (2) of the Court’s Rules. It provides:
 - 90 (1) The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies thereof on each respondent who has complied with the requirements of rule 79.
 - (2) The appellant shall also serve copies of the memorandum of appeal and the record of appeal on such other parties to the original proceedings as the court may at any time on application or of its own motion direct and within such time as the court may appoint.
17. Rule 79 of this Court’s Rules, provides as follows:
 1. Every person on whom a notice of appeal is served shall within—
 - a. fourteen days after service on him of the notice of appeal lodge in the appropriate registry and serve on the intended appellant notice of a full and sufficient address for service; and
18. It is paradoxical that the applicant herein is seeking striking out of the appellant’s memorandum of appeal yet he is yet to comply with Rule 79 (1) (a) of the Court of Appeal Rules for the appellant’s obligation under Rule 90 (1) of this Court’s Rules 2010 to crystalize. Consequently, we find that so long as there was failure to comply with Rule 79 (1) (a) of Court of Appeal Rules, the seven days within which the appellant was required to serve the record of appeal upon the applicant/1st respondent herein never crystalized and as a result the record of appeal was regularly filed.
19. Accordingly, we find and hold that the record of appeal was filed within time. We therefore reject the 1st respondent’s application to strike out the record of appeal. We accordingly dismiss the 1st respondent’s application dated August 5, 2019. Costs of the application shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2023

H.A. OMONDI

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JUDGE OF APPEAL



J. MATIVO

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

