



Ruto & another v Keitany & 5 others (Civil Appeal (Application) 94 of 2019) [2023] KECA 1552 (KLR) (15 December 2023) (Ruling)

Neutral citation: [2023] KECA 1552 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL (APPLICATION) 94 OF 2019
DK MUSINGA, F SICHALE & FA OCHIENG, JJA
DECEMBER 15, 2023**

BETWEEN

KIMOI RUTO 1ST APPLICANT

ESTHER RUTTO 2ND APPLICANT

AND

SAMUEL KIPKOSGEI KEITANY 1ST RESPONDENT

VINCENT KIRWA RUTO 2ND RESPONDENT

PIUS KIBEREN RUTO 3RD RESPONDENT

THE AGRICULTURAL FINANCE CORPORATION 4TH RESPONDENT

ELGEIYO MARAKWET COUNTY LAND REGISTRAR 5TH RESPONDENT

THE ATTORNEY GENERAL 6TH RESPONDENT

(An application to strike out an Appeal arising from the Ruling of the Environment & Land Court at Eldoret (A. Ombwayo, J.) dated 31st May, 2016 in ELC Cause No 149 of 2015)

RULING

1. The application before us is dated February 17, 2020. It is an application seeking to strike out the appeal. The application is supported by the affidavit of Peter Kiarie Ndarwa, learned counsel for the applicants. He depones in the affidavit that:
 - “a) The respondents filed an application dated December 10, 2018 seeking extension of time to file and serve a record of appeal.
 - b. The application was allowed on October 17, 2019 when the court directed the respondents to: file and serve a notice of appeal within 14 days of the ruling; file



and serve the record of appeal within 60 days of lodging the notice of appeal; in default, the application dated December 10, 2018 and filed on December 18, 2018 to stand dismissed; and that the costs of the application be paid to the respondents personally by the respondents' advocates.

- c. The respondents filed their notice of appeal on October 23, 2019 but failed to serve the same upon the respondents within the 14 days as ordered by the court. They served the applicants on November 22, 2019.
 - d. On account of the christmas vacation that year, the respondents were to serve the applicants with the record of appeal by January 14, 2020.
 - e. However, the record of appeal was served upon the applicants' counsel on January 20, 2020.
 - f. The failure by the respondents to serve the record of appeal by January 14, 2020 meant that the application dated December 10, 2018 automatically stood dismissed, and the leave to appeal out of time lapsed.
 - g. The appeal on record stands filed out of time, it is incompetent, and for striking out.
 - h. The respondents were obliged to strictly comply with the orders of the court, which they failed to do.”
2. When the application came up for hearing on September 27, 2023, Mr. Kiarie, learned counsel appeared for the applicants, whereas Mr. Magut, learned counsel appeared for the respondents.
 3. Mr. Kiarie submitted that whereas the respondent was granted leave extending time to serve the notice and record of appeal, the leave was conditional, because there had been a delay of over two (2) years in filing the appeal. One of the conditions was that in case of default, the leave to appeal out of time stood vacated. Counsel pointed out that the notice of appeal was to be filed by October 31, 2019 but it was filed 22 days late; while the record of appeal was served seven (7) days late, and that the respondents did not apply for an extension of time. Counsel also pointed out that the respondents have not filed a replying affidavit and/or submissions in response to the instant motion.
 4. In their written submissions, the applicants reiterated that they were served out of time, and in disregard of the orders of the court. In this regard, the applicants were of the view that the appeal before court is incompetent, having been filed out of time, without leave. The applicants pointed out that the order of the court was conditional, and that failure to comply meant that the application for extension of time stood automatically dismissed; as the orders were not reviewed or varied.
 5. The applicants relied on the case of *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR and *Kenya Bureau of Standards v Centurion Engineers & Builders Limited* [2019] eKLR in submitting that the effect of filing documents out of time without leave is that, such pleadings should be struck out. They were of the view that respondents did not explain the reason for non-compliance with court orders, hence this court cannot indulge their indolence.
 6. Mr. Magut submitted that he had indeed not filed a replying affidavit and submissions in relation to the application. Counsel submitted that although the other respondents had been served on time, the applicants had been served late. Counsel was of the view, however, that the delay does not occasion any prejudice to the applicants.



7. We have carefully considered the application, the affidavit in support thereof, the submissions by counsel, the authorities cited and the law. The issue for determination is whether or not the application is merited.
8. It is common ground that the application herein is undefended.
- However, we have noted with concern that the application did not cite the grounds upon which the applicants were relying or the specific law they were relying upon as the foundation for the application.
9. Be that as it may, it is common ground that the respondents were ordered by the court to file and serve a record of appeal within 60 days of lodging their notice of appeal in line with rule 85 of the [Court of Appeal Rules, 2022](#) which provides that:
- “(1) If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, that party shall be deemed to have withdrawn the notice of appeal and the Court may, on its own motion or on application by any other party, make such order.
- (2) The party in default under sub-rule (1) shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.”
10. The respondents failed to comply with the court orders and the applicants filed the present application pursuant to rule 86 of the [Court of Appeal Rules](#) which 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 —
- a. that no appeal lies; or
- b. 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.”
11. From our perusal of the application, the applicants have brought this application on the limb that, “that some essential step in the proceedings has not been taken or has not been taken within the prescribed time” being that, the notice of appeal was served on them after the expiry of 14 days from the date of the ruling while the record of appeal was also filed and served late by seven (7) days of the lodging of the notice of appeal.
12. The applicants’ main contention is that they were served with both the notice of appeal and the record of appeal outside the stipulated timelines. Rule 79(1) of the [Court of Appeal Rules](#) provides that:
- “An intended appellant shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal:
- Provided that the court may, on application which may be made ex parte, within seven days after the lodging of the notice of appeal, direct that service need not be effected on any person who did not take part in the proceedings in the superior court.”



13. In this instance, the respondents had made an application for extension of time within which to file a notice of appeal and record of appeal. They were granted 14 days leave to file and serve a notice of appeal and 60 days of the lodging of the notice of appeal to file and serve a record of appeal. It is evident from the application that, although the notice of appeal was filed on time, there was delay in serving the applicants. It is also clear from the record that the record of appeal was served upon the applicants after the lapse of the 60 days ordered by the court; and counsel for the respondents conceded as much. The respondents did not advance any reason for the delay.

14. In the case of *Mae Properties Limited v Joseph Kibe & another* [2017] eKLR, this court stated thus:

“It is not in dispute that the notice of appeal was lodged at the High Court registry on May 26, 2015. It is also not in dispute that by dint of rule 82(1) of the *Court of Appeal Rules 2010*, the appeal should have been instituted within sixty days thereafter, but was not. It in fact had not been instituted as at the date of the filing of the motion some 15 months later. As at the hearing of the motion, more than two years had elapsed.

We have said on numerous occasions that the *Rules of Court* exist for the purpose of orderly administration of justice before this Court. The timelines for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals that come before us. The Rules are expressed in clear and unambiguous terms and they command obedience.

Failure to comply with the timelines set invites sure consequences. In the case of failure to lodge an appeal within 60 days after filing of the notice of appeal, Rule 83, which is invoked by the applicant herein, provides thus;

‘83. 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 may on its own motion or on 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.’

We think that the true meaning and import of the rule is more often than not scarcely appreciated. The rule as framed prescribes the legal consequence for non-institution of an appeal within the 60 days appointed by the *Rules of Court*. Moreover, the said consequence is couched in mandatory, peremptory terms: the offending party shall be deemed to have withdrawn the appeal. It seems to us that the deeming sets in the moment the appointed time lapses.

Essentially this is a practical rule that is intended to rid our registry of merely speculative notices of appeal filed either in knee-jerk reaction to the decision of the court below, or filed in holding mode while the party considers whether or not to lodge a substantive appeal. Indeed, it is not uncommon and we take judicial notice of it, for such notices to be lodged ex abundanti cautella by counsel upon the pronouncement of decisions but to await instructions on whether or not to proceed full throttle with the appeal proper - with the attendant risks, prospects and consequences.”

15. We find that the delay in effecting service of the notice of appeal and record of appeal was in contravention of the court order dated October 17, 2019 and the provisions of rules 85 and 86 of the *Court of Appeal Rules*. The respondents have not sought any orders which could regularise the default, and therefore, the notice of appeal and the record of appeal ought to be struck out for being incompetent.



16. In the result, the application is allowed. We strike out the notice of appeal and the record of appeal.
17. As costs follow the event, and in compliance with rule 85(2) of the *Court of Appeal Rules*, the respondents shall bear the costs of this application.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 15TH DAY OF DECEMBER, 2023.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

