



**Tom Ojienda & Associates v National Land Commission (Civil Appeal
(Application) E264 of 2020) [2023] KECA 1515 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1515 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E264 OF 2020
MSA MAKHANDIA, S OLE KANTAI & PM GACHOKA, JJA
DECEMBER 8, 2023**

BETWEEN

PROF TOM OJIENDA & ASSOCIATES APPLICANT

AND

NATIONAL LAND COMMISSION RESPONDENT

*(An application to strike out the record of appeal against the Ruling
of the High Court of Kenya at Nairobi (Kasango, J.) dated 20th
September, 2017 in Nairobi HCCA Misc. Civil App. No. 513 of 2016)*

RULING

1. Prof Tom Ojienda & Associates, the applicant, is seeking to have the record of appeal filed by the National Land Commission, the respondent, on August 25, 2020 be struck out. The application is brought under rule 84 of the [Court of Appeal Rules](#) “the rules”. The grounds in support of the application are that the judgment, the subject of the appeal was delivered on September 20, 2018, and the respondent filed a notice of appeal on October 4, 2018. The appellant was then obligated to file a record of appeal within 60 days. Instead, it filed the same after 664 days in violation of the provisions of rule 83 of the [Rules](#).
2. While still in that slumber, the applicant on August 12, 2020 filed an application to have the said notice deemed as withdrawn under rule 83 of the [Rules](#). This action awoke the respondent who then filed the record of appeal out of time and without leave of this Court on August 25, 2020. In the premises, the record of appeal was filed 664 days after the filing of the notice of appeal. That the said delay was inordinate and inexcusable hence the plea that the record of appeal be struck out. The respondent did not file any papers in response to the application.
3. When the motion came up for hearing on September 26, 2023, Prof Ojienda, SC appeared for the applicant but there was no representation by the respondent though served. Senior Counsel opted to



rely on the written submissions he had filed in which he reiterated the facts of his case as stated above. While relying on the case of *Patrick Kiruja Kitbinji v Victor Mugira Marete* [2015] eKLR, counsel submitted that time as to when a notice or record of appeal is filed, goes to the jurisdiction of this court and when it is found that they were filed out of time and without leave, it becomes a candidate for striking out.

4. We have considered the application, the submissions made on behalf of the applicant and the law. We shall begin by considering the issue of the competency of the application which though not raised, is upon us to consider nonetheless. Rule 84 of the *Rules* is the basis upon which an application for striking out a notice or record of appeal can be made. It provides inter alia:

“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.”

5. In the case of *Mae Properties Limited vs. Joseph Kibe & another* [2017] eKLR, where this court while dealing with an application to strike out a notice of appeal which was filed outside the 30-day limit in the proviso to rule 84 aforesaid reasoned as follows:

“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.”



- 6. Was this application however filed within the requisite time frame? It is not in dispute that the record of appeal was served upon the applicant on March 23, 2021, having been filed on August 25, 2020. The instant application was dated and filed on April 21, 2021. It was therefore filed within the timeframes required under the rules.

- 7. We are fully convinced that, on the authorities, this Court has been quite consistent on the validity, utility and binding force of the rules. It has never been the practice that sympathy with an appellant on account of the importance of the subject matter of an appeal or public interest would, of and in itself, save an incompetent appeal. To worsen the situation in the instant application, the respondent did not deem it necessary to file any response to the application or to attend court when the application was called out for hearing despite the colossal amount involved. The averments of the applicant are therefore uncontroverted. It is obvious that the record of appeal was filed and served out of time.

- 8. In the circumstances, we have no choice but to allow the application dated April 21, 2021 with costs to the applicant.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF DECEMBER 2023.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

M. GACHOKA CIArb., FCIArb.

.....

JUDGE OF APPEAL

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

SIGNED

DEPUTY REGISTRAR

