



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nzusyo & another v Wambua & another (Civil Appeal (Application)  
7 of 2019) [2022] KECA 17 (KLR) (21 January 2022) (Ruling)**

Neutral citation: [2022] KECA 17 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPEAL (APPLICATION) 7 OF 2019  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
JANUARY 21, 2022**

**BETWEEN**

**MUTISYA MUINDI NZUSYO ..... 1<sup>ST</sup> APPELLANT**

**BEATRICE KAVATA WAMBUA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MARGARET K. WAMBUA ..... 1<sup>ST</sup> RESPONDENT**

**KINGSTON MULEWA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application to strike out the appellant's notice of appeal dated 21st December, 2018 and record of appeal against the judgement of the High Court at Malindi delivered by the Hon Mr Justice W. Korir rendered on 19th December 2018 in Succession Cause No. 3 of 2009)*

**RULING**

1. The application before us is dated 13th February 2019. It has been brought pursuant to Rule 84, 82, (1) and (2) of the [Court of Appeal Rules](#). It seeks the following orders:
  - i. That the Honourable Court be pleased to strike out the Appellants'/ Respondents' Notice of Appeal dated 21<sup>st</sup> December 2018 filed in court on 27<sup>th</sup> December 2018.
  - ii. That the Honourable Court be pleased to subsequently strike out the Record of Appeal and Memorandum of Appeal filed herein.
  - iii. That the Appellants/Respondents be condemned to pay costs of the application.



2. The application is premised on grounds that the Notice of Appeal was filed on 27th December, 2018, but was not served upon the Applicants within seven (7) days from the lodging of the Notice as provided for under Rule 77 of this court's rules, and that essential procedural steps in the proceedings have not been taken, or were not taken within the prescribed time as stipulated under the provisions of Rule 84 of the Rules and should therefore be struck out. The Applicants contend that their advocate was only served with a record of appeal on 5th February, 2019.
3. The background to the appeal is that the 1st Respondent and the 2nd Applicant were co-wives of the deceased Nelson Wambua Masila and were co-administratrix of the estate of the deceased pursuant to a grant that was issued on 11th May, 2015. On 19th May, 2016 the co-administratrix entered an oral consent in which they distributed the estate of the deceased. In the consent, it was agreed that the issue of Plot No. 54 Ngala Estate Malindi be heard by way of oral evidence.
4. The 1st Applicant (Mutisya Muindi Nzusyo), who was the Objector in the Cause contended that he bought Plot no. 54 from one Peter Kirubi who had purchased the same from the deceased, hence it did not form part of the estate of the deceased for purposes of distribution. The judgement of 19th December, 2018 sustained his objection and declared that the plot belonged to him. The Respondents were aggrieved and therefore filed the appeal herein against the Objector and the first widow, the Applicants herein.
5. Submitting in support of the application, learned Counsel Gicharu Kimani contended that this court had jurisdiction to entertain this application pursuant to Rule 77 (1) of the Court of Appeal Rules which provides that the Notice of Appeal should be served before or within seven days after being lodged, and Rule 84 of the same Rules which gives this court jurisdiction. He buttressed his submissions with two cases, *Peter Gichuki Kingara v IEBC & Others* Nyeri C. A No, 31 of 2013 and *Kamlesh Pattni v Director of Public Prosecutions & 3 Others* [2015] eKLR, both of which we have considered.
6. Counsel argued that the Respondents were in breach of Rule 77(1) of the Court of Appeal Rules and in the absence of an explanation for the said violation then the application ought to be allowed. He urged that the application of procedural rules must be upheld by the court. Mr Gicharu Kimani urged that it is not enough for the Respondents to heap blame entirely on their advocate on record for the violations complained of, but that they should demonstrate that indeed they took tangible steps and exercised due diligence in following up their case, which in the circumstances herein, no such evidence has been rendered.
7. Mr. Gicharu Kimani submitted that the Respondents do not stand to suffer any prejudice if the application is granted as they have a remedy against their erstwhile advocates. For that proposition he relied on *Omwoyo v African Highlands & Produce Ltd* [2002] 1 KLR.
8. The 1st Respondent swore an affidavit in response to the application in which he contends that being a lay man he had no reason to doubt his advocates, and urged that the mistake or negligence of his advocates should not be visited on him. He invited the court to consider the fact that the Notice and Record of Appeal were filed within time and find that no prejudice was intended, and none will be suffered by the Applicants if the appeal is heard. The 2nd Respondent in his affidavit in addition to what was deposed by the 1st Respondent emphasized the need for justice over procedural technicalities.
9. The Respondents advocates Tonia Mwanja & Associates filed submissions in which they invited the court to consider the case of *Nicholas Kiptoo Salat vs IEBC & 8 Others* Civil Appeal (application) No. 228 of 2013. She also relied on the Ugandan case of *Banco Arabe Espanol vs Bank of Uganda* (1999) 2 EA 22 for the proposition that courts should give preference to determination of cases on merit.



Counsel submitted that the mistakes of the advocate ought not to be visited on the client, and invited the court to note that the Notice and Record of Appeal were filed within time with no intention to occasion prejudice on the Applicants. It was also argued that the delay in service was not deliberate and should not be a ground for striking out the appeal; that no prejudice has been occasioned to the applicant. The court was urged to dismiss the application.

10. We have considered this application, the affidavits filed for and against the application and the submissions by both parties. The issue for determination is whether the Notice of Appeal and the Record of Appeal should be struck out for violation of procedural laws, as sought by the Applicants. Rule 84 of the Court of Appeal Rules enables a person affected by an appeal to apply for striking out of the notice or the appeal itself, if already instituted, if an essential step in the proceedings was not taken or was not taken within the prescribed time. It is by dint of this Rule that the Applicants contend that the Respondent's Notice of Appeal and the appeal itself should be struck out for failure of the Respondents to serve them with the Notice of Appeal within the stipulated 7 days.
11. It is admitted by the Respondents that the Notice of Appeal was not served upon the Applicants within the time stipulated by this Court's Rules. The Notice of Appeal was filed on 27th December, 2018. Instead the Record of Appeal, which contained the Notice of Appeal was served on 5th February, 2019. It is not disputed that both the Notice and Record of Appeal were filed within time. The Notice of Appeal should have been served within 7 days from date it was lodged, which means that the delay involved is about one month.
12. This Court has on numerous occasions expressed itself on the issue at hand. On the issue of noncompliance with the timelines within which to serve a notice of appeal, this Court in *Daniel Nkirimpa Monirei vs. Sayialele ole Koilel & 4 Others* [2016] eKLR, stated that:

“Whichever way, one looks at it, there was no service of the Notice of Appeal on the applicant. The purpose of service of a Notice of Appeal is to alert the parties being served that the case in question has not been concluded yet, as the same has been escalated to another level. This enables the party to prepare and get ready for another fight, be it by way of gathering resources or just getting mentally prepared for defending the intended appeal. Failure to serve a party with a Notice of Appeal within the time prescribed by law gives a party false belief that the matter has been concluded, only to be ambushed later with the record of appeal in which the said notice is tucked away somewhere in the NRB Civil Application No. E248 of 2020 Ruling of the Court 14 record. That occasions prejudice to the ambushed party, and it is in our view a habit that should not be countenanced in any fair and just process. That would explain why Rule 77 (1) of the Court of Appeal Rules is couched in mandatory terms.”
13. However, unlike the situation in *Daniel Nkirimpa Monirei vs. Sayialele ole Koilel* (supra), where the Respondents filed their appeal out of time, the Respondents in the instant case filed both the Notice of Appeal and the appeal in time. The Respondents have explained the reason for the delay in serving the Notice of Appeal as mistake of their previous counsel, and they have urged us not to penalize them for that mistake, or drive them from a merit determination of their appeal.
14. In the circumstances, and in the interests of justice the appellants/Respondents should have an opportunity to regularize by making an application for extension of time within 30 days from the date of this ruling, failing which the appeal will stand struck out.
15. Subject to the condition set in paragraph 14 above, this application is dismissed. The Applicants will have the costs of this application in any event.



DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF JANUARY 2022.

S. GATEMBU KAIRU (FCIArb)

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

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

*Signed*

**DEPUTY REGISTRAR**

