



Taib & another v Wekesa & another ((Suing as the legal representative of the Estate of George Ellam Wekesa)) (Civil Application 41 of 2019) [2022] KECA 444 (KLR) (18 March 2022) (Ruling)

Neutral citation: [2022] KECA 444 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 41 OF 2019
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MARCH 18, 2022**

BETWEEN

SHEIKH ALI TAIB 1ST APPLICANT

ABDALLA ALI TAIB 2ND APPLICANT

AND

SELINA WEKESA 1ST RESPONDENT

KENNEDY ELLAM WEKESA 2ND RESPONDENT

**(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GEORGE
ELLAM WEKESA)**

(Being an application to strike out the memorandum of appeal lodged on 11th April, 2019 and the record of appeal dated 26th March, 2019 against the ruling of the Honorable Lady Justice N.A. Matheka delivered in Mombasa on 6th December, 2018 In ELC No 454 of 2002)

RULING

1. Before us is the notice of motion application dated 21st May, 2019 brought under Rules 82 and 84 of the *Court of Appeal Rules*. It seeks two orders; that the Memorandum of Appeal lodged on 11th April, 2019 in Mombasa Civil Appeal No. 51 of 2019, and the Record of Appeal dated 26th March, 2019 and lodged in the same file be struck out with costs.
2. The grounds of the application are: that the Respondent failed to make a formal application for a copy of proceedings in the Environment and Land Court (ELC) Case No 454 of 2002 in accordance with Rule 82(2) of this court's rules; that the Respondents have not served the Applicants with a copy of the letter to the Deputy Registrar requesting for a copy of the proceedings; that the Respondents have not annexed a copy of the letter to the Deputy Registrar requesting for a copy of the proceedings in the Record of Appeal; and, that the appeal was filed out of time.



3. The affidavit in support of the application is sworn by the 1st Applicant, and reiterates the grounds contained on the face of the notice of motion. It deposes further that the Applicants counsel was on 25th April, 2019 served with a record of appeal dated 26th March, 2019. Yet the Record of Appeal filed in Civil Appeal No. 51 of 2019 revealed that the copy of proceedings was received on 24th January, 2019. It is disposed that the appeal was filed out of time and should be dismissed.
4. The 2nd Respondent has sworn a replying affidavit in response to the application, dated 13th February 2020, and filed late with the leave of the court granted on 18th December, 2019. He deposes that he lodged an appeal against the decision of the trial court, desirous to prosecute his appeal. He has annexed the Notice of Appeal which is dated 18th December 2018. He deposes that he made a formal application for a copy of the proceedings on the 18th December, 2018, a copy of which letter he has annexed to his affidavit. He admits that there was delay in the filing of the record of appeal by one day, and explains that this was occasioned by the process of following up on the relevant documents from the court. He avers that the letter requesting for a copy of the proceedings appears at page 359 of the record, contrary to the averment of the Applicant that the same was not there.
5. The application was heard virtually on the 8th December, 2021. Only Mr. Shehi holding brief for Mr. Mukiri for the Applicants and Mr. Wameyo for the 2nd Respondent attended the session. The firm of Ms. Musinga and Co advocates for the 1st Respondent did not attend the virtual court despite being served with the hearing notice. Mr. Shehi for the Applicants, and Mr. Wameyo for the 2nd Respondent both informed the court that they had filed their respective submissions and wished to entirely rely on them.
6. In the submissions filed on behalf of the Applicants, counsel reiterated the grounds on the face of the notice of motion, and contained in the supporting affidavit. Counsel urged that the Respondents failed to make a formal application for a copy of the proceedings in the ELC therefore flouting Rule 82(2) of this court's rules, and also that they neither served them with a copy of the said letter, nor annexed the letter to the Record of Appeal as required by the rules. He urged that the appeal was filed out of time contrary to Rule 82(1) of this court's rules and that the Memorandum of Appeal and the Record of Appeal should be struck out with costs.
7. Mr. Wameyo in his submissions in opposition to the application reiterated the contents of the replying affidavit sworn by his client. He urged that the application was not meritorious as the Respondent has offered credible explanation and rebuttal to the averments in the Motion. He urged that the Notice of Appeal was filed on 18th December, 2018 against the ruling of the trial court delivered on 6th December, 2018 and was done in compliance with Rule 77 of the rules. He submitted that the discretion to strike out proceedings should be determined on the merits of each case. Counsel cited the case of *Daniel Nkirimpa Morina v Sayialel Ole Koilel & Others* Civil Appeal 140 of 2015 which dealt with a similar application to the instant one and in which this court, differently constituted held that a proper basis must be laid before the court can invoke the overriding principle in favour of a party.
8. Mr. Wameyo submitted that if the appeal were to be struck out as applied in the application, there was inherent danger that the 1st Respondent/Appellant who is a paraplegic widow may be evicted from the suit property without giving her a chance to have her day in court. He urged the court to find that the appropriate order to make would be not to strike out the appeal but to grant the Respondents extension to file a proper record of appeal.
9. We have considered the application, the affidavits sworn for and against the application together with the submissions filed by the respective parties. We have also considered the cases cited.



10. The application has been brought under Rules 82 and 84 of this court's rules. Rule 82 (1) (2) of the Rules provides:

1. Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged—
 - (a) a memorandum of appeal, in quadruplicate;
 - (b) the record of appeal, in quadruplicate;
 - (c) the prescribed fee; and
 - (d) security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

2. An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent”

11. Rule 84 of the rules provides as follows:

“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.”

12. Rule 82(1) requires the letter bespeaking proceedings to be lodged and served within thirty (30) days of the decision intended to be impugned, and be served upon the Respondent. In default, a party cannot find succor in the proviso to 82(1) of the Court's Rules. The ruling intended to be appealed from was delivered on the 6th December, 2018 and the Notice of Appeal filed on 18th December, 2018, within the requirement of Rules. The Applicants complaint is that the letter bespeaking of the proceedings was never written to the Deputy Registrar, nor served upon them. The Applicants have annexed a Certificate of Delay addressed to Mr. Wameyo, then on record for both Respondents, from the Deputy Registrar which refers to the counsel's request for certified copies of proceedings by a letter dated 18th December, 2018. This is proof that the request was indeed made.

13. The Applicants second complaint is that the letter bespeaking of the proceedings was never served upon their advocate. In reply to that allegation, the 2nd Respondent annexed a copy of the letter delivered to the Applicants' counsel marked exhibit KEW4. The letter is not annexed to the copy of the affidavit scanned and filed in court alongside the other annexures. However, the Applicants advocate was served with the replying affidavit. It is instructive that there was no response filed, which means that the receipt of the impugned letter is no longer in dispute.

14. The conclusion we make is that the only merited complaint in this application is the late filing of the appeal. The Certificate of delay was dated 7th March 2019 explaining that the period between



18th December 2018 and 24th January 2019 was the required for the preparation and delivery of the proceedings. That means that in order to comply with Rule 82 of the Rules, the Respondent should have filed the appeal on or before 24th March, 2019. The appeal was filed on 26th March, 2019, meaning that the delay involved was one day.

15. This court has numerously pronounced itself on consequences of noncompliance with the Rules of this court.

In regard to the noncompliance with Rule 82 this court in the case of *Patrick Kiruja Kithinji vs. Victor Mugira Marete* [2015] eKLR, held that the issue as to whether or not an appeal is filed on time is a fundamental issue as it goes to the jurisdiction of the Court, and that the Court only has jurisdiction to entertain appeals filed within the requisite time and or appeals filed out of time but with the leave of the Court.

16. This appeal was filed outside the requisite time, and without leave of the court. The 2nd Respondent's counsel urged us not to strike out the appeal but grant the Respondents an extension of time to file a proper Notice of Appeal and Record of Appeal.

17. What should this court do? This court has also pronounced itself as to the consequences of an appeal filed out of time without leave. In *Ali K. Ahmed T/A Sky Club Restaurant vs. Kabundu Holdings Limited* [2009] eKLR; and *Kenya Industrial Estates Limited vs. Anne Chepsiror & 4 Others* [2018] eKLR; including that cited by the Respondent of Daniel Nkirimpa Morina, (supra) this court held that an appeal filed out of time without leave is a proper candidate for striking out. In *Ramji Davji Vekaria Vs Joseph Oyula* [2011] eKLR this court held that lodging an appeal out of time is not a procedural technicality which can be cured by the court invoking the overriding principle. The issue is a substantive one that goes to the core of ensuring that an intended respondent or interested/affected party is accorded reasonable time to prepare for an appeal.

18. The court can invoke the overriding principle only in well deserving cases, depending on its own peculiar circumstances, as the overriding principle is not a panacea for all ills and in every situation. Proper basis must be laid before the court, and the court giving effect to that principle must do so judiciously and with proper and explicable foundation. That was the holding in this court's case of *Murandula Suresh Kantaria Vs Suresh Nanalal Kantaria* Civil Appeal No. 277 of 2005.

19. The Respondent has explained that the delay was inadvertent having been occasioned by following up of the documents from the court. We find the explanation reasonable. The delay involved was one day. This is not inordinate.

20. As a result, the undeniable fate of an appeal filed out of time without leave of the court is to be struck out. However, in the interest of justice we hereby suspend the order of striking out the Record of Appeal for a period of 45 days from the date hereof. Within that period the Respondents shall file and serve the requisite application for the extension of time under Rule 4 of this court's rules and in default the appeal will stand struck out with costs to the applicants. The Applicants will have the costs of this application in any event.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF MARCH, 2022.

S. GATEMBU KAIRU (FCIArb)

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JUDGE OF APPEAL

P. NYAMWEYA



.....
JUDGE OF APPEAL

J. LESIIT

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR

