



**Gathuma & another v Hinga (Civil Appeal (Application)  
259 of 2020) [2022] KECA 530 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KECA 530 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) 259 OF 2020**

**K M'INOTI, JA**

**APRIL 28, 2022**

**BETWEEN**

**WILLIAM MWANGI GATHUMA ..... 1<sup>ST</sup> APPLICANT**

**JANET WANJIKU MWANGI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**ANN MUMBI HINGA ..... RESPONDENT**

*(Application for extension of time to apply to strike out Record of Appeal from the Judgment of the Environment and Land Court at Nairobi (Kimei, J.) dated 22nd September 2017 in ELCC No. 34 of 2011)*

**RULING**

1. The Motion on Notice dated April 21, 2021 seeks extension of time to enable the applicants apply to strike out the record of appeal filed by the respondent on June 26, 2020. There is also a prayer to strike out the record of appeal once extension of time is granted. Sitting as a single judge, my jurisdiction is strictly limited to the issue of extension of time. Whether the record of appeal should or should not be struck out is an issue for the full Court.
2. By dint of rule 84 of the Rules of this [Court](#), a party affected by an appeal may apply to strike out the notice or the record of appeal on the ground that no appeal lies or that some essential step has not been taken at all or within the prescribed time. The proviso to that rule however, requires that any such application must be brought within 30 days from the date of service of the impugned notice of appeal or record of appeal. The applicants did not file the application to strike out the record of appeal within the period set by the proviso to rule 84, and are therefore before me for extension of time.
3. The facts of the application are a bit peculiar. On September 22, 2017 the Environment and Land Court (Kemei, J.) dismissed a suit by the respondent, Anne Mumbi Hinga, who was then represented by M/s Gathara Mahinda & Company Advocates. On September 27, 2017, the said advocates lodged



a notice of appeal evincing intention to appeal the judgment of the Environment and Land Court. It appears that subsequently the respondent filed an application for stay of execution and the record of appeal.

4. In the affidavit sworn on February 22, 2021 by the 1st applicant in support of the application, he deposes that upon learning of the application and the appeal, which were served upon M/s Kairu Mbuthia Law LLP Advocates, instead of their advocates on record, M/s Kiingati Ndirangu & Associates, the applicants made inquiries to M/s Gathara Mahinda & Company Advocates, who promptly disowned the application and appeal, contending that they had not filed the same and that their signatures thereon were forgeries. The applicants further state that they did not know how to proceed in light of the firm of Gathara Mahinda & Company Advocates disowning the appeal and took time in correspondence with the said advocates and the Court to figure out how to proceed. The Court advised them to wait for directions, but none were forthcoming. Ultimately, they were served with a hearing notice for the appeal. The applicant's then decided to apply to strike out the appeal, but they were already out of time.
5. The applicants further contend that other than the fact that the advocates who purportedly filed the appeal have disowned it, the appeal is filed out of time without leave because the certificate of delay indicates that certified copies of the judgment and proceeding were availed on June 21, 2017, but the record of appeal was filed on June 26, 2020.
6. The respondent opposes the appeal on the basis of two affidavits sworn on April 19, 2021, one by herself, and the other by Simon Ndege, Advocate. The respondent accuses her former advocates of professional misconduct and asserts that she had agreed with those advocates that they would work with Mr. Ndege in compiling and filing the record of appeal. Whereas it is conceded that the record of appeal was prepared and filed by Mr. Ndege, it is contended that it was filed with the consent of M/s Gathara Mahinda & Company Advocates. In their written submissions which I have duly considered, both parties have elaborated on their respective cases and cited authorities in support.
7. The Court's discretion in an application for extension of time is wide and unfettered, and is subject only to the caveat that the discretion should be exercised judiciously and on reason rather than whimsically or capriciously. The considerations that guide the Court are well laid out in such decisions as *Fakir Mohamed v. Joseph Mugambi & 2 Others*, CA No. Nai. 332 of 2004 and *Sila Mutiso v. Rose Hellen Wangari Mwangi*, Civil Application No. Nai. 255 of 1997. The considerations include, among others, the length of delay, the reason for the delay, the chances of the appeal or application succeeding if time is extended, and the degree of prejudice to the respondent if the application is granted.
8. The applicant explains the delay in making the application to strike out the record of appeal on the basis of the 'paralysis' that arose after the respondent's former advocates disowned the appeal and the fact that they were waiting for the directions of the Court. The impugned record of appeal was filed on June 26, 2020 and this application was made on 21st February 2021. Although under normal circumstances I would consider that delay inordinate, in light of the peculiar circumstances of this application and the explanation advanced, I am persuaded that the delay had been sufficiently explained.
9. On the prospects of the application to strike out the record of appeal, prima facie there is evidence on record that the respondent's former advocates have disowned and disassociated themselves from the record of appeal filed in their name. The certificate of delay on record shows that the certified copies of the proceedings and judgment were availed on June 21, 2017 but the record of appeal is dated June 26, 2020 three years later. However, it is not for me to determine whether these would justify striking out the record of appeal; that is for the full Court.



10. The replying affidavits in opposition to the application address more the question why the record of appeal should not be struck out rather than why time should not be extended to enable the applicants to strike out the notice and record of appeal. At the risk of repetition, whether to strike out those documents is to be determined by the full court. In the circumstances I am satisfied that this application is merited. I allow the same, extend time and deem the application to strike out the record of appeal as filed within time. The registry shall now fix the said application before the full Court for hearing and determination. Costs of this motion shall abide the outcome of the application to strike out the record of appeal.

**DATED AT NAIROBI THIS 28TH OF DAY APRIL, 2022**

**K. M'INOTI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

