



**Spiga & another v Khaminwa (Civil Application 12 of 2020)
[2022] KECA 614 (KLR) (13 May 2022) (Ruling)**

Neutral citation: [2022] KECA 614 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION 12 OF 2020
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MAY 13, 2022**

BETWEEN

PAOLO SPIGA 1ST APPLICANT

GIANFRANCO MARIA SANTUCCI 2ND APPLICANT

AND

DR. JOHN MUGALASINGA KHAMINWA RESPONDENT

(An Application to strike out the Notice of Appeal dated and lodged on 10th April 2010)

RULING

1. The application before this Court is a Notice of Motion dated January 17, 2020, brought pursuant to Rules 42, 75 (1) & (2), 82, 83 and Rule 84 of the [Court of Appeal Rules, 2010](#). The Applicants are seeking to have the Notice of Appeal dated and lodged by the Respondent on 10th April 2019 by the Respondent struck out. The application is supported by an affidavit sworn on January 17, 2020 by Santucci Gianofranco Maria, the 2nd Applicant.
2. The Applicants' case is that on April 9, 2019, a ruling was delivered in Malindi ELC Case No. 35 of 2009 in their favour, whereupon the Respondent lodged a Notice of Appeal against the said ruling on April 10, 2019. The Notice was subsequently served on the Applicants on April 27, 2019, but the Respondent did not serve them with any letter seeking for the typed proceedings. In addition, that the Applicants were served with the Record of Appeal on August 27, 2019, yet no leave was sought by the Respondent to file the said Record of Appeal out of time. The Applicants annexed copies of the Ruling in Malindi ELC Case No 35 of 2009 and the Respondent's Notice of Appeal dated 10th April 2019 and lodged on the same date.



3. When the matter came up for hearing on 21st February 2022, the counsel for the Applicants and Respondent were not present, and we proceeded to reserve a ruling date based on the parties' submissions on record.
4. Muli & Ole Kina Advocates filed submissions dated 10th November 2021 on behalf of the Applicants, wherein the counsel reiterated that the record of appeal was filed outside the 60 days provided for under Rule 82 of the Rules of the Court, and that no letter requesting for proceedings was served on the applicant. Further, that the strict adherence to the timelines in Rule 82 was emphasized in *Nexus Strategy Limited vs Samuel Njiraini Ngabia* [2021] e KLR, and as a result, the Respondent may not benefit from a certificate of delay issued under Rule 82 (3) of the Court of Appeal Rules. The Applicants submitted that they have moved the Court pursuant to the provisions of Rule 83, and placed reliance on the decision in *Nexus Strategy Limited vs Samuel Njiraini Ngabia* (*supra*) that where a notice of appeal is not backed by institution of an appeal, the conclusion is that the intended appellant has abandoned his intention to appeal notwithstanding that he has not formally withdrawn the notice of appeal under Rule 81.
5. Submissions in opposition to the application dated 19th November 2021 were filed by Khaminwa & Khaminwa Advocates. The counsel admitted the failure on their part to serve the Notice of Appeal within the period prescribed by the Court of Appeal Rules, which he submitted was an oversight and sought the Court's indulgence on the same. Counsel drew the Court's attention to the power to extend time under Rule 4, and urged that this Court to ensure substantive justice over error of form and procedure as provided in Article 159 (2) (d), 48 and 50 (1) of *the Constitution*, and stated in the case of *Philip Chemwolo & Another v Augustine Kubende* (1986) eKLR.
6. The Respondent submitted that he was desirous of prosecuting his appeal having filed his Notice of Appeal in time and proceeded to request for the proceedings, which he stated was evidenced by his letters of April 10, 2019, 13th & 25th September 2019, October 1, 2019 and 22nd November 2019. Subsequently that the Certificate of delay dated March 2, 2020 was issued, and the Record of Appeal lodged on August 20, 2020. Further, that though the Certificate of delay dated March 2, 2020 stated that the proceedings were collected on February 19, 2020, the National Council on the Administration of Justice suspended with immediate effect all Courts proceedings on 15th March 2020 as a result of the Covid -19 pandemic, and it was not possible to file the record of appeal within the required timelines.
7. Lastly, the Respondent faulted the Applicants for filing their application on January 27, 2020 when they were served with the Notice of Appeal on August 27, 2019. Counsel submitted that the Applicants were therefore in breach of Rule 84 of the Court of Appeal Rules and their application should be dismissed.
8. We have considered the various pleadings filed by the parties herein. The prayer in the instant application seeks to strike out the Notice of Appeal, and although the Applicants have submitted that they have moved this Court pursuant to Rule 83, there is no specific prayer in their application seeking to have the Notice of Appeal deemed as withdrawn. While this Court has discretion to deem a Notice of Appeal as withdrawn suo moto under Rule 83, it is notable that the said Rule applies when there is default in instituting an appeal, whereas there is a Record of Appeal already filed by the Respondent in the instant application.
9. On the other hand, the provision for striking out of a Notice of Appeal is under Rule 84 of the Court of Appeal Rules of 2010, and the proviso to the said Rule requires an application to strike out a notice of appeal or record of appeal, as the case may be. This Court has in this regard held in *Salama Beach Hotel Limited & 4 others v Kenyariri & Associated Advocates & 4 others* (2016) eKLR and *Joyce Bochere*



Nyamweya v Jemima Nyaboke Nyamweya & another [2016] eKLR that failure to observe the timelines in the proviso to Rule 84 renders an application fatally defective and liable to be struck out, and that if a party finds itself caught up by the lapse of time as was in this case, the proper thing to do is to file an application for extension of time.

10. It is not disputed that the Respondent's Notice of Appeal was served on the Applicants on August 26, 2019, and the instant application, which was lodged on January 21, 2020 is clearly out of time, having been lodged after the thirty days' timeline in the proviso to Rule 84. The application is therefore incompetent as it is filed out of time and the Applicants did not bring any evidence of having been granted extension of time.
11. The application dated January 17, 2020 is accordingly struck out with costs to the Respondent.
12. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF MAY 2022

S. GATEMBU KAIRU, FCIarb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

