



Cabinet Secretary, Ministry of Lands Housing and Urban Development (Formerly Known as the Hon. Minister For Lands) & 2 others v Osman (On his own Behalf and on behalf of 1222 Evictees of Medina Location, Municipal Council of Garissa) & another; Global Initiative for Economic Rights & 6 others (Amicus Curiae) (Civil Appeal 89 of 2017) [2022] KECA 876 (KLR) (22 July 2022) (Ruling)

Neutral citation: [2022] KECA 876 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 89 OF 2017
HM OKWENGU, F SICHALE & A MBOGHOLI-MSAGHA, JJA
JULY 22, 2022**

BETWEEN

CABINET SECRETARY, MINISTRY OF LANDS HOUSING AND URBAN DEVELOPMENT (FORMERLY KNOWN AS THE HON. MINISTER FOR LANDS) 1ST APPELLANT
CABINET SECRETARY, MINISTER OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT (FORMERLY KNOWN AS THE HON. MINISTER FOR STATE FOR PROVINCIAL ADMINISTRATION AND INTERNAL SECURITY) 2ND APPELLANT
ATTORNEY GENERAL 3RD APPELLANT

AND

IBRAHIM SANGOR OSMAN (ON HIS OWN BEHALF AND ON BEHALF OF 1222 EVICTEES OF MEDINA LOCATION, MUNICIPAL COUNCIL OF GARISSA) 1ST RESPONDENT
COUNTY GOVERNMENT OF GARISSA (FORMERLY KNOWN AS MUNICIPAL COUNCIL OF GARISSA) 2ND RESPONDENT

AND

GLOBAL INITIATIVE FOR ECONOMIC RIGHTS AMICUS CURIAE
SOCIAL ECONOMIC RIGHTS INSTITUTE AMICUS CURIAE
COMMUNITY LAW CENTRE AMICUS CURIAE
CENTRE FOR ECONOMIC AND SOCIAL RIGHTS AMICUS CURIAE
CENTRE FOR EQUALITY RIGHTS IN ACCOMODATION ... AMICUS CURIAE



SOCIAL RIGHTS ADVOCACY CENTRE AMICUS CURIAE

MALCOM LANGFORD AMICUS CURIAE

*(An appeal from the judgment and decree of the High Court of Kenya at Embu (Muchelule, J.)
dated 16th November, 2011 IN CONSTITUTIONAL PETITION NO. 2 OF 2011)*

RULING

1. The applicant described as Ibrahim Sangor Osman on his own behalf and on behalf of 1,222 evictees of Medina Location, Municipal Council of Garissa filed a Notice of Motion dated 28th July, 2017. In the main, they sought an order that the Notice of Appeal and the Appeal herein be deemed as having been withdrawn, or in the alternative, the Notice of Appeal and the Appeal be struck out.
2. The motion was supported by the affidavit of Mbugua Mureithi Advocate sworn on 28th July, 2017 in which he deposed that the record of appeal is defective for lack of primary documents to wit the decree and the applicant's written submissions; the Notice of Appeal is defective for omission of parties in the suit in the lower court; the applicant was not served with the Notice of Appeal; the Appeal was filed out of time and without leave of the court; there was inordinate delay in filing the Appeal inspite of the proceedings being available and finally, that the Attorney General (the 3rd respondent) had filed post judgment proceedings in the lower court challenging the outcome of the case, the implication of which was that the appeal herein was abandoned.
3. The motion was opposed by the 3rd respondent vide a replying affidavit dated 4th May, 2018 sworn by Peter Thande Kuria, a Senior State Counsel in the State Law office in which he deposed that the Notice of Appeal (in respect of the judgment delivered on 16th November, 2011) was filed on 25th November, 2011; that on the same date (25th November, 2011), he wrote a letter bespeaking the proceedings which letter was copied to M/s Mbugua Mureithi (the applicant's counsel); that a certificate of delay was issued on 18th May, 2017; that the Notice of Appeal and the letter bespeaking the proceedings were served on the applicant's counsel on 28th November, 2011; that Mr. Odindo Opiata, who represented the Amicus Curiae had died, hence the inability to serve the Notice of Appeal upon the Amicus Curiae who have since hired another advocate; that the omission of certain documents in the record of appeal is not fatal; that nothing prevents a litigant from filing an application post judgment for review and/or setting aside of a judgment.
4. Then there is a replying affidavit of Pauline Vata Musangi on behalf of Amicus Curiae sworn on 30th July, 2018 in which she deposed that she was appointed by the Board of Directors of Hakijamii to take over the matter from the late Odindo Opiata; that she has since filed a Notice of Change of Advocate; that the above notwithstanding, she is yet to be served with the record of appeal; that the Amicus Curiae had been enjoined in the proceedings in the lower court which joinder proceedings are not included in the record of appeal and finally, that the notice of appeal does not have the Amicus Curiae as a party in the Appeal.
5. On 16th May 2022, the motion came up before us for plenary hearing, albeit virtually due to the Covid-19 protocols. Mr. Mbugua Mureithi, learned counsel was the only one present inspite of service of the hearing notice via email on 10th May, 2022 at 10.55 a.m on all the parties. In view of service of the hearing notice and the absence of the respondent inspite of service of the hearing notice, we directed that the motion be heard ex parte. Mr. Mbugua Mureithi wholly relied on the applicant's written submissions and its list of authorities both dated 9th May, 2022 filed on 10th May, 2022.



6. In the submissions, Mr. Mureithi submitted that the record of appeal was lodged on 29th June, 2017 and served upon his firm on 30th June, 2017; that the record of appeal is defective for omission of primary documents to wit the decree and the applicant's written submissions; that there was non-joinder of parties particularly the Amicus Curiae who were consequently not served with the Notice of Appeal; that the 3rd respondent had filed a review in the lower court, thus essentially abandoning this Appeal and finally, that the Appeal was filed out of time. None of the other parties filed submissions.
5. We have considered the record, the affidavits in support of the motion, the 3rd respondent's affidavits in opposition to the motion, the applicant's written submissions and the law.
6. The decision from which the intended Appeal arises was delivered on 16th November, 2011, a long way back. However, it would appear that immediately after the date of judgment (on 16th November, 2011) and within a period of 9 days (on 25th November, 2011), the 3rd respondent filed a Notice of Appeal. The 3rd respondent also, vide its letter of 23rd November, 2011 wrote to the Deputy Registrar of the court bespeaking the proceedings. This letter was copied to the firm of Mbugua Mureithi, the applicant's counsel. The Notice of Appeal filed on 25th November, 2011 and the letter bespeaking the proceedings were served on the applicant's advocate's firm on 28th November, 2011. There is a confirmation of receipt of the Notice of Appeal as annexed in the affidavit of Peter Thande Kuria and marked as PTKI. The certificate of delay annexed as PTK – 3 shows that whereas proceedings were applied for on 25th November, 2011, it was not until 11th May, 2017 (a period of 1621 days) that they were availed. The appeal was filed on 29th June, 2017 which was well within the 60 days contemplated by this Court's Rules.
7. As regards the omission of certain primary documents, the law places an obligation on the part of the applicant as well as the respondents to file a supplementary record. Rule 92(1) of this Court's Rules provide:
 92. "92. (1) If a respondent is of the opinion that the record of appeal is defective or insufficient for the purposes of his case, he may lodge in the appropriate registry four copies of a supplementary record of appeal containing copies of any further documents or any additional parts of documents which are, in his opinion, required for the proper determination of the appeal."
8. The omission of documents in our view, is not a sufficient ground to have the appeal struck out in view of Rule 92(1) of this Court's Rules.
9. It is true that the record of appeal does not name the Amicus Curiae. However, the 3rd respondent explained that its attempts to serve the Notice of Appeal upon the Amicus Curiae was unsuccessful following the passing on of its advocate. The fact of the death of Mr. Odindo Opiato is not denied. Whereas this may have been a plausible reason for the non-service of the Notice of Appeal upon the Amicus Curiae, it does not explain the misjoinder of the Amicus Curiae in the Appeal. However, the non-joinder notwithstanding, we do not think that this would constitute sufficient reason to have the Appeal struck out. More so noting that the Amicus Curiae has now through Pauline Vata Mbugua filed a Notice of Appointment of Advocate dated 28th July, 2017.
10. We believe we have said enough to show that the motion dated 28th July, 2017 is for dismissal and is hereby dismissed. We award no costs, given the non-appearance of the respondent during the plenary hearing of the motion.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2022.



HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

