



REPUBLIC OF KENYA



KENYA LAW
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**Nyaribari & another v Kenya Alliance Insurance Co.Ltd (Civil Application
E004 of 2022) [2022] KECA 696 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KECA 696 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E004 OF 2022
PO KIAGE, K M'INOTI & M NGUGI, JJA
JULY 22, 2022**

BETWEEN

EUNICE NYABOKE NYARIBARI 1ST APPLICANT

CLEOPHAS NYAMONGO 2ND APPLICANT

AND

KENYA ALLIANCE INSURANCE CO.LTD RESPONDENT

(Application to strike out Notice of Appeal from the Judgment and Decree of the High Court of Kenya at Nyamira (Maina, J.) dated 28th October 2021 in HCCC No. 1 of 2019)

RULING

1. On 28th October 2021, the High Court of Kenya at Nyamira (Maina, J.) delivered a judgment which aggrieved the Respondent, the Kenya Alliance Insurance Company Ltd. The respondent lodged a notice of appeal the day after the judgment, namely 29th October 2021, and served the same upon the applicants' advocates on 22nd November 2021, well outside the seven days prescribed by rule 77(1) of the Court of Appeal Rules. On 17th January 2022, the applicants took out the motion on notice before us, praying for an order to strike out the notice of appeal on the grounds that there was no valid notice of appeal on record. The foundation of the application is the late service of the notice of appeal.
2. The respondent opposed the application vide an affidavit sworn on 2nd March 2022 by its advocate, Mr. Paul Murimi Kiongo. Counsel readily admitted that the notice of appeal was served out of time but contended that he was unable to serve the same on time because the trial judge was on transfer and had custody of the court file, which was not released until 22nd November 2021 when counsel obtained a copy of the judgment. Counsel further urged that the delay was not inordinate and was curable under Article 159(2)(c) of *the Constitution*. The more substantial issue raised by the respondent, however, is that the application to strike out the notice of appeal was itself incompetent, having been filed outside the 30 days prescribed by rule 84 of the Rules of this Court.



3. The only two issues we are called upon to decide is whether the application to strike out the notice of appeal is incompetent and if not, whether we should strike out the notice of appeal. It is common ground that the respondent served the notice of appeal upon the applicants on 22nd November 2021. By dint of the proviso to rule 84, the applicants were obliged to make the application to strike out the notice appeal within 30 days of service of that notice upon them.
4. It is common ground that the application was made on 17th January 2022, which on the face of it appears to be outside the prescribed 30 days. However, in computation of time, the applicants rely on rule 3 of the Court of Appeal Rules which allows exclusion of the Court's Christmas recess in computation of time. The period of the relevant recess was from 21st December 2021 to 13th January, 2022. If the period is computed from 23rd November 2021 to 17th January 2022, excluding the recess period aforesaid, the application was filed within 28 days, which is within the period allowed by rule 84. Accordingly, we are satisfied that the application to strike out the notice of appeal was made within time.
5. On the second issue it is readily admitted that the notice of appeal was served outside the prescribed time. The explanation which essentially blames the learned judge for allegedly keeping the court file in her chambers is a bit disingenuous. The notice of appeal on record is date-stamped 29th October 2021 and endorsed as lodged the same day by the Registrar of the High Court at Nyamira. Once a notice of appeal is lodged, it is availed to the party filing it for service. This must have happened on the 29th October 2021 and therefore the question of the court file being with the learned judge does not arise. Furthermore, the letter from the court relied upon by the respondent and dated 22nd November 2021 merely forwarded the judgment, not the notice of appeal, suggesting that if there was any delay on the part of the court, it was in regards to supply of the judgment, rather than the notice of appeal.
6. In *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court reiterated that where a law provides for the time within which something ought to be done, if the time lapses, one must seek extension of time. In the circumstances of this application, there is clear non-compliance with the rules by the respondent. For reasons best known to the respondent, upon being served with the application to strike out the notice of appeal, it did not even bother to apply before a single judge for the notice to be deemed as filed on time. Compliance with prescribed timelines is not tantamount to paying undue regard to procedural technicalities. (See *Patrick Kiruja Kithinji v. Victor Mugira Marete* [2015] eKLR). This is particularly the case where the rules expressly afford a party the remedy of applying for extension of time.
7. Accordingly, we find that the application is merited and we allow the same. The notice of appeal lodged on 29th October 2021 is hereby struck out, with costs to the applicants. It is so ordered.

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

P. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

MUMBI NGUGI



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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

