



REPUBLIC OF KENYA



**KENYA LAW**  
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**Omaido v Omunga & 3 others (Civil Application E181 of 2021)  
[2022] KECA 839 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KECA 839 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E181 OF 2021  
PO KIAGE, K M'INOTI & M NGUGI, JJA  
JULY 22, 2022**

**BETWEEN**

**JACKSON EKIM OMAIDO ..... APPLICANT**

**AND**

**LUCIA NGAIRA OMUNGA ..... 1<sup>ST</sup> RESPONDENT**

**NELSON MAKOKHA ..... 2<sup>ND</sup> RESPONDENT**

**JOHN OKWAROI ..... 3<sup>RD</sup> RESPONDENT**

**STANLEY EKOINE JUMA ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Motion on Notice before us is taken out principally under Rules 82, 83 and 84 of the [Court of Appeal Rules](#) and craves an order to strike out the respondents' record of appeal arising from the ruling and order of the Environment & Land Court at Kisumu dated 3<sup>rd</sup> May 2021. The applicant contends that the record of appeal was filed and served out of time without leave of the Court and is therefore incompetent. The application to strike out the record of appeal is dated 17<sup>th</sup> December 2021.
2. The record shows that after the ruling in question was delivered on 3<sup>rd</sup> May 2020, the respondents filed a notice of appeal the next day, on 4<sup>th</sup> May 2021, which was well within the 14 days prescribed by rule 75(2) of the [Court of Appeal Rules](#). However, the applicant contends that the respondents served the notice of appeal upon his advocates on 13<sup>th</sup> May 2021, which is outside the seven days required by rule 77(1). The applicant further contends that the respondents filed their record of appeal on 5<sup>th</sup> October 2021 and served his advocates with the same on 9<sup>th</sup> December 2021. It is the applicant's contention that the record of appeal was filed outside the sixty days prescribed by rule 82(1) and that the respondents cannot benefit from the proviso to the said rule because they never served upon the applicant a letter bespeaking the proceedings. It is also the applicant's contention that even if the certificate of delay were taken into account, the record of appeal was still filed out of time because the proceedings were availed



- to the respondents on 28<sup>th</sup> June 2021, after which they had sixty days to file the record of appeal. The applicant relied on the rulings of this Court in *Patrick Kiruja Kithinji v. Victor Mugira Marete* [2015] eKLR and *Daniel Nkirimpa Monirei v. Sayialel Ole Koilel & 4 others* [2016] eKLR and submitted that failure to file an appeal on time was not a mere procedural irregularity curable under article 159(2) (c) of *the Constitution*.
3. The respondents opposed the application vide a replying affidavit sworn by Lucia Ngaira Omunga on 22<sup>nd</sup> December 2021, together with their written submissions. They contend that upon filing the notice of appeal, they applied for copies of the proceedings and ruling and served the notice of appeal and the application for proceedings upon the applicant's counsel on 13<sup>th</sup> May 2021. It is argued that rule 82(2) requires an appellant to serve and not to copy the letter bespeaking the proceedings to the opposite party. Copies of the proceedings were supplied on 28<sup>th</sup> June 2021 and a certified copy of the ruling on 28<sup>th</sup> July 2021.
  4. As regards the filing of the record of appeal, the respondents state that they filed the same online on 1<sup>st</sup> September 2021 but upon enquiry at the Registry, they were advised to re-file the record using a different email address, which they did on 23<sup>rd</sup> September 2021 but were issued with a receipt dated 5<sup>th</sup> October 2021. The record of appeal was stamped as filed on 5<sup>th</sup> October 2021 and service upon the applicant was effected on 9<sup>th</sup> December 2021. It is conceded that based on the certificate of delay, the record of appeal was filed out of time. The delay in service of the record of appeal is attributed to mistake of an unnamed clerk in the advocates' firm, which we are urged not to visit on the respondents.
  5. The respondents relied on a number of decisions, among them *Charles Karanja Kiiru v. Charles Gitbinji Muigwa* [2017] eKLR, which we note are relevant in an application for extension of time under Rule 4 of the Court's Rules rather than to an application for striking out an appeal filed out of time, as is the case in the present application. In *Kamlesh Mansukhalal Damji Pattni v. Director of Public Prosecutions & 3 others* [2015] eKLR also relied upon by the respondents, this Court found that the record of appeal was filed and served on time, but even if it was not served on time, the applicant, who had obstructed service, could not be heard to complain. Clearly, it does not aid the respondents in this application
  6. Turning to the merits of this application, it is common ground that the notice of appeal was filed on time. It is also common ground that the notice of appeal was served upon the applicant on 13<sup>th</sup> May 2021, which was outside the time prescribed by the rules. There is no evidence on record of service of the letter bespeaking the proceedings upon the applicant. The respondents contend that the same was served upon the applicant on 13<sup>th</sup> May 2021, the day the notice of appeal was served. Whilst the applicant readily admits service of the notice of appeal on 13<sup>th</sup> May 2021, he flatly denies that he was served with the letter bespeaking the proceedings.
  7. The onus is upon the respondents to satisfy us that they indeed served the letter bespeaking proceedings upon the applicant on 13<sup>th</sup> May 2021. Whilst it is true that rule 82(2) requires the letter bespeaking proceedings be served rather than be copied to the opposite party, the record persuades us that the respondents did neither.
  8. The effect of that conclusion is that the respondents are not entitled to rely on the proviso to rule 82(2), which means that they should have filed the record of appeal within 60 days of the filing of the notice of appeal. Indeed, even if the certificate of delay dated 28<sup>th</sup> June 2021 were to be taken into account, the respondents readily admit that the appeal was filed out of time (on 5<sup>th</sup> October 2021) and served out of time (on 9<sup>th</sup> December 2021) for which they blame an unnamed clerk.



9. In the event, we find merit in the applicant's motion on notice dated 17<sup>th</sup> December 2021 and allow the same. The respondents' record of appeal filed on 5<sup>th</sup> October 2021 is hereby struck out with costs to the applicant. 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**

