



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mongereki v Mudoki & another (Civil Application  
38 of 2019) [2022] KECA 669 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KECA 669 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION 38 OF 2019  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
JULY 8, 2022**

**BETWEEN**

**SAMMY KANYANGI MONGEREKI ..... APPLICANT**

**AND**

**JOSEPH MWAURA MUDOKI ..... 1<sup>ST</sup> RESPONDENT**

**PAUL CHOMBA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for leave to extend time to make an application to strike out a Notice of Appeal dated 10<sup>th</sup> March, 2015 arising from the judgment of the Environment and Land Court at Malindi (Angote, J)inELC No. 20 of 2010)*

**RULING**

1. The application is a Motion dated 24<sup>th</sup> May 2019, brought under Rule 4 and 84 [86] of the [Court of Appeal Rules](#), seeking orders of extension of time to apply to strike out the Notice of Appeal dated 10<sup>th</sup> March 2015; that if leave is granted, the Court be pleased to strike out the Notice of Appeal dated 10<sup>th</sup> March 2015, and vary, set aside and or vacate the order dated the 2<sup>nd</sup> October 2015 staying the judgment dated 27<sup>th</sup> February 2015.
2. The application is premised on grounds on the face of the Motion, that the respondent filed a notice of appeal on 11<sup>th</sup> March 2015, dated 10<sup>th</sup> March 2015 indicating that he wished to contest the judgment of the High Court before the Court of Appeal. That the respondents obtained an order dated 2<sup>nd</sup> October 2015, staying the judgment of the High Court but have failed to file a memorandum of appeal. That because of the stay the applicant is unable to enjoy the fruits of the judgment dated 27<sup>th</sup> February 2015.
3. The application was called out for virtual hearing on the 23<sup>rd</sup> March 2022.



Only Mr. Anthony Okuto, learned counsel for the applicant was present. Mr. Muraya Wachira, learned counsel for the respondent was absent despite service upon him of the hearing notice through email on 15<sup>th</sup> February 2022.

4. Mr. Okuto relied on the written submissions filed on the 18<sup>th</sup> March 2022; the supporting affidavit and the submissions by counsel for the applicant which reiterate the grounds on the face of the application. Counsel relied on a ruling extending time to file this application, which counsel claimed was issued by Okwengu, JA, on a date he could not recall in 2019.
5. We have not been able to get that ruling on the file as should have been the case. We are aware of this Court's position as expressed in *Tome & another v Attorney General & 2 others* (Miscellaneous Civil Application 185 of 2019) [2021] KECA 150 (KLR) (Environment and Land) (19 November 2021) where it was ruled that Parties are bound by the mandatory nature of the proviso to Rule 84 [now 86] of the *Court of Appeal Rules* to bring an application seeking to strike out a Notice or Record of Appeal or other pleading within 30 days from the date of service of the pleading. That non-compliance with this Rule renders such an application fatally defective and liable to be struck out. That notwithstanding, we shall consider the application as the incompleteness of the Court record cannot be visited on the applicant or his counsel. We shall take it that indeed counsel did obtain the order extending time to file this application before a single Judge, Okwengu, JA.
6. This Court in the case of *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR approached with caution application to strike out pleadings when it observed that;

“The power to strike out pleadings, and in the process deprive a party of the opportunity to present his case has been held over the years to be a draconian measure which ought to be employed only as a last resort and even then only in the clearest of cases.
7. In this case, the record is clear that the respondents filed a notice of appeal on 11<sup>th</sup> March 2015, dated 10<sup>th</sup> March 2015 indicating that they wished to contest the judgment of the High Court before the Court of Appeal. That the respondents obtained an order dated 2<sup>nd</sup> October 2015, staying the judgment of the High Court. Since obtaining the order of stay in 2015, the respondent has not taken any other step to prosecute his appeal; no necessary step is evident as to date the respondents have failed to file a memorandum of appeal. This is seven years since the High Court passed judgment. We are of the view that this is a clear and fit case in which to exercise our discretion and strike out the Notice of appeal for reason the respondent has proved that he has no intention to pursue his appeal.
8. In the circumstances, we allow the Notice of Motion dated 24<sup>th</sup> May 2019 and strike out the Notice of Appeal dated 11<sup>th</sup> March 2015. Costs of the application to the applicant.

**DATED AND DELIVERED AT MOMBASA THIS 8<sup>TH</sup> DAY OF JULY 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**

