



**Runji & 3 others v National Land Commission & another (Civil Application 47 of 2020) [2022] KECA 670 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KECA 670 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION 47 OF 2020  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
JULY 8, 2022**

**BETWEEN**

**HERESIA RUNJI ..... 1<sup>ST</sup> APPLICANT  
MARIETA GITONGA CHEGE ..... 2<sup>ND</sup> APPLICANT  
NAOMI KIIO ..... 3<sup>RD</sup> APPLICANT  
SAMMY MACHARIA KARA ..... 4<sup>TH</sup> APPLICANT**

**AND**

**MIRITINI FREEPORT LIMITED ..... 1<sup>ST</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

*(An application to strike out the record of appeal dated 28th February 2020 and filed on 6th March 2020 against the judgment and decree of the High Court of Kenya at Mombasa in Constitutional Petition No. 17 of 2018 issued by Hon. Justice E.K. Ogola on 12th November 2019)*

**RULING**

1. In their application dated April 16, 2020 presented under Rules 42, 47, 82, 83 and 84 of the [Court of Appeal Rules](#), 2010, the applicants seek an order for the striking out of the respondents' record of appeal dated February 28, 2020 and filed on March 6, 2020 (in Civil Appeal No. 24 of 2020) against the judgment of the High Court delivered on November 12, 2019 in Mombasa Constitutional Petition No. 17 of 2018. It is not clear why the present application was not filed within the appeal that is sought to be struck out.
2. The application is based on the grounds set out on the face of the application and supported by an affidavit sworn by Gikandi Ngibuini, learned counsel for the applicants. The grounds are that following the delivery of the judgment on November 12, 2019, the respondents filed a notice of appeal dated November 22, 2019 which was served on the applicants on November 25, 2019; that the notice



of appeal is defective for referring to the judgment of Hon. Lady Justice E. K. Ogola; that the applicants filed an application before this Court dated 16<sup>th</sup> December 2019 to strike out that notice of appeal, which application is still pending for determination by the Court; that the respondents' record of appeal dated February 28, 2020 and filed on March 6, 2020 and served on the applicants on March 11, 2020 is incompetent as the typed proceedings from the lower court were certified and ready for collection by November 22, 2019 and the applicants advocates duly notified the 1<sup>st</sup> respondent of the same by letter dated November 29, 2019; and that respondents have not sought extension of time and the record of appeal has therefore been filed without leave of the court and is incompetent and should be struck out with costs.

3. In opposition to the application the 1<sup>st</sup> respondent filed a replying affidavit sworn by one Brian Ikol who states that he is the Acting Director, Legal Affairs and Enforcement of the 1<sup>st</sup> respondent in which he deposes that: the reference in the notice of appeal to Hon. Lady Justice E. K. Ogola as opposed to Hon. Mr. Justice E. K. Ogola was an inadvertent error which has not occasioned the applicants any prejudice; that the applicants by their application in Civil Appeal (Application) No. 24 of 2020 sought to rectify the error; that the 1<sup>st</sup> respondent applied for certified copies of the typed proceedings from the lower court on November 25, 2019 and the same were collected on January 28, 2020; that the 1<sup>st</sup> respondent was issued with a certificate of delay in accordance with Rule 82 of the Court of Appeal Rules which certified the facts relating to when the 1<sup>st</sup> respondent made the request for proceedings and when they were collected and the time excluded from computation of time for purposes of filing the record of appeal based on which the record of appeal herein was filed within time; that the applicants cannot usurp the powers of the Registrar of the High Court by purporting to obtain and deliver the typed proceedings to the respondents; that the applicants have not made any application to challenge the certificate of delay issued by the High Court and the present application is without merit and should be dismissed with costs.
4. During the virtual hearing of the application on 15<sup>th</sup> March 2022, learned counsel Mr. Gikandi appeared for the applicants. Mr. Mbuthia, learned counsel, appeared for the 1<sup>st</sup> respondent, while Mr. Oluga, learned counsel, appeared for the 2<sup>nd</sup> respondent. Mr. Gikandi objected to late service of the 2<sup>nd</sup> respondent's notice of preliminary objection dated 10<sup>th</sup> March 2022 and authorities in support of that objection whereupon Mr. Oluga reluctantly withdrew the same.
5. In support of the application, Mr. Gikandi submitted that it is not in dispute that the proceedings and judgment of the lower court were certified on November 22, 2019; that the advocates for the applicant notified the 1<sup>st</sup> respondent that the proceedings and judgment were available; that the appeal was therefore filed outside the 60 days provided for under the Court of Appeal Rules without an extension of time; that in those circumstances the appeal is incompetent and should be struck out.
6. Counsel for the 1<sup>st</sup> respondent Mr. Mbuthia in opposing the application relied on his written submissions dated October 18, 2021 and the afore stated replying affidavit of Brian Ikol. Counsel submitted that following delivery of the judgment on November 12, 2019, the 1<sup>st</sup> respondent applied for the proceedings and judgment on November 22, 2019 and the same were collected on January 28, 2020 following notification by the lower court; that a certificate of delay was issued on February 4, 2020 and the record of appeal, being Civil Appeal No. 24 of 2020, was filed on March 6, 2020 which was within time. It was submitted that it is the function of the Court to notify parties when typed proceedings are ready and that in the present case the 1<sup>st</sup> respondent was notified on January 28, 2020.
7. In as far as the complaint by the applicants relating to the reference in the notice of appeal to Hon. Lady Justice E. K Ogola as opposed to Hon. Mr. Justice E. K. Ogola, it was pointed out that the same



was rectified following amendment of the notice of appeal with leave of the Court granted in a ruling given on November 5, 2021 in Civil Appeal (Application) No. 24 of 2020.

8. Mr. Oluga for the 2<sup>nd</sup> respondent in opposing the application submitted that the present application is incompetent and it should be struck out. Counsel drew the Court's attention to ground number 4 of the application where the applicants state that the record of appeal was served on March 1, 2020; that under Rule 84 of the Court of Appeal Rules, the present application should have been filed within 30 days from March 11, 2020 but was filed on June 19, 2020 well outside the 30 days window.
9. In his brief rejoinder, Mr. Gikandi urged that the application should be considered on its merits as there is no application to strike it out for non-compliance with Rule 84 of the Court's rules.
10. We have considered the application, the affidavits and the submissions. As regards the complaint that the notice of appeal is defective on account of reference to Hon. Lady Justice E. K Ogola as opposed to Hon. Mr. Justice E. K. Ogola, it was indicated in the grounds in support of the application and in the affidavit of Gikandi Ngibuini in support that there is a separate application dated December 16, 2019 pending before the Court in which orders for striking out the notice of appeal are sought. That application was not before us when we heard the present application. It suffices for now to state that in a ruling delivered by this Court on November 5, 2021 in Civil Appeal (Application) No. 24 of 2020 the Court granted leave for filing of an amended notice of appeal to correct the title of the Judge whose judgment is challenged.
11. As for the competence of the present application, and notwithstanding the withdrawal of the notice of preliminary objection as to the competence of the application, it was incumbent upon the applicants to bring themselves within Rule 84 of the Court of Appeal Rules, which they have themselves invoked in seeking the order to have the record of appeal struck out. Recently, in the case of *Borderless Tracking Limited vs Thigab* (Civil Application E035 of 2021) [2022] KECA 38 this Court reiterated that the timelines provided by the Rules for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals and the same command obedience. The proviso to Rule 84 states that:

“Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.”

12. The applicants state without contest that the record of appeal sought to be struck out was served on March 11, 2020. The present application was filed on June 18, 2020 which is clearly beyond thirty days of service of the record of appeal. No leave was sought or obtained to file the application out of time. In *Salama Beach Hotel Limited & 4 Others vs Kenyariri & Associated Advocates & 4 Others* (2016) eKLR this Court stated:

“This Court has in the past had occasion to decide the fate of applications made under Rule 84, but which had been filed out of time. In *Joyce Bochere Nyamweya v Jemima Nyaboke Nyamweya & another* [2016] eKLR, this Court held that parties are bound by the mandatory nature of the proviso to Rule 84 of this Court's Rules. An application seeking to strike out a notice of appeal or an appeal must be made within thirty (30) days of service of the notice of appeal or the appeal sought to be struck out. That failure to do so renders such an application fatally defective and liable to be struck out. As was held in the *Joyce Bochere* case (supra), stipulations on time frames within which acts should be done in law are of essence and must be strictly observed. In the event that 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 under Rule 4 of this Court's."

13. We respectfully adopt that statement. The circumstances in the present application are similar to those in *Municipal Council of Mavoko vs Aristocrats Concrete Company Limited* [2015] eKLR where the Court stated:

"We find that the filing of a Rule 84 application outside the stipulated thirty [30] days renders the application incompetent. The rules serve the role of ensuring the just expeditious and efficient dispensation of justice and should be complied with. Accordingly, in the circumstances of this application, we find that the motion before us that seeks to strike out the notice of appeal on account of default is itself incompetent."

14. As to the claim that the applicants supplied the 1<sup>st</sup> respondent with certified copies of the proceedings and judgment on December 3, 2019, what emerges from the record of the application is that the advocates for the applicants applied to the Deputy Registrar of the High Court to be supplied with certified copies of the proceedings and judgment by a letter dated November 19, 2019. Subsequently by a letter dated November 29, 2019 addressed to Kabale Tache Arero, A.g. Secretary/Chief Executive Officer of the 1<sup>st</sup> respondent, the advocates for the applicant demanded compliance with the judgment and gave notice that unless compensation was tabulated within four days, application would be made to the High Court for assessment of damages. Copies of the judgment, the decree and proceedings were enclosed in that letter.

15. On the other hand, the 1<sup>st</sup> respondent applied to the Deputy Registrar of the High Court for certified copies of the typed proceedings for purposes of preferring an appeal by letter dated November 22, 2019. The Deputy Registrar issued a certificate of delay under Rule 82 of the Court of Appeal Rules on 4<sup>th</sup> February 2020 certifying that 1<sup>st</sup> respondent collected the copies of the proceedings on January 28, 2020. It however not clear when the respondent was notified that the proceedings were ready in light of item 3 of the same certificate where it is that "the time taken by this court to prepare and supply copies of the proceedings was from November 22, 2019 to November 22, 2019 when the proceedings were certified."

16. We are however mindful of the pronouncements by this Court in *Michael Mwalo vs. Board of Trustees National Social Security Fund* [2014] eKLR that:

"A certificate of delay is prima facie evidence that the court took the period it relates to prepare and deliver the proceedings. A certificate of delay has always been relied upon unless salient and cogent reasons are set out to challenge it. See *Ratemo Oira T/A Ratemo Oira & Co. Advocates V. Blue Shield Insurance Co. Ltd Civil Appeal (Application) No. 177 and 178 of 2009*. See also *Safe Rentals Ltd. V. African Safari Club Ltd Civil Appeal (Application) No. 225 of 2010*.

In *Daniel Ng'ang'a Kanyi V. Sophinaf Company Ltd & Another*, Civil Appeal (Application) No. 315 of 2001 this Court stated that:-

"The certificate of delay confirms when delivery of the copies were made to the appellants. That is all that the rule requires of the court to consider. We are satisfied as no evidence has been placed before us to confirm otherwise, that any errors of omission or commission in this matter were made by the court."



17. In the foregoing circumstances and the record having been filed within time, we are inclined to reject the application to strike out the record of appeal. Accordingly, the application fails and is hereby dismissed with costs to the respondents.

**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**

..... **JUDGE OF APPEAL**

**J. LESIIT**

..... **JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

