



Meru County Assembly & 2 others v Muriuki & 5 others (Civil Appeal (Application) E128 & E130 of 2021 (Consolidated)) [2022] KECA 1280 (KLR) (18 November 2022) (Ruling)

Neutral citation: [2022] KECA 1280 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) E128 & E130 OF 2021 (CONSOLIDATED)
AK MURGOR, F SICHALE & F TUIYOTT, JJA
NOVEMBER 18, 2022**

BETWEEN

**MERU COUNTY ASSEMBLY 1ST APPELLANT
JACOB KARARI 2ND APPELLANT**

AND

**KENNETH MURIUKI 1ST RESPONDENT
MERU COUNTY ASSEMBLY SERVICE BOARD 2ND RESPONDENT
EARNEST KIMAITA 3RD RESPONDENT**

**AS CONSOLIDATED WITH
CIVIL APPEAL (APPLICATION) E130 OF 2021**

BETWEEN

MERU COUNTY ASSEMBLY SERVICE BOARD APPELLANT

AND

**KENNETH MURIUKI 1ST RESPONDENT
MERU COUNTY ASSEMBLY 2ND RESPONDENT
JACOB KARARI 3RD RESPONDENT
EARNEST KIMAITA 4TH RESPONDENT**

(An Appeal from the Judgment and Decree of the High Court at Meru (P.J. Otieno, J.) delivered on 22nd October 2021 in Meru Court Petition No. 4 of 2021)



RULING

1. This matter is concerned with Civil Appeal (application) No. E128 of 2021 Kenneth Muriuki vs Meru County Assembly and Jacob Karari (the first application) and Civil Appeal (application) No. E130 of 2021 Kenneth Muriuki vs Meru County Assembly Service Board (the second application) which were consolidated by this Court, with Civil Application No. E128 of 2021 being the lead file.
2. On the hearing date, both the first and second applications and Civil Appeals Nos. E128 and E130 of 2021 being the substantive appeals from the ruling of the High Court of 22nd October 2021 were placed before this Court for hearing and determination. The applications and the appeals were canvassed together, and it being agreed that the outcome of the Court's decision on the applications to strike out the appeal would determine whether or not the Court would proceed to render a judgment in respect of the appeals.
3. As such, we begin with consideration of the applications.
4. In the first application, brought under rules 77 (1) and (2), 84 and 90 (1) of the *Court of Appeal Rules, 2010* and Article 159 (2) (c) of *the Constitution* of Kenya, the applicant, Kenneth Muriuki seeks for the 1st and 2nd appellants/respondents' appeal to be struck out for failure to comply with the requisite provisions of the law, together with costs.
5. The motion that was premised on the grounds on its face and the supporting affidavit of the applicant contended that the notice of appeal lodged on 27th October 2021 was never served on the applicant, and that though the record of appeal was filed and lodged within the time prescribed, on 30th November 2021, it was served on the applicant's advocate on 9th December 2021, which was beyond the timelines specified for service of the record; that in addition, neither the notice nor the record of appeal included the 3rd respondent's address of service, despite his having been a party to the proceedings; that as such, the record of appeal having been served without adherence to the mandatory provisions of the rules of this Court, the appeal ought to be struck out with costs.
6. In a replying affidavit sworn on 16th May 2022, Earnest Kimaita, the 2nd respondent supported the application and confirmed that he was not served with either the notice or record of appeal.
7. In the second application, premised under rules 77 (1) and (2), 84 and 90 of the Court of Appeal Rules, 2010 and Article 159 (2) (c) of *the Constitution* of Kenya, the applicant, Kenneth Muriuki seeks for the appellant/respondent's appeal to be struck out for failure to comply with the requisite provisions of the law, together with costs. The motion premised on the grounds on its face and the applicant's supporting affidavit outlined similar averments to that of the first application.
8. Both applications were supported by written submissions, where the applicant reiterated the contents of the motions.
9. Having considered the applications and the submissions, it is clear that in respect of the first and second applications, the applicant seeks to strike out the appellant/respondent's notice and the record of appeal for the reason that they were not served on him in accordance with the timeframe stipulated by the rules, and that further, the respondent had not sought for time to be extended to serve the notice and the record out of time.



10. To begin with, rule 84 allows for a party to apply to this Court to have a notice of appeal, or a record of appeal struck out. The rule specifies;

“ 1 A person affected by appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

2 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.” (emphasis ours)

11. Before dealing with the issue of whether the application ought to be struck out on account of the lack of service on the applicant, it is important for us to ascertain whether the applicant’s application falls within the ambits of the proviso to rule 84, that is whether it was filed within 30 days from the date of the filing of the notice of appeal and record of appeal as highlighted above. The notice of appeal was lodged in the High Court on 27th October 2021, while the record of appeal was filed on 30th November 2021.

12. Concerning the notice of appeal, the applicant contends that it was not at any time served on him or his advocate, and that it only came to his attention after it was included in the record of appeal filed on 30th November 2021. If at all he was served with the notice of appeal simultaneously with the filing of the record on 30th November 2021, this would imply that the notice of appeal was indirectly served on him on that date. So that the period from 30th November 2021 to 22nd December 2021 when this application was filed is 8 days, which would render the application in respect of the notice of appeal as having been filed well within the 30-day period specified by rule 84.

13. Regarding the record of appeal, it was asserted in both applications, that the records were lodged on 30th November 2021. The applications were filed on 22nd December 2021. This would similarly mean that they were filed within the 30 days’ period specified by the rules. In effect, the applications in relation to the date of filing and service of the notice and record of appeal clearly complied with the proviso to rule 84.

Having said that, rule 90 (1) provides that;

“The appellant shall before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies thereof on each respondent who has complied the requirements of rule 79.”

14. Having regard to the clear provisions of the above rule, we turn to consider whether the 1st and 2nd appellant / respondents failed to serve the applicant with the notice of appeal within the prescribed time frame of seven days. As seen above, the notice of appeal was indirectly served on the applicant in the record of appeal on 30th November 2021 which was more than 7 days after it was lodged. The record of appeal was served on the applicant on the 9th December 2021. Again, it was served on the applicant out of the prescribed period of 7 days.



15. In the case of *Daniel Nkirimpa Monirel vs Sayialel Ole Koilel & 4 Others* [2016] eKLR, this Court emphasized the importance of service of the notice of appeal thus;

“The purpose of service of a Notice of Appeal is to alert the parties being served that the case in question has not been concluded yet as the same has been escalated to another level. This enables the party to prepare and get ready for another fight, be it by way of gathering resources or just getting mentally prepared for defending the intended appeal. Failure to serve a party with a Notice of Appeal within the time prescribed by law gives a party false belief that the matter has been concluded, only to be ambushed later with the record of appeal in which the said notice is tucked away somewhere in the record. That occasions prejudice to the ambushed party, and it is in our view a habit that should not be countenanced in any fair and just process. That would explain why Rule 77(1) of the Court of Appeal Rules is couched in mandatory terms.”

16. With this in mind, it would also follow that without service of the notice of appeal, it would not have been possible for the applicant to comply with rule 76 and lodge their address to enable service of the memorandum and record of appeal.

17. Further, we have perused the record, and there is nothing that discloses that the 1st and 2nd appellant/respondents sought for leave of this Court to extend time for service of the notice and record of appeal on the applicant. Without making any attempt to regularise the late service by having time extended, it becomes clear that the 1st and 2nd appellant/respondents have not complied with the rules of this Court, which misstep would render the appeal incompetent and liable to be struck out.

19. In sum, the notice of motions in respect of the first and second applications dated 22nd December 2021 are merited and are hereby allowed.

20. Accordingly, the notices and records of appeal lodged in this Court on 30th November 2021 in respect of Civil Appeals Nos. E128 and E130 of 2021 are hereby struck out with costs to the applicant. And having found as we have, we need not proceed to determine the merits of the appeals.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF NOVEMBER 2022.

A.K. MURGOR

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

