



REPUBLIC OF KENYA



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**Chepkwony (Suing as the Administrator of Limited Grant of the Estate of Kaplachan Maritim) v
Langat (Civil Application E039 of 2022) [2022] KECA 1367 (KLR) (8 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1367 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E039 OF 2022
F SICHALE, LA ACHODE & WK KORIR, JJA
DECEMBER 8, 2022**

BETWEEN

**RAEL CHEPKEMOI CHEPKWONY (SUING AS THE ADMINISTRATOR
OF LIMITED GRANT OF THE ESTATE OF KAPLACHAN
MARITIM) APPLICANT**

AND

SYLVESTER KIPKIRUI LANGAT RESPONDENT

*(Being an Application to strike out the Notice of Appeal from
the judgment and decree of the Environment and Land Court at
Kericho (Oundo, J) dated 26th May, 2022 in (ELC Case No. 8 of 2012)*

RULING

1. Before this court is the notice of motion dated 12th July, 2022, brought pursuant to the provisions of sections 3A and 3B of the *Appellate Jurisdiction Act*, cap. 9 of the Laws of Kenya, Rule 86 of the *Court of Appeal Rules, 2022* and all other enabling provisions of the law in which the applicant, Rael Chepkemoi Chepkwony (Suing as the Administrator of Limited Grant of the Estate of Kaplachan Maritim), seeks the striking out of the Notice of Appeal dated May 31, 2022 lodged by the respondent, Sylvester Kipkirui Langat, in the Environment and Land Court at Kericho on June 10, 2022. The applicant further seeks the costs of the application.
2. The motion is supported by the grounds on its face and an affidavit sworn by David Otieno, counsel for the applicant. The applicant's counsel deposed inter alia that on May 26, 2022, the trial court gave judgment in favour of the applicant as against the respondent whereupon on June 17, 2022, the respondent served them with a Notice of Appeal dated May 31, 2022 and that the said Notice of Appeal indicated that it was lodged on June 10, 2022.



3. The applicant's case is that the Notice of Appeal should have been filed on or before June 9, 2022 which was within 14 days from the date of the judgment and the same was for striking out having been filed out of time without the leave of the court.
4. The application was opposed vide a replying affidavit sworn on August 4, 2022 by Edmond Kiprono, counsel for the respondent who deposed inter alia that the Notice of Appeal was filed on May 31, 2022 and transmitted via email to the Court Registry and that immediately the assessment was done, the Notice of Appeal was paid for and that as such, the Notice of Appeal was lodged on time before the lapse of the 14 days.
5. It is the applicant's averment that on June 9, 2022 there were delays in M-PESA transactions thereby resulting in a lag of payments which only reflected on June 10, 2022. Further, that the Kericho Law Court registries have been fraught with difficulties in terms of assessing documents, processing payments and stamping receipts due to poor internet connectivity occasioned by the shifting of the court from its traditional location to its current location at "Corner C".
6. Through a further affidavit sworn on October 6, 2022 by counsel for the applicant, it is averred that it is clear from the face of the Notice of Appeal that the same was lodged on June 10, 2022 and the court fees paid on the same date. Further, that the respondent had been invoiced on June 9, 2022 within the time for filing the Notice of Appeal.
7. In response to the respondent's deposition that there were delays in M-PESA transactions on June 9, 2022, the applicant contends that there was no evidence to support the allegation. Further, that the respondent could have easily established that there were such delays by producing his own M-PESA transactions for June 9, 2022.
8. As for the claim that the operations at Kericho Law Courts have been lethargic owing to the relocation of the court, the applicant deposes that the court was moved long ago and the case giving rise to this appeal was partly tried at the new court location.
9. It was submitted for the applicant through submissions dated October 6, 2022 that a notice of appeal is a primary document and that it is the document from which this court draws jurisdiction to entertain an appeal and that this court was divested of jurisdiction to entertain an appeal from the judgment of the trial court on the lapse of 14 days from the date of the judgment on May 26, 2022. According to the applicant, the respondent is inviting this court to walk into an appeal which it has no power to entertain in the face of its late filing.
10. Through submissions dated October 7, 2022, the respondent reiterated the contents of the replying affidavit and submitted that the delay in the assessment and processing of the payment was exacerbated by the fact that there was relocation of Kericho Law Courts from its traditional place to another site. The respondent contends that the delay in filing the notice was occasioned by factors beyond his control and this court should not punish him for mistakes that were not of his making.
11. In regard to the draconian nature of the order sought by the applicant, the respondent relied on the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR in urging that courts should spare parties the draconian approach of striking out pleadings. The argument is also supported by reference to the decision of this court in *Abdirahman Abdi v Safi Petroleum Products Ltd & 6 others* [2011] eKLR where this court excused a delay of one day in the filing of a notice of appeal. Another authority cited in support of the respondent's argument is the case of *Joseph Kiangoi v Waruru Wachira & 2 others*, Civil Appeal (Application) No. 130 of 2008.



12. The respondent also relied on the decisions in *Attorney General v Lucy Nduta Nganga* [2017] eKLR and *Kensilver Express Limited & 137 others v Commissioner of Insurance & 4 others* [2014] eKLR in support of the argument that dismissing a notice of appeal is more prejudicial to the appellant than it is to the respondent and that the striking out of a notice of appeal will not determine the issues in controversy with finality since the appellant will have to restart the appellate process by seeking leave for extension of time.
13. We have carefully considered the motion, the grounds in support of the application, the supporting affidavit, the replying affidavit, the applicant’s further affidavit, the parties’ submissions and the law.
14. It is indeed not in dispute that the judgement the respondent intended to appeal against was delivered on May 26, 2022. The respondent was therefore supposed to file the Notice of Appeal within 14 days after the date of the decision against which the appeal is lodged as stipulated in Rule 77(2) of the *Court of Appeal Rules, 2022*. The period of 14 days from the date of the delivery of the judgement lapsed on June 9, 2022.
15. The Notice of Appeal herein is dated May 31, 2022 and was filed when it was paid for on June 10, 2022. This is confirmed by the copy of the official receipt from the Judiciary which indicates that payment was made on June 10, 2022, which was one day after the lapse of the statutory period for filing the Notice of Appeal. Therefore, the averment by the respondent that the Notice of Appeal was filed on May 31, 2022 when it was emailed to the court is erroneous and misleading. Transmission of the Notice of Appeal to the Court Registry via email on May 31, 2022 cannot be tantamount to filing of the same.
16. Similarly, the contention by the respondent that on June 9, 2022, there were delays in M-PESA transactions and that Kericho Law Courts registries had difficulties in assessing documents is not supported by any evidence. In any event, such averments could only be helpful in support of an application for extension of the time for lodging the Notice of Appeal.
17. A notice of appeal is the key that opens access to the appellate jurisdiction of this court. It is the instrument that grants this court authority to entertain and determine appeals for which it has been granted constitutional and statutory power to entertain. In other words, a notice of appeal enables the court to be properly seized of an appeal. Without a valid and proper notice of appeal on record, this court cannot have the authority to entertain an appeal.
18. In *Anuar Loitiptip v Independent Electoral & Boundaries Commission & 2 others* [2019] eKLR, the Supreme Court stressed the importance of a notice of appeal and its timeliness as follows:

“(78) We are of the view that the failure to launch an appeal against specific decision would deem that party having waived the right to challenge the decision. It is a conditional precedent to the existence of the appeal, and we emphasize that it is in the proper and timely filing of a Notice of Appeal, an absolute requirement, that invokes a court’s jurisdiction. It is a vital document and without it, there can be no appeal.”
19. The respondent has urged us to be persuaded by the case of *Abdirahman Abdi v Safi Petroleum Products Ltd & 6 others* [2011] eKLR where in upholding a notice of appeal filed out of time this court stated that:

“In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of sections 3A and 3B of the *Appellate Jurisdiction Act*, cap 9 Laws of Kenya, and later, article 159(2)(d) of the Constitution of Kenya, 2010, changed the position. The



former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2)(d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.”

20. The question is whether failure to lodge a notice of appeal within 14 days from the date of the decision to be appealed should result in the automatic striking out of the notice of appeal once an application for striking out is brought within the timelines set in the Rules. Although it is appreciated that the calling of this court is to do substantive justice to the parties who appear before it, parties should not take the litigation rules lightly because they guide the procedures of the Court and failure to comply can sometimes be prejudicial to the opposing side. The importance of complying with the timelines for filing an appeal was stressed by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR when it stated that:

“What we hear the applicant telling the Court is that he is acknowledging having filed a ‘document’ he calls ‘an appeal’ out of time without leave of the court. Pursuant to rule 33(1) of the court’s rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the court’s rules, this court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.

By filing an appeal out of time before seeking extension of time, and subsequently seeking the court to extend time and recognize such ‘an appeal’, is tantamount to moving the court to remedy an illegality. This, the court cannot do.

To file an appeal out of time and seek the court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this court will not accept a document filed out of time without leave of the court. It is unfortunate that Petition No 10 of 2014 has been accorded a reference number in this court’s Registry. This is irregular as that document is unknown in law and the same should be struck out.”

21. On the requirement to file a notice of appeal within the period provided in the rules of a court, the Supreme Court held in *Teachers Service Commission v Simon P Kamau & 19 others* [2015] eKLR that:

(54) When the applicant filed its notice of appeal on September 9, 2014, the law required it to do so within 14 days of the decision of the Court of Appeal. But the applicant failed to observe the timelines; which necessitated an application for extension of time to file a belated notice of appeal, under Rule 53 of the Supreme Court Rules, 2012. No such application was made even though, curiously, the applicant now mentions a need for the court to extend time within which to file a notice of appeal. Already there is a notice of appeal on record, even though the applicant says it will be seeking the court’s indulgence, and the grant of extension of time to file



a notice of appeal. The applicant did not, however, canvass this intention; and the notice of appeal on record is clearly irregular, and of no consequence in law.

55. We find that notice of appeal, as a prelude to the filing of an appeal, was a requirement both in the 2011 rules, and under the current (2012) Rules of the Supreme Court; and that the appellate court while it acted as the Supreme Court, had a long-standing practice as regards notice of appeal. The applicant did not file a notice of appeal, until late in 2014—and then without the leave of the court. Clearly, the applicant did not appreciate the importance of the notice of appeal; for even this time, the applicant has not endeavoured to make a case for extension of time to file the notice. By past practice, this Court has not favoured the practice by parties of filing a document improperly, and then seeking ex post facto endorsement by the Court...
56. Consequently, the notice of appeal purportedly filed on September 9, 2014 is hereby struck out, as it was filed without leave. The effect is that there is no notice of appeal on record, and therefore, this application is fatally flawed. In view of the importance of a notice of appeal, as a jurisdictional requisite, the lack of it cannot be bailed out by the invocation of article 159 of the Constitution.”
22. The principle that emerges from the cited decisions of the Supreme Court is that a notice of appeal filed out of time without the leave of the court amounts to nothing. In this court, a notice filed out of time without the leave of the court can be resuscitated under Rule 4 of the Court of Appeal Rules, 2022 which allows a party to seek extension of time “whether before or after the doing of the act.” The respondent did not make such a move.
23. The respondent before us appears to blame Safaricom (the operator of the M-PESA platform) and the Judiciary for the delay in making payment for the Notice of Appeal. In doing so, he fails to appreciate the fact that his notice of motion is improperly on record and his excuses could only be entertained by this court through an application for extension of time. Where a party fails to comply with the timelines provided by the Rules of this court, the onus automatically shifts to that party to explain through an application for extension of time that the reasons for the delay are genuine and plausible.
24. The Notice of Appeal herein having been filed one day after the lapse of the statutory period for filing the same and more so without leave of this court, the same is not properly on record and must only suffer one fate which is its being struck out. Accordingly, the applicant’s Notice of Motion dated July 12, 2022 is allowed and the respondent’s Notice of Appeal dated May 31, 2022 and lodged in court on June 10, 2022, is hereby struck out with costs to the applicant.

DATED AND DELIVERED AT NAKURU THIS 8TH DAY OF DECEMBER, 2022.

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

