



REPUBLIC OF KENYA



KENYA LAW
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**Mapema Holdings Limited v Gaitara & 2 others (Civil Application Nai
229 of 2014) [2022] KECA 1358 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1358 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION NAI 229 OF 2014
HA OMONDI, KI LAIBUTA & PM GACHOKA, JJA
DECEMBER 2, 2022**

BETWEEN

MAPEMA HOLDINGS LIMITED APPLICANT

AND

PRUDENZIO NICHOLAS GAITARA 1ST RESPONDENT

PATRICK KAIRURI MUIRURI 2ND RESPONDENT

THIKA DAIRIES LIMITED 3RD RESPONDENT

*(Being an application to strike out the Notice of Appeal lodged on the 14th
August 2014 from the Ruling and Order of the High Court of Kenya at Nairobi
(Nyamweya, J.) dated 1st August 2014 in ELC Civil Suit No. 1400 of 2013)*

RULING

1. The notice of motion dated September 3, 2014 brought pursuant to rule 84 of the [Court of Appeal Rules](#) and supported by the affidavit sworn by Odera Obar Kennedy seeks orders to strike out the notice of appeal dated August 14, 2014, and that costs be provided for. The prayers are premised on the grounds that: the notice of appeal lodged on August 14, 2014 was not served upon the applicant within the period prescribed by the rules of this court; and that it was only served on the applicant's advocates on August 26, 2014. It is noteworthy that the respondents did not file any replying affidavit.
2. In numerous occasions, courts have pointed out that the power to strike out pleadings is a draconian measure to be employed sparingly, and the court will exercise it only in clear cases where, upon looking at the pleading concerned, there is no reasonable cause of action or defence disclosed, (see *Wambua vs Wathome* [1968] EA 40; *Coast Projects Ltd vs MR Shah Construction* [2004] KLR 119). Needless to say, the power of this court to strike out an appeal is discretionary and its exercised based on the peculiar circumstances of each case.



3. The main issue for this court to deal with in this application, is the competency of the appeal. rule 84 is instructive on the basis upon which an application for striking out a notice or record of appeal. It provides “...provided that an application to strike out notice of appeal or an appeal shall not be brought after expiry of 30 days from the date of service of the notice or record of appeal.”
4. We take note that this application was filed on September 3, 2014, whereas the notice of appeal was served on August 26, 2014 and, as such, it falls within the timelines contemplated under rule 84 of this court’s Rules (2010), which were applicable then and, therefore, the application is competently before this court.
5. Rule 84 also provides that “A person affected by an appeal may at any time, either before or after the institution of an appeal, apply to the court to strike out the notice of appeal, as the case may be, on the ground that no appeal lies or some essential step in the proceedings has not been taken or that has not been taken within the prescribed time.”
6. The relevance of this proviso has received considerable deliberation and, in particular, its import. In *Joyce Bochere Nyamweya vs Jemima Nyaboke Nyamweya & another* [2016] eKLR, this court held that parties are bound by the mandatory nature of the proviso to rule 84 of the rules, and failure to comply renders the application defective. See also *Salama Beach Hotel Limited & 4 others vs Kenayriri & Associates Advocates & 4 others* [2016] eKLR; *Pickwell Properties Limited vs Kenya Commercial Bank Ltd* [2016] eKLR; and *Michael Mwalo vs Board of Trustees of National Security Fund* [2014] eKLR.
7. This court also agrees with the applicant that the notice of appeal was served outside the stipulated time, and that no steps have been taken to institute the appeal. Rule 83 of this court’s Rules provides: “if a party who has lodged a notice of appeal fails to institute an appeal within the

“Stipulated time he shall be deemed to have withdrawn the notice of appeal and the court may on its own motion or on application by any party, make such order. The party in default shall be liable to pay costs arising therefrom.”
8. This court in *John Mutai Mwangi & 26 others vs Mwenja Ngure & 4 others* [2016] eKLR stated that the import of rule 83 essentially is to enable the court to clean out its record by striking out all the notices of appeal which have not been followed up within 60 days by records of appeal.
9. The case of *Charles Wanjohi Wathuku vs Gitinji Ngure & another* [2016] eKLR reiterates the intent of rule 82 of this court’s Rules, stating that:

“That timeline is strict and is meant to achieve the constitutional, statutory and rule based objective of ensuring that the court process dispense justice in a timely manner.”
10. We note that, despite filing the notice of appeal, no step has been taken to file the record of appeal and, further, that the respondents have not bothered to respond to the application to try and explain the delay if at all.
11. This court has on numerous occasions stated that the rules of this court exist for the purpose of orderly administration of justice. The timelines for doing of certain things and taking of certain steps are indispensable in the proper adjudication of the appeal before this court. The Rules are expressed in clear and unambiguous terms and the command appearance as per Kiage, J, *Esther Anyango Ochieng vs Transmara Sugar Company* [2020] eKLR. The learned judge further pointed out in *Mae Properties Limited vs Josephine Kibe & another* [2017] eKLR, goes further to state that where a record of appeal has not been filed, then without further ado the court ought to deem the notice of appeal as having been withdrawn.



12. We therefore find that the application dated September 3, 2014 is merited and is allowed with costs to the applicant.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA – CI Arb, FCIARB

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

