



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT ELDORET**

**CORAM: (OUKO (P), KARANJA & J. MOHAMMED, J.J.A)**

**CIVIL APPLICATION NO. 146 OF 2019**

**BETWEEN**

**EWOTON LEONARD EKUTIAN.....1<sup>ST</sup> APPLICANT**

**PIUS ATOK EWOTON.....2<sup>ND</sup> APPLICANT**

**AND**

**MICHAEL KORE ROTICH.....1<sup>ST</sup> RESPONDENT**

**PETER NGETICH.....2<sup>ND</sup> RESPONDENT**

**ALLAN CHELIMO.....3<sup>RD</sup> RESPONDENT**

**JOHN KIPKOSGEI CHELIMO.....4<sup>TH</sup> RESPONDENT**

**JANE CHESANG.....5<sup>TH</sup> RESPONDENT**

*Being an application to strike out the notice of appeal from the judgment and decree of the*

*Environment & Land Court at Kitale(Mwangi Njoroge, J.) delivered on 29th January, 2019*

***in ELC Case No. 87 of 2009)***

\*\*\*\*\*

**RULING OF THE COURT**

**Background**

1) By a Notice of Motion dated 11th November, 2019, **Ewoton Leonard Ekutian** (the 1st applicant) and **Pius Atok Ewoton** (the 2nd applicant) seek *inter alia*, that the notice of appeal lodged by **Michael Kore Rotich, Peter Ngetich, Allan Chelimo, John Kipkosgei Chelimo and Jane Chesang** (the respondents), be struck out.

2) The respondents who were the defendants in **Land Case Number 87 of 2009** were aggrieved by the judgment of the Environment and Land Court (ELC) (Mwangi Njoroge, J) delivered on 29th January, 2019 and desirous of challenging it file the notice of appeal in question.

3) In brief, the applicants contend that the respondents lodged a notice of appeal against the judgment of the ELC on **24<sup>th</sup> October, 2019** and served it on counsel for the applicants on **25<sup>th</sup> October, 2019**. It was the applicants' further contention that fourteen (14) days within which a valid notice of appeal should have been filed against the impugned judgment expired on **12<sup>th</sup> February, 2019**; that the notice of appeal was filed 261 days outside the time prescribed by **Rule 75(2) of the Court of Appeal Rules (this Court's Rules)**; and that no leave was sought and obtained to lodge the notice of appeal out of time.

4) From the record there is no replying affidavit or written submissions filed on behalf of the respondents despite service on their counsel.

**Determination**

5) We have considered the application, the submissions made and the law. The question for our determination is whether the notice of appeal filed on **24<sup>th</sup> October, 2019** and served on counsel for the applicants on **25<sup>th</sup> October, 2019** should be struck out for non-compliance with **Rule 75(2) of this Court's Rules?**

6) **Rule 75 of this Court's Rules** provides as follows:

*“(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.*

*(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”*

7) Accordingly, the notice of appeal should have been filed within fourteen (14) days from **29<sup>th</sup> January, 2019**. The impugned notice of appeal was filed on **24<sup>th</sup> October, 2019** and was therefore filed outside the prescribed period without leave and is therefore incompetent.

8) **Rule 75(2) of this Court's Rules** provides that the notice of appeal shall, subject to **rules 84 and 97**, be lodged within 14 days of the impugned decision. Rule 97 relates to the rights of a respondent when an appeal is withdrawn and is not relevant in the determination of the instant application.

9) **Rule 84 of the Court of Appeal Rules** is pertinent in the determination of this application and provides as follows:

*“A person affected by an 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.*

*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 supplied)

10) The proviso to **Rule 84** is couched in mandatory terms. As stated in *Gichuki Kingara & Co Advocates v AL Jalal Enterprises Ltd & Others, Civil Appl. No. NAI 211 of 2012 (unreported)*:

*“The applicant did not file its application within the stipulated period of thirty days. It did so on the 9th August 2012 which was about five months outside the limit set by the Rules. It is clear to us that such an omission renders the application before us a non-starter given the logic and rationale of the time-bound provision. The rule is mandatory and an application brought outside the thirty-day period properly qualifies to be seen as an afterthought.”*

11) The notice of appeal was served on counsel for the applicants on **25<sup>th</sup> October, 2019**. The instant application was lodged on **13<sup>th</sup> November, 2019** and was therefore filed within the requisite 30 day time frame. The applicants have therefore complied with the proviso to **Rule 84 of this Court's Rules** and the instant application is therefore competent.

12) In the circumstances, the Notice of Motion dated 11<sup>th</sup> November, 2019 is based on sound grounds and must succeed. It is allowed with the result that the notice of appeal dated **22<sup>nd</sup> October, 2019** is struck out with costs to the applicants. Orders accordingly.

**Dated and delivered at Nairobi this 29<sup>th</sup> day of January, 2021.**

**W. OUKO (P)**

.....

**JUDGE OF APPEAL**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**