



REPUBLIC OF KENYA



**Tome & another v Attorney General & 2 others (Miscellaneous Civil Application  
185 of 2019) [2021] KECA 150 (KLR) (19 November 2021) (Ruling)**

Neutral citation: [2021] KECA 150 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
MISCELLANEOUS CIVIL APPLICATION 185 OF 2019  
RN NAMBUYE, J MOHAMMED & HA OMONDI, JJA  
NOVEMBER 19, 2021**

**BETWEEN**

**SHADRACK OLETETIA TOME ..... 1<sup>ST</sup> APPLICANT**

**TABITHA MATEYIAN TOME ..... 2<sup>ND</sup> APPLICANT**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**FREDRICK OLONANA TOME ..... 3<sup>RD</sup> RESPONDENT**

*(An Application from the ruling of the High Court of Kenya at Nairobi,  
(Ougo, J.) dated 17th December, 2015 in HC. Civil Case No.457 of 2006)*

**RULING**

1. The Application for consideration by this Court is the Notice of Motion dated 18<sup>th</sup> June, 2019, pursuant to Rules 84 & 85 (1) of the [Court of Appeal Rules](#) seeking that:
  - (i) The Notice of Appeal dated 12<sup>th</sup> June, 2015, and filed on 16<sup>th</sup> June, 2015, together with all consequential orders thereto be struck out.
  - (ii) That costs be provided for.
2. The gist of the application is that the 2<sup>nd</sup> respondent has failed to file the Record of Appeal within the 60 days stipulated by Rule 82 of the Court of Appeal Rules. The application is supported by an affidavit sworn by the applicant, and is based on grounds that 4 years after filing the notice of appeal on 16<sup>th</sup> June, 2015, the 2<sup>nd</sup> respondent has never taken any steps to have the appeal filed. That the 2<sup>nd</sup> respondent has never made a request for proceedings, neither obtained the order or decree nor prepared



any record of appeal within the stipulated period. Further, that no prejudice will be occasioned if the application is allowed as it is apparent that the 2<sup>nd</sup> respondent is no longer interested in pursuing the appeal, and is simply delaying the fair execution of the judgment and decree.

3 The 2<sup>nd</sup> respondent by a replying affidavit dated 6<sup>th</sup> September, 2021, contests the allegation that she has lost interest in the intended appeal, pointing out that immediately after the delivery of the said judgment, together with the 2<sup>nd</sup> defendant (Fredrick Olonana Tome) they instructed their Advocates on record to process an appeal on their behalf. Subsequently, a Notice of Appeal was filed on 16<sup>th</sup> June, 2015, which was served upon the applicant on time.

4 Thereafter, her Advocates wrote to the Deputy Registrar requesting for typed proceedings for purposes of the intended appeal on 18<sup>th</sup> June, 2015. However, by a letter dated 18<sup>th</sup> June, 2015, (and copied to the Applicant's Advocates) their Advocate, Mr. Paul Amuga, informed them, that the lower court had not furnished his firm with the typed proceedings despite numerous reminders his firm had delivered to the court. She has attached various copies of correspondence delivered to the court by Advocates and marked "NGT1."

5 The application has been argued by way of written submissions.

In his written submissions, the applicant states that the 2<sup>nd</sup> defendant in the High Court Suit, Fredrick Olonana Tome (deceased) had already died at the time of filing of the Notice of Appeal and it is not known to him that a legal representative has been appointed for the estate to have enabled the filing of the Notice of Appeal. That no legal representative has ever been appointed then this notice of appeal or suit has abated as 4 years have lapsed from the date it was filed.

6 He draws from Rule 85 (1) of the Court of Appeal Rules which provides that;

"An appeal shall not be instituted in the name of a person who is dead but may be instituted in the name of his legal representative."

7 The applicant also refers to the provision under Rule 84 that:

"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 presented time."

8 Further, that to Rule 82 of the Rules which provides as follows;

"Subject to rule 115 an appeal shall be instituted by lodging in the appropriate registry within a sixty days of the date when the notice of appeal was lodged."

9 The applicant has urged us to find that in the light of these provisions, the respondents have failed to file any appeal within the timelines set in law and therefore there is no appeal lying before this Court.

10 In support of this submission the applicant refers to the case of *John Mutai Mwangi and 26 others vs Mwenje W. Ngure and 4 others* where the court held:

"This deeming provision appears to us to be in build case-management system loaded into the Rules. It enables the court, ideally, to clean up its records by striking out all notices of appeals that have not been followed up within 60 days, by record of appeal.

....that notices of appeal should not be lodged in jest or frivolously, with no real or serious intention to actually institute appeals. The rationale of this self-evident but made the



more compelling by a recognition that mischievous or crafty litigants may be content to merely park the bus at appeal gate and not move thereafter-especially should they obtain some kind of stay or injunctive orders protective of their interests pending appeal.... It essentially concludes that the intended appellant has abandoned his intention to appeal notwithstanding that he has not formally withdrawn the notice of appeal under Rule 81... it is a clean-up exercise born by the need for rationality in appellant and litigation practice.”

11 The 2<sup>nd</sup> respondent on the other hand submits that she indeed complied with Rule 82 (2) of the Court of Appeal Rules, requested for typed proceedings to be supplied to her for purposes of lodging the intended appeal and she cannot, therefore, be blamed for the delay in the preparation of the typed proceedings which has caused the delay in lodging the record of appeal.

12 In this regard, reference is made to the case of *Hassan Nyange Charo v Khatib Mwashetani & 3 others* [2014] eKLR where the Supreme Court of Kenya stated the following in a similar situation:

[27] "Counsel for the applicant has stated that he has exercised all due diligence to get the proceedings from the Court of Appeal, but to no avail. We note that the last correspondence in the record before us was on 20<sup>th</sup> January, 2014, and that could cast doubt on the measure of assertion of diligence; but there is nothing to show that the applicant has not made other efforts to inquire about the proceedings, or to show that the proceedings are now ready but remain uncollected. As no respondent has called into question the assertion that the proceedings are not yet available, we would not impugn the applicant's claim of diligence.

[28] Would it be in the interests of justice then to turn away an applicant who has, prima facie, exercised all due diligence in pursuit of his cause, but is impeded by the slow-turning wheels of the Court's administrative machinery? We think not. We find that though prejudice to the representation of the people of Lunga Lunga Constituency will persist, it is due to no fault on the part of the applicant.”

### **Has the Applicant satisfied the requirements for Striking Out Notice of Appeal?**

13 It is now a settled principle that striking out a pleading is a draconian act, which may only be resorted to in plain and outright instances. The power of this court to strike out an appeal is discretionary and is exercised based on the peculiar circumstance of each case.

14 Rule 84 is instructive on the basis upon which an application for striking out a Notice or Record of Appeal, and 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.”

15 This Court has held on several occasions that parties are bound by the mandatory proviso to Rule 84 that the failure to comply with the same renders an application filed thereunder defective. See Civil Application 35 of 2017 *Total Kenya Limited v Rueben Mulwa Kioko* [2018] eKLR.

16 This Court in *Esther Onyango Ochieng v Transmara Sugar Company* [2020] eKLR quoting this Court's decision in the case of *Salama Beach Hotel Limited & 4 Others v Kenyariri & Associates Advocates & 4 Others* [2016] eKLR stated ‘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 the Court of Appeal Rules. An application seeking to strike out a notice of appeal must be filed within thirty (30) days of service of the notice of appeal, or the filing of the appeal ought to be struck off. The failure to do so renders such an application fatally defective and liable to be struck out.

- 17 Similarly, in *William Mwangi Ngaruki v Barclays Bank of Kenya Ltd* [2014] eKLR , this Court held that an application to strike out a notice of appeal that is brought after 30 days from the date of service of the notice of appeal is incompetent unless leave is sought and obtained to file the application out of time. See also *Michael Mwalo v Board of Trustees of National Social Security Fund* [2014] eKLR.
- 18 The instant application is dated 18<sup>th</sup> June, 2019 and the 2<sup>nd</sup> respondent's Notice of Appeal was filed on 16<sup>th</sup> June, 2015 and served on 23<sup>rd</sup> July, 2015, well over the 30 days referred to under Rule 84, and obviously fails to meet the requirements under Rule 84.
- 19 Secondly, from the record and the annexures availed, we agree that the 2<sup>nd</sup> respondent has also demonstrated the following facts which are not, or cannot be, contested which is that, after the 2<sup>nd</sup> respondent requested to be supplied with typed proceedings vide the letter dated 18<sup>th</sup> June, 2015, she followed up the request through reminder letters dated 23<sup>rd</sup> March, 2017, 3<sup>rd</sup> May, 2017, 10<sup>th</sup> December, 2018, 20<sup>th</sup> August, 2018, 15<sup>th</sup> October, 2018, 20<sup>th</sup> December, 2019, 31<sup>st</sup> March, 2021 and 29<sup>th</sup> June, 2021. However, the Environment and Land Court is yet to supply the typed proceedings to the 2<sup>nd</sup> respondent despite the numerous reminders.
- 20 The afore-going clearly demonstrates that the delay in lodging the intended appeal up to the date of filing the instant application, and to this date, has been occasioned by the failure by the court appealed from to supply the typed proceedings which the 2<sup>nd</sup> respondent requires to lodge the record of appeal.
- 21 We echo the views of the Supreme Court in *Hassan Nyange Charo vs Khatib Mwashetani & 3 others* (supra) and say that counsel for the respondent has been diligent in his pursuit to get the proceedings, but to no avail- indeed the last effort is the letter dated June, 2021. The applicant is not at fault and she cannot be driven from the seat of justice empty handed by denying her an opportunity to exercise her undoubted right of appeal.
- 22 The upshot of the above assessment and reasoning is that this application is a non-starter both technically and on merit, and it is dismissed with costs to the 2<sup>nd</sup> respondent.
- 23 The Deputy Registrar of the Environment and Land Court to be notified of the delay in availing proceedings, which is impeding access to justice.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

**H. A. OMONDI**

.....

**JUDGE OF APPEAL**



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

*Signed*

**DEPUTY REGISTRAR**

