



REPUBLIC OF KENYA



KENYA LAW
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**Ahmed v Rishard Abdul Rehman Khator (aka Rishad Abdul Rehman Khator)
Ali Bwana Bwanaadi (as Administrators of the Estate of Tima and Fatuma
Children of Ali Bashir (Deceased) & 2 others (Civil Appeal (Application)
E018 of 2020) [2021] KECA 271 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 271 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E018 OF 2020**

JW LESSIT, JA

DECEMBER 3, 2021

BETWEEN

IDHA MARIE AHMED APPELLANT

AND

**RISHARD ABDUL REHMAN KHATOR (AKA RISHAD ABDUL REHMAN
KHATOR) ALI BWANA BWANAADI (AS ADMINISTRATORS OF THE
ESTATE OF TIMA AND FATUMA CHILDREN OF ALI BASHIR
(DECEASED) 1ST RESPONDENT**

THE REGISTRAR, COAST 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

*((An application for extension of time for filing an application to strike out
appeal against the judgement of the Environment & Land Court at Mombasa
(Omollo, J.) dated 22nd October, 2019 and delivered by (Yano, J.) on 31st October,
2019 so that the application for orders to strike out the same, filed alongside this
application is deemed to have been filed within time in ELC Case No. 23 of 2013)*



RULING

1. The Notice of Motion application coming up for hearing on 19th October, 2021 is the one dated 17th day of February, 2021. It has been brought under Rules 4, 41 and 47 of the *Court of Appeal Rules*. The applicants are seeking orders that: -
 1. The time for filing of an application to strike out this appeal is extended appropriately so that the application for orders to strike out the same, filed alongside this application, is deemed to have been filed within time.
2. The application is based on the grounds which I summarize as follows; that at the time the judgment was delivered by the superior court at Mombasa on 31st October, 2019 S.M. Kimani, Advocate was the one on record for the plaintiffs. That on 3rd March, 2020 the 1st applicant in the case filed without leave of court, a Notice of intention to act in person which was also not served upon the advocate then on record for the applicants. That the on 12th March, 2020 the applicants jointly appointed again without leave, new advocates M/S Gekonde Co. Advocates, to act for them in the court below, which firm in turn filed a Notice of Change of Advocates. That both notices were by a ruling delivered on 20th June, 2020 by Munyao J. of the ELC Mombasa, expunged from the record for being irregular. That despite that development, the Respondent filed a record of appeal in October 2020 and have up to now not served the same on S.M Kimani, advocate on record for the applicants. The applicants advocate urged that the said omission to serve is an affront to the rules of court.
3. That the Respondent ignored and disregarded the finding of the trial court that the notice of intention to act in person and the purported change of advocates were ineffectual for irregularity and proceeded to file and serve the record of appeal upon M/S Hezron Gekonde and Co. Advocates. That the applicants were not aware of the filing and service of the record of appeal upon M/S Hezron Gekonde and Co. advocates until January 29th, 2021.
4. The applicants urge that they are aggrieved and are entitled to an order to extend time to move court under rule 84 ex debito justitiae, and that the delay in bringing this application was occasioned by the proposed appellant's contemptuous act of filing and serving the record of appeal in contravention of the finding of the trial court, and this court is invited to exercise its discretion to allow the present applicants to participate in the appeal and challenge the probity of the record of appeal through their advocates on record, as found by the court. It is further urged that the Respondent will not suffer any prejudice now that she is the author of this unfortunate delay occasioned by irregular service of the record of appeal on a firm whose notice of change of advocates, to the appellant's advocates knowledge, was expunged in June 2020.
5. The application was supported by the affidavit of Rishad Abdulrehman Khator Salim, one of the Respondents to the appeal, in which he reiterates the facts in the grounds of the application which I have summarized above.
6. The Respondent opposed the application by way of a replying affidavit sworn on 22nd April 2021. She deposes that the 1st and 2nd applicants are the authors and initiators of the circumstances that they are now complaining of. The Respondent deposes that she caused to be filed a notice of appeal on the 1st November 2019 and served the applicants on the 18th and 20th November 2019 respectively. The Respondent proceeded to apply for certified copies of proceeding on 13th November 2019. She deposes that the firm of Stephen Macharia Kamau advocates wrote to her advocates, Benjamin Kimani Njoro



dated 19th December, 2020 but served on 17th January, 2020 informing her advocate on record that the firm no longer had instructions to act for the applicants. And as if to confirm that information her advocates was served with a copy of the decree by the 1st Respondent. All these documents are annexed to the Respondent's affidavit.

7. The Respondent opposes the application and urges that the applicants have not demonstrated any prejudice that they have suffered or stand to suffer, and that therefore the court should decline the orders sought in favour of preserving the appeal to be heard on merits.
8. The Respondent contends that upon being served with the Notice of Appeal on 18th November, 2019, the applicants did not file a Notice of Address of Service which was a requirement of Rule 79 (i) (a) of the Court of Appeal Rules, 2010. That M/S Stephen Macharia Kimani & Company Advocates had by a letter dated 19th December, 2019, indicated he no longer had instructions to represent the 1st and 2nd Respondents. That upon filing the Record of Appeal, his advocates, out of abundant caution served M/S Hezron Gekonde Advocates with the Record of Appeal on 4th November, 2019 and the advocate neither declined nor returned the Record of Appeal to signify that he was not instructed to represent the applicants in this appeal. That the challenge now taken by the applicants is technical and flows from their own actions or failure to comply with rule 79 (1) (a) of the Court of Appeal Rules, 2010. That any perceived prejudice was cured once the applicants received the Record of Appeal on 29th January, 2021 and that there was no contempt, intention to over reach, or to contravene the rules of the honourable court in his actions. The appellant urged that in any event the application falls outside the timelines contemplated by rule 84 of the Court of Appeal Rules, 2010 and will lead to the delay of the finalization of this appeal.
9. The applicant in his submissions repeated the averments in the application and added that the applicant, Mr. Rishad Abdulrehman Khator and their advocates M/S Hezron Gekonde and Co. Advocates, and the 1st defendant (now appellant) and his advocates on appeal, M/S Njoroge & Katisya Advocates, were all present when the ruling of 10th June, 2020 was read by Munyao, J.
10. The parties to this application have said a lot, most of which will be relevant at a later stage, if the application is allowed. For now, what the court needs to bear in mind in considering this matter is the well-known passage often cited from the case of *Leo Sila Mutiso v. Rose Helen Wangari Mwangi* Civil Application No NAI 251 of 1997 (unreported) where it ruled as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which the court generally takes into account in deciding whether to grant an extension of time are first the length of the delay. Secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the Respondent if the application is granted.”
11. I have considered the rival positions of the parties in this application. The application herein has been brought by the original plaintiffs in the suit, for extension of time so that their parallel application to strike out the record of appeal for want of service, is deemed as properly filed.
12. I have considered the length of the delay involved in this application and the explanation given. It is not in dispute that the notice of appeal was filed on the 1st November, 2019. The Respondents averred that the notice was served upon the applicants in person on 18th and 20th November, 2019. The notice is annexure IMA “A” of the replying affidavit, showing the stamps of those served on 18th November, 2019 including S.M Kimani advocate. The Respondent contends that the applicants did not file notice



of address as required under rule 79(1)(a) of this court's rules, and that it was for that reason that her advocate, out of abundance of caution served the firm of Hezron Gekonde advocate.

13. The applicants have contested this and have contended that they were unaware of the notice of appeal until 29th January, 2021 when the 1st applicant got the information from Gekonde & Co. advocates. That cannot be the correct position, as service of the notice was effected on the applicants advocate within the prescribed time. The letter the advocate wrote to the Respondent's advocate informing them he was no longer acting for the applicants came later in January 2020. The time started running on the 18th November, 2019. By the time this application was filed in the February 2021, it was three months later. It ought to have been brought within 30 days of date of service of the notice of appeal. The relevant rule here is rule 84 of this court's rules which provides:

“ 84. Application to strike out notice of appeal or appeal

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”.

14. As for the explanation for the 60 days of delay, the applicants have started on the wrong footing by denying service of the notice on 18th November, 2019 which has been disproved.

They have clearly not offered any explanation for the delay. I find that the delay of two months to file this application was inordinate. Coupled with the lack of any reasonable explanation for the delay, I find the application without merit.

15. Accordingly, the application is dismissed for lack of merit.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

