



REPUBLIC OF KENYA



KENYA LAW
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**Ngetsa v Karisa & 2 others (Environment & Land Case
4 of 2021) [2024] KEELC 3425 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3425 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 4 OF 2021**

**EK MAKORI, J
APRIL 24, 2024**

BETWEEN

SARAH KAHONZI NGETSA APPELLANT

AND

FUNDI KARISA 1ST RESPONDENT

**KATANA KARISA WALE (SUED AS THE ADMINISTRATOR OF THE ESTATE
OF KARISA WALE GONA - DECEASED) 2ND RESPONDENT**

CHARLES CHESARO 3RD RESPONDENT

*(Being an appeal against the ruling and orders of the Senior Principal Magistrate
Court at Kilifi in ruling delivered on 21st January 2021 by Honourable J.M Kituku)*

RULING

1. The Notice of Motion Application dated 10th July, 2023 brought under Section 1A, 3A, 3B, 63(E) and 79G of the [Civil Procedure Act](#) Cap 21 laws of Kenya and Order 42 Rule 12 (4) and Order 51 Rule 1 of the [Civil Procedure Rules 2010](#) and ALL enabling Provisions of the Law) and seeks the following reliefs;
 - a. That the Appeal be struck out for being filed out of time without leave of the court.
 - b. That the Record of Appeal dated 24th April 2023 and filed on 27th April 2023 is incomplete and contravenes the Provisions of Order 42 Rule 12 (4) of the [Civil Procedure Rules 2010](#) which requires all pleadings to be included in the Record of Appeal. Thus the Record of Appeal is incompetent and the same be struck out together with the appeal for incompetency.
 - c. That the costs of this application be borne by the Appellant.
2. The grounds upon which it is premised are that:



1. The ruling in KILIFI ELC NO. 52 OF 2020 was delivered by the Trial Court on 20th January 2021.
2. The Memorandum of Appeal herein dated 7th February 2021 was filed on 1st March 2021, 41 days from the date of the ruling contrary to Section 79G of the [Civil Procedure Act](#).
3. The Memorandum of Appeal filed herein on 1st March 2021 was filed out of time and without leave of the court.
4. The Record of Appeal dated 27th April 2023 and filed on 27th April 2023 is incomplete as it does not include the following pleadings filed by the 1st and 2nd Respondents in the trial:
 - a. Memorandum of Appeal dated 25th August 2020 and filed on 26th August 2020.
 - b. Authority to plead dated 9th September 2020 and filed on 9th September, 2020
 - c. 1st and 2nd Defendant's/Respondent's Replying sworn on 9th September, 2020 and filed on 11th September, 2020.
 - d. 1st and 2nd Defendants written submissions on Notice of Motion Application dated 13th July, 2020 and filed on 11th November, 2020.
 - e. 1st and 2nd Defendants statement of defence and counter claim dated 8th May, 2023 and filed on 10th May 2023.
 - f. 1st and 2nd Defendant list of witness dated 8th May, 2023 and filed on 10th May, 2023.
 - g. 1st Defendant's Witness Statement dated 8th May, 2023 and filed on 10th May, 2023.
 - h. 2nd Defendant's written submissions dated 8th May, 2020 and filed on 10th May, 2020.
 - i. Witness Statement of Kahaso Karisa Wale dated 8th May 2023 and filed on 10th May 2020.
 - j. 1st and 2nd Defendant's list of documents dated 8th May, 2023 and filed on 10th May, 2023
5. The Record of Appeal filed herein contravenes the Provisions of Order 42 Rule 12 (4) of the [Civil Procedure Rules, 2010](#) for failure to include the pleadings filed by the 1st and 2nd Respondent in the trial court and is therefore incompetent and ought to be struck out together with the Memorandum of Appeal.
6. This court has no jurisdiction to hear an appeal filed out of time without leave of the court.
7. This Appeal filed out of time without leave is an abuse of the court process.
8. It is therefore in the interest of justice that the Appeal herein be struck out with costs to the 1st and 2nd Respondents.
9. I see no response from the Appellant to controvert the Preliminary Objection raised on the progression of the intended appeal.
10. The issues that stand for the determination of this Court are whether the appeal is incomplete and therefore stands incompetent and ought to be struck out in limine and whether the same was filed out of time was filed out of time and therefore fit for striking out.
11. The issue of the incomplete record of appeal can be seen from the record that has been subject and raised in the past and the appellant granted time to regularize the same. It has never happened. I think



that is the reason for the current application. It has been raised that the appellant selectively included the appellant's record as comprised in the Lower Court, but failed to include that of the respondent.

12. The Court of Appeal in the case of *Intercounties Importers and Exporters v Teleposta Pension Scheme Registered Trustees & 5 others (Civil Appeal (Application) 293 of 2016) [2021] KECA 44 (KLR) (23 September 2021) (Ruling)* had this to state on an incomplete record of appeal:

“In our view, striking out this appeal on grounds that the record of appeal as filed is incomplete, while the reason for the incompleteness is the unavailability of the records will not serve the ends of justice. Accordingly, we dismiss this application and order that the applicant has 45 days within which to file and serve a supplementary record of appeal to bring on board any relevant documents it may have in its possession omitted from the record which may assist in the just and fair disposal of this appeal. If no supplementary record is filed and served as ordered, the appeal to proceed for hearing with the record as filed.”

13. The Court of Appeal then in that judicial authority was of the view that a party could be given time to file a supplementary record of appeal. This the Court has granted the appellant who seen not to act.

14. It then takes me to the 2nd limb of the objection that the appeal was filed out of time. According to the Respondent/Applicant the ruling appealed against was delivered on 21st January 2021. The Memorandum of Appeal was filed on the 1st of March 2021, 41 days late. No leave was obtained from this Court. The appellant/Respondent has not controverted the allegations that neither leave to appeal out of time was granted nor proffered reasons for the late appeal.

15. Leave of the Court to appeal out of time was necessary. Section 79G of the *Civil Procedure Act* provides that:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

16. In *Mombasa County Government v Kenya Ferry Services & Anor. [2019]*, in paragraph 25 the Supreme Court held that;

“25] Concerning extension of time, this Court has already set the guiding principles in the Nick Salat Case as follows:

QUOTE

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;



2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents if extension is granted;
6. whether the application has been brought without undue delay; and
7. whether in certain cases, like election petitions, public interest should be a consideration for extending time” [emphasis supplied]”

17. In this matter we not only have an incomplete record of appeal but also an appeal filed out of time without leave. The appellant too has neglected to regularise the same after being granted time to do so. Looking at the appeal it seeks to challenge interlocutory orders issued by the Lower Court, which means the current appeal is delaying the determination of the primary suit. I think it will be unjust to continue holding on an appeal which is a non-starter. I allow the application dated 10th July 2023 by striking out the pending appeal with costs to the Applicant/Respondent.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 24TH DAY OF APRIL 2024, IN THE ABSENCE OF PARTIES WHO HAD NOTICE OF THE SAME. CONSEQUENTLY, THE RULING BE SUPPLIED TO THE PARTIES VIA THEIR EMAILS.

E. K. MAKORI

JUDGE

