



**Victory Children’s Home Foundation & 4 others v Otieno (Constitutional
Petition E001 of 2020) [2025] KEHC 2449 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2449 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CONSTITUTIONAL PETITION E001 OF 2020
MS SHARIFF, J
FEBRUARY 27, 2025**

BETWEEN

VICTORY CHILDREN’S HOME FOUNDATION & 4 OTHERS APPLICANT

AND

CHARLES ANDERSON OTIENO RESPONDENT

RULING

1. Vide a Motion application dated 20th December 2023, the 1st Respondent/Applicant herein seek to have the Respondent’s Notice of Appeal dated 4th February 2021 deemed as withdrawn or struck out with costs for want of prosecution. Jared Sala, an Advocate of the High Court of Kenya, swore an Affidavit in support of the Motion on an even date wherein he deposed that the Respondent/Appellant failed to institute a record of appeal within the requisite time as per law since he filed his Notice of Appeal to the Court of Appeal on 4th February 2021. According to him, it stands that there is no appeal on record. He avers that it is now over two (2) since the Respondent/Appellant filed his Notice of Appeal which declared his intention of lodging an appeal before the Court of Appeal and that the time to lodge his record of Appeal has expired. He deposed that the delay in filing the Appeal to the Court of Appeal is causing the Applicants undue prejudice and the same is inordinate, inexcusable and an abuse of the Court process.
2. In response to the motion application, the Petitioner/Respondent filed his Notice of Preliminary Objection dated 8th February 2024, on the following points of law:
 - i. That the Court of Appeal held in Nairobi Civil Application No. 308 of 2015 Judicial Service Commission and Another vs Hon. Lady Justice Kalpana H. Rawal that “The importance of a Notice of Appeal cannot be underestimated. A Notice of Appeal is the procedural mechanism for transferring jurisdiction from the trial Court to the appellate Court; it is a jurisdictional transfer mechanism; the filing of the Notice ends the exercise of original jurisdiction and begins the exercise of appellate jurisdiction.” Therefore, this Court being the trial Court lacks



jurisdiction, original, inherent or otherwise to hear and determine any matter touching on the Notice of Appeal dated 4th February 2021.

- ii. The Notice of Appeal dated 4th February 2021, was filed pursuant to the provisions of Rule 75 of the Court of Appeal Rules and as such, this Court lacks jurisdiction to hear or determine any matter as the *Appellate Jurisdiction Act* Chapter 9 Laws of Kenya is for application only in the Court of Appeal.
 - iii. The Notice of Appeal dated 4th February 2021 was filed pursuant to the provisions of Rule 75 of the Court of Appeal Rules, therefore, any matter touching on the validity or otherwise of the Notice of Appeal dated 4th February 2021 can only be heard and competently determined pursuant to the provisions of the *Appellate Jurisdiction Act* Chapter 9 Laws of Kenya and The Court of Appeal Rules 2010 as such, the High Court in its capacity as a superior Court has no jurisdiction, discretion or powers whatsoever to order the striking out of the very notice that ousts its jurisdiction.
 - iv. The Applicants application dated 20th December 2023, has invoked the provisions of Order 42 Rule 35 of the Civil Procedure Rules which strictly applies to appeals from the subordinate Court to the High Court and not appeals from the High Court, in its capacity as a superior Court, to the Court of Appeal.
3. In reaction to the preliminary objection the respondent filed his Grounds of Opposition dated 21st June 2024, and stated thus :-
- i. That the High Court has inherent powers to hear and determine the Respondent's application dated 20th December 2023.
 - ii. That the Notice of Appeal is a jurisdictional document that transfers jurisdiction from the lower Court to the Higher Court, in this case, the Court of Appeal. Jurisdiction is conferred to the Court of Appeal by filing the Notice of Appeal together with the record of Appeal. The Petitioner/Respondent has failed to file his record of Appeal from 4th February 2021, to date, without giving any reason. They have failed to move the Court of appeal thus not conferring its jurisdiction in this suit.
 - iii. That the Notice of Appeal dated 4th February 2021, is a waste of judicial time as they have not demonstrated any hinderance in filing the record of appeal, 3 years and 5th months after filing the Notice of Appeal.
 - iv. That the said application be dismissed with costs to the Respondent herein.
4. The Preliminary Objection dated 8th February 2024, was canvassed by way of written submissions by the Applicants herein. The Respondent opted to rely on his filed Preliminary Objection.
5. In a nutshell, counsel for the Applicants herein submitted that High Court has the inherent jurisdiction to hear and determine their application dated 20th December 2023. He referred to Section 3A of the *Civil Procedure Act* and Article 159 of *the Constitution* of Kenya, 2010. According to him, the Notice of Appeal was filed by the Applicants in the High Court notifying the Court of their intention to appeal to the Court of Appeal, but the Respondent failed to file the requisite Record of Appeal as per the law and no reasons were availed. This action means that they failed to move the Court of Appeal thus failed to confer it with the requisite jurisdiction.
6. Finally, counsel submitted that the Notice of Appeal dated 4th February 2021 is a waste of judicial time as the Respondent failed to demonstrate any hinderance in filing the Record of Appeal 3 years



and 5 months after filing the Notice of Appeal. Counsel relied on the case of Aviation Cargo Support Limited vs St. Mark Freight Services Limited (2014) eKLR.

7. The Court notes that the provisions cited in application namely Sections 1A & 3A of the [Civil Procedure Act](#) and Order 42 Rule 35 & Order 51 Rule 1 Civil Procedure Rules apply to suits but not appeals. However, since the respondent /applicant never raised, I will go to the merit of application.
8. It is necessary to consider the issue of jurisdiction that has been raised by the Respondent regarding the application for want of prosecution of the notice of appeal by the Applicants. It is trite law that, for a party to invoke the jurisdiction of the Court of Appeal under Rule 5(2) (b), it must first file a Notice of Appeal in accordance with Rule 77 of the [Court of Appeal Rules](#).
9. In Phoenix of EA Assurance Company Limited v S M Thiga t/a Newspaper Service [2019] eKLR, the Court of Appeal held that: “A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the court cannot confer jurisdiction on itself.”
10. Rule 75(1) and (2) of the Court of Appeal Rules requires “any person who desires to appeal to the Court” to “... give notice in writing within 14 days of the date of the decision against which it is desired to appeal.”
11. Notably, the procedure for rejection and/or admission of appeal and giving of directions is very well set out in the [Civil Procedure Rules](#). However, this procedure does not seem to be strictly followed and differs from one Court to another.
12. Invariably, the Registrar issues the notice for admission and directions of appeal after the High Court receives the file and lower court proceedings. The Appellant does not seem to have any role in fixing the appeal for directions as contemplated under Order 42 Rule 11 of Civil Procedure Rules and Order 42 Rule 13 (1) of the Civil Procedure Rules. It is important to point out that under Order 42 Rule 13 (4) of the Civil Procedure Rules, the judge shall not allow a matter to proceed for hearing unless the record of Appeal is duly filed.
13. Once directions are given under Order 42 Rule 13 of [Civil Procedure Rules](#) and the Appellant fails to fix the appeal for hearing, the Respondent may fix the same for hearing and/or seek dismissal of the same for want of prosecution under Order 42 Rule 35 (1) of the [Civil Procedure Rules](#) or the registrar lists the appeal before a judge for dismissal under Order 42 Rule 35 (2) of Civil Procedure Rules.
14. Order 42 Rule 35 (1) of the [Civil Procedure Rules](#) stipulates as follows:

“Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution”.
15. Order 42 Rule 35 (2) of the [Civil Procedure Rules](#) stipulates as follows: -

“If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal”
16. From the above analysis, it is clear that the provisions of the law relating to dismissal of the notice of appeal under Order 42 Rule 35 relates to appeals from the subordinate Court to the Hight Court.



17. It is inevitable that the Respondent herein invoked the jurisdiction of the Court of Appeal as per Rule 75 of the *Court of Appeal Rules* when he lodged his Notice of Appeal dated 4th February 2021. Rule 75 of the Court's Rules provides as follows:

“75. Notice of appeal

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.”

18. I echo what the Court of Appeal stated in the case of *Mae Properties Limited v Joseph Kibe & Another* [2017] eKLR thus:

“We have said on numerous occasions that the Rules of Court exist for the purpose of orderly administration of justice before this Court. The timelines appointed for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals that come before us. The Rules are expressed in clear and unambiguous terms and they command obedience.”

19. The Respondent invoked the jurisdiction of the Court of Appeal when he filed a Notice of Appeal dated 4th February 2021 within 14 days of the judgment which was delivered on 3rd February 2021. The Respondent then served the notice to the Applicants within seven days.

20. From the above analysis, it is clear that the Applicants ought to have approached the Court of Appeal under Rule 86 of the Court of Appeal Rules is instructive on the basis upon which an application for striking out a notice or record of appeal shall be made; and it provides thus:

Rule 86 of the Court of Appeal Rules provides 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 -

- a) that no appeal lies; or
- b) 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”

21. Flowing from the above findings, the Respondent's Preliminary Objection dated 8th February 2024 is hereby allowed with costs of Kshs. 10,000/= to the Respondent herein.

DATED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF FEBRUARY 2025.

SHARIFF MWANAISHA SAIDA

JUDGE

In the presence of :



N/A for Applicants

N/A for Respondent

DianaCourt Assistant

