



**Mukangu v Mukangu (Civil Appeal (Application) E083 of 2024)  
[2025] KECA 1352 (KLR) (18 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1352 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL (APPLICATION) E083 OF 2024  
JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA  
JULY 18, 2025**

**BETWEEN**

**STEPHEN NDUMBA MUKANGU ..... APPLICANT**

**AND**

**FREDRICK KINYURU MUKANGU ..... RESPONDENT**

*(Being an application to strike out the appeal from the Judgment of the Environment and Land Court at Meru (Nzili, J.) delivered on 16th November 2022 in ELC Case No. 88 of 2015)*

**RULING**

1. Before the court is an application by way of a notice of motion dated 30<sup>th</sup> May 2024, brought under Rule 86 of the Court of Appeal Rules 2022, seeking orders to strike out the notice of appeal dated 18<sup>th</sup> November 2022; the memorandum of appeal dated 2<sup>nd</sup> April 2024; for the orders made on 1<sup>st</sup> March 2023 vacated; and with an award of costs to the applicant.
2. The application is predicated on the grounds on the face of the application, reiterated in the supporting affidavit of the applicant, Stephen Ndumba Mukangu. The applicant avers that the respondent filed his notice of appeal on 21<sup>st</sup> November 2022, but did not serve it until 28<sup>th</sup> May 2024, in breach of Rule 79 of the Court of Appeal Rules 2022, further, the memorandum of appeal and the record of appeal were lodged on 2<sup>nd</sup> of April, 2024, 554 days after filing the notice of appeal and only served on 28<sup>th</sup> May 2024, contrary to Rule 84 of the Rules.
3. Further he deposed that following an application for a stay of execution, parties compromised and agreed to maintain the status quo pending hearing and determination of the appeal and that the respondent continues to benefit from status quo orders, to the detriment of the applicant as has been using six(6) acres of land, despite a judgment requiring him to sign transfer documents for half of the land, which would allow the applicant to make a living from it. Further, the application has been filed promptly.



4. The appellant filed a replying affidavit in response, sworn on 3<sup>rd</sup> December 2024. He deposed that he filed a notice of appeal on 18<sup>th</sup> November 2022, which was duly signed by the Deputy Registrar on 21<sup>st</sup> November 2022. Additionally, through an application dated 23<sup>rd</sup> December 2022, he sought a stay of execution of the judgment in question. This application included his memorandum of appeal, which outlined the grounds for appeal.
5. Further, he stated that the assertion that there was no compliance with Rule 79 of the Court of Appeal Rules is unfounded. Upon filing the notice of appeal, he submitted an application that included all the documents the applicant claimed were not served. The court reviewed these documents before delivering its ruling on 1<sup>st</sup> March 2023, where counsel represented the applicant.
6. Furthermore, he argued that he did not fail to comply with Rule 84 of the Court of Appeal Rules, as his advocate requested certified copies of the proceedings and judgment on 18<sup>th</sup> November 2022, and these were made available on 21<sup>st</sup> June 2024.
7. The application was heard on the court's virtual platform. Learned counsel for the applicant relied on his written submissions dated 19<sup>th</sup> November 2024, where he cited the case of Daniel Nkirimpa Monirei vs. Sayialel ole Koilel & 4 Others [2016] KECA 148 (KLR), in support of his contention that the non-service of the notice of appeal on time amounts to failure to comply with Rule 79 of the Court's Rules.
8. Learned counsel further asserted that it is well-established that whether or not a record of appeal has been filed on time goes to the jurisdiction of the court. He referred to the case of Patrick Kiruja Kithinji vs. Victor Mugira Marete [2015] KECA 872 (KLR), in which this Court stated that the timeliness of filing an appeal is a fundamental issue because it directly affects the court's jurisdiction. The court only has jurisdiction to entertain appeals filed within the requisite timeframe, or those filed out of time but with the court's leave.
9. On his part, learned counsel for the respondent filed submissions dated 3<sup>rd</sup> December 2024. He relied on Article 159 (2)(d) of *the Constitution* and Sections 3A and 3B of the *Appellate Jurisdiction Act* to urge that the primary role of a court is to render substantive justice to the parties involved. Further, he contended that the applicant's counsel, having participated in the application dated 23<sup>rd</sup> December 2022, which resulted in the consent order for status quo, was aware of the appeal, and that the court allowed the consent based on the said notice of appeal. To support his argument, learned counsel relied on the case of Multipurpose Co-operative Society Limited vs. Serser & 3 Others (Civil Appeal No. 160 of 2018 (2023) KECA 441 (KLR)).
10. We have considered the application, the supporting affidavit, the replying affidavit, the submissions by counsel for the parties, the cited case law, and the relevant law. The singular issue is whether to strike out the appeal due to non-compliance with Rules 79 and 84 of the Court of Appeal Rules.
11. It is not in dispute that the judgment subject of the appeal herein was delivered on 16<sup>th</sup> November 2022. The applicant asserted that the notice of appeal was lodged on 21<sup>st</sup> November 2022 and served on 28<sup>th</sup> May 2024. The respondent has not disputed the averment. Save to state that the applicant knew that he had filed the notice of appeal. Rule 77 (now 79) of the Court's Rules provides that:



1. An intended appellant shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal: Service of notice of appeal on persons affected.

Provided that the Court may, on application which may be made ex parte, within seven days after the lodging of the notice of appeal, direct that service need not be effected on any person who did not take part in the proceedings in the superior court.

12. It is clear that the service of the notice of appeal is to be within seven (7) days of lodging the same, except where the court directs otherwise. Counsel for the respondent does not deny service of the same was belatedly done, save stating that the applicant's counsel was aware of the intended appeal. The purpose of the notice of appeal is to put on notice a party that an appeal will be lodged. Counsel for the applicant may not have raised the issue of non-service when the parties first appeared in court, but that does not change the facts. It may as well be that it was not the proper forum to raise the issue.
13. In the case of Mistry Premji Ganji (Investment) Limited vs. Kenya National Highway Authority [2018] KECA 102 (KLR), the court in appreciating that Section 77(1) is couched in mandatory terms was of the view that lateness in servicing a notice of appeal can be excused where an applicant can satisfy the court on the lateness. In this instance, no explanation was given for the late service. Save that learned counsel invoked Article 159 of *the Constitution*. Put bluntly, learned counsel asked us to disregard the rules. Rules of procedure are established to ensure the smooth, orderly, and just expedited hearing of cases. They ought not to be thrown out of the window callously simply because a litigant failed to comply and cares less to explain the reason for the delay. In the case of Mae Properties Limited vs. Joseph Kibe & Another [2017] KECA 238 (KLR), this Court stated:

“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.”

14. The second limb of the application is whether the record of appeal was filed but served way out of the timelines stipulated in Rule 84 of the Courts Rules, which provide:

84.(1) Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged— Institution of appeals.

- a. a memorandum of appeal, in four copies;
- b. the record of appeal, in four copies;
- c. the prescribed fee; and
- d. security for the costs of the appeal:

Provided that where an application for a copy of the proceeding in the superior court has been made in accordance with sub-rule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.



2. An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless the appellant's application for such copy was in writing and a copy of the application was served upon the respondent.
3. The period specified in sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction.
15. The rule is equally couched in mandatory time. The proviso to the rule is that the letter bespeaking the proceedings has to be copied to the other side, and a certificate of delay is issued. None of the parties raised the issue of the letter bespeaking proceedings or made any mention of the certificate of delay, which means the proviso is not applicable in the circumstances herein.
16. The respondent appears to be unaware of the requirement of Rule 84 that an appeal must be filed within 60 days of lodging the notice of appeal and, for the proviso to apply, the letter initiating proceedings should have been copied to the other side, and a certificate of delay specifying the time it took to prepare the record provided. He also seems to be oblivious of the fact that time may be extended upon an application to the court. This Court succinctly addressed the import of Rule 84, in the case of *Mae Properties Limited vs. Joseph Kibe & Another* (supra) as follows:

“Failure to comply with the timelines set invites sure consequences. In the case of failure to lodge an appeal within 60 days after filing of the notice of appeal, Rule 83, which is invoked by the applicant herein, provides thus;

“83. If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.”

We think that the true meaning and import of the rule is more often than not scarcely appreciated. The rule as framed prescribes the legal consequence for non-institution of an appeal within the 60 days appointed by the Rules of Court. Moreover, the said consequence is couched in mandatory, peremptory terms: the offending party shall be deemed to have withdrawn the appeal. It seems to us that the deeming sets in the moment the appointed time lapses.

...It is safe to say, therefore, that a notice of appeal dies a natural death after the expiry of 60 days unless its life should be sooner extended by lodgment of the appeal within 60 literal days, or such longer time as may still amount to 60 days by operation of the proviso to Rule 82(1) on exclusion. It may also be resuscitated or vivified by an order extending time for the lodging of the appeal properly made by a single Judge on a Rule 4 application. Absent those supervening circumstances, the notice of appeal dies in the eyes of the law. Its interment may then take the form of an order of the court suo motu, on its own motion and at its sole discretion, presumably with neither notice nor reference to the parties. The Court has this inherent power to make the formal Under the same Rule 83, and assuming that the Court will not have sooner made



the deeming order, a party may move the court to make it. We think that it is a simple application that is required to show only that the 60 days appointed have elapsed without an appeal having been lodged. Once those two facts are established, we do not see why the Court should not, unless persuaded by some compelling reason in the interests of justice, simply make the order deeming the notice of appeal as withdrawn. (Emphasis added)

17. We have said enough about the delays. The logical outcome is to allow the application with costs and to vacate the consent order issued on 1<sup>st</sup> March 2023.

**DATED AND DELIVERED AT NYERI THIS 18<sup>TH</sup> DAY OF JULY, 2025.**

**J. LESIIT**

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**JUDGE OF APPEAL**

**ALI-ARONI**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

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

*Signed*

Deputy Registrar

