



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS APPLICATION NUMBER 20 OF 2020**

*(Consolidated with JR No. 8 of 2020, JR No. 7 of 2020, JR No. 13 of 2020, IR No. 20 of 2020, & JR No.21, of 2020)*

**IN THE MATTER OF AN APPLICATION BY**

**OTENE RICHARD OKOMO FOR ORDERS OF CERTIORARI & MANDAMUS**

**AND**

**IN THE MATTER OF ARTICLES 10, 23(3), 43(1), (F) AND 47 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACT 2015**

**BETWEEN**

**OTENE RICHARD OKOMO.....RESPONDENT/APPLICANT**

**AND**

**KENYA SCHOOL OF LAW.....APPLICANT/RESPONDENT**

**THE HON. ATTORNEY GENERAL.....RESPONDENT**

**RULING**

The Kenya School of Law, the present applicant herein, moved this Honourable Court by a Motion dated 16 October 2020 seeking extension of time within which to lodge a notice of appeal; it also sought for the order that a copy of the notice exhibited to the affidavit in support of the motion be deemed to have been duly filed upon payment of the requisite fees. In seeking for these orders, it invoked article 159 of the Constitution, Sections 3A, 3B and 7 of the Appellate Jurisdiction Act, cap.9; Rules 75 and 82 of the Court of Appeal Rules, 2010; Sections 1A, 1B, 3A and 95 of the Civil Procedure Act; and, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules.

Fredrick Muhia, the applicant’s academic services manager, swore the affidavit in support of the motion. He deposed that he was informed of the judgment against which the applicant intends to appeal on 28 August 2020 which is the same date that the judgment was delivered. A week after that, more particularly on 4 September 2020, he was informed that a notice of appeal had been filed. However, the notice was filed in the Court of Appeal portal instead of this honourable court’s portal. He swore that it is an error for which the applicant ought not to be punished; instead the filed notice should be deemed as duly filed.

At any rate, he swore, the delay in filing the present application is not inordinate.

Muhia deposed that failure to file the Notice of Appeal in the appropriate registry was an inadvertent error largely occasioned by the challenges that are associated with navigating the e-portal.

The ex parte applicants in Judicial Review Application Nos. 8, 20 and 21 of 2020 who are some of the beneficiaries of the judgment sought to be impugned opposed the application and filed a replying affidavit to that effect. Mildred Kamene Musau swore the affidavit on her behalf

and on behalf of the rest of the applicants in those matters. In the affidavit, she chronicled the history of the dispute between the ex parte applicants and the Kenya School of Law culminating in the judgment in question.

As far as the motion before court is concerned, she swore it is made in bad faith and it is a malicious attempt by the Kenya School of Law to deny them admission to the school yet it has already given the ex parte applicants provisional admission letters for admission in the Advocates Training Program for the academic year 2021/2022.

Ms Musau also swore that there is no proof of an honest mistake as alleged by Mr Muhia in his affidavit and that no explanation was given why it took the applicant more than 30 days to realise an error had been made in filing the notice of appeal.

Besides the replying affidavit, the ex parte applicants also filed a notice of preliminary objection in which they urged that the applicant had failed to comply with what I understand to be the court decree and admit the ex parte applicants; again they urged that the motion is in breach of article 159 of the Constitution and Orders 42 and 51 of the Civil Procedure Rules.

The rest of the ex parte applicants did not file a response of any sort to the applicant's motion.

At the hearing of the motion Mr. Simiyu, the learned counsel for the applicant reiterated in his submissions, the averments made in the applicant's pleadings and the depositions in the affidavit in support of the motion. In particular, counsel urged that after the judgment was delivered on 28 August 2020, the applicant moved with speed and filed a notice of appeal on 1 September 2020. The Deputy Registrar of this Court duly signed the notice on 4 September 2020. However, the payment of the fee for the notice, which according to the receipt was assessed at Kshs. 450/= was made in the Court of Appeal. At the end of the day, as I understood the learned counsel, the only problem with the notice of appeal was the registry in which the payment was made upon filing of the notice and nothing more.

He urged the Court to allow the application since none of the ex parte applicants had demonstrated that they would suffer prejudice of any sort if the application was allowed.

Ms. Eunice Nganga, the learned counsel for the ex parte applicant in Judicial Review No. 13 of 2020 did not oppose the application.

On his part, Mr. Murimi the learned counsel for the ex parte applicants in Application Nos. 8, 20 and 21 of 2020 opposed the motion. In his view, the applicant's motion was made in bad faith and is malicious. The applicant, according to him, did not give adequate explanation why it had to take it 30 days before it discovered that it had made an error in payment for the filing of the notice. The notice of appeal, according to him, is frivolous and is only intended to delay the conclusion of this matter.

Ms. Esther Kimani, one of the ex parte applicants and who has been acting in person also opposed the application because, in her own words, it was putting a 'strain on her funds.'

Mr. Munyua Ezekiel, the learned counsel for the ex parte applicant in Judicial Review No. 7 of 2020 opposed the motion. His main concern was that this honourable court lacked jurisdiction to entertain this application because it was rendered *functus officio* the moment it delivered its judgment on 28 August, 2020. According to the learned counsel, the application ought to have been filed in the Court of Appeal in accordance with Rule 4 of the Court of Appeal Rules.

Now, the procedure for filing appeals in the Court of Appeal against decisions of the superior courts in civil matters is found in Part IV of the Court of Appeal Rules, 2010. Of particular relevance to the applicant's application is rule 74 which prescribes, among other things, the content of a notice of appeal and the form it takes; the rule also prescribes where and when it should be lodged after the delivery of an impugned judgment. That Rule reads 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.**

**(3) Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the address for service of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice.**

**(4) When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.**

**(5) where it is intended to appeal against a decree or order, it shall not be necessary that the decree or order be extracted before lodging notice of appeal.**

**(6) A notice of appeal shall be substantially in the Form D in the First Schedule and shall be signed by or on behalf of the appellant.**

It is apparent from the material before and neither is it in dispute that the applicant in the motion before court intended to appeal against the

judgment of this honourable court delivered on 28 August 2020 and so on 1 September 2020, it lodged the requisite notice of appeal with the Deputy Registrar of this honourable court. Proof of this lodgment is a combination of a copy of an auto-generated electronic mail from this Court acknowledging the applicant's submission of the notice for assessment and a copy of a screen shot confirming an M-pesa transaction of a payment of KShs. 450 which was the assessed fee payable on filing of the notice.

A further proof that the notice was received at this Court's registry is the Deputy Registrar's signature appended on the notice on 4 September 2020; this signed copy is exhibited on Mr Muhia's affidavit in support of the motion. It is logical to conclude that, having received and signed the notice, the deputy registrar must have transmitted it to the appropriate registry in accordance with Rule 76 of the Court of Appeal Rules.

The notice was lodged barely three days after delivery of the judgment and therefore it was lodged well within the limitation period. It is also apparent on its face that the intended appeal was against the whole of the decision of the superior court; what is more, it is in the form prescribed.

On the face of it, there is no doubt that the applicant complied with all that was required of it in the filing a Notice of Appeal.

As much as the applicant's fear that the notice may not be in order for the reason that the filing fee was received in the Court of Appeal Account rather than in the High Court Account, I do not see how the diversion of the fee to a separate account other than the intended account could affect the validity of the notice to such an extent that the applicant must have found it was necessary to make the present application; as a matter of fact, I do not think the validity of the notice was affected at all once it was demonstrated that the requisite fee was paid and the notice duly filed. It is not lost to me and neither should it be to anybody else, that the accounts belong to the same account holder and the fees paid in these accounts ultimately end up in the same pot, so to speak.

In any event, looking at the e-mail from the judiciary acknowledging receipt of the applicant's notice for assessment, the judiciary not only assessed the fee payable for filing of the notice but it also outlined specific instructions on how to make payment via mobile money transfer; it also generated a payment reference number which I suppose was specific to this payment alone. Certainly the applicant would not be punished for following these instructions and making the payment if the money ended up in one account rather than the other.

My assessment of the applicant's application is of a party who is overly cautious. In my humble view, the notice was properly lodged at the correct registry and, in any event, in compliance with Rule 74 of the Court of Appeal Rules. That being the case, I would describe the applicant's motion as unnecessary and, at the very least, superfluous.

But even if it was necessary for the applicant to seek extension of time for one reason or the other, I doubt this court would be the proper forum to entertain this kind of application. I say so because according to Rule 4 of the Court of Appeal Rules, it is only the Court of Appeal which has the jurisdiction to extend time within which to file a notice of appeal. That Rule reads as follows:

#### ***4. Extension of time***

***The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.***

The 'court' referred to in this rule as having the powers to extend the time is the Court of Appeal; there is nothing in the Court of Appeal Rules or the Civil Procedure Rules that suggests that the jurisdiction to extend time in this regard is shared between the Court of Appeal and this honourable court; the power to extend time to do any act that is subject to limitation period under the Court of Appeal Rules is within the exclusive jurisdiction of the Court of Appeal. It follows that the applicant's motion would not have stood the test of time assuming that the applicant had any reason to seek for extension of time within which to lodge and serve the notice of appeal.

For the reasons I have given I am inclined to reject the applicant's application. It is hereby dismissed. Parties will bear their respective costs. Orders accordingly.

**Signed, dated and delivered this 23<sup>rd</sup> day of December 2020**

**Ngaah Jairus**

**JUDGE**