



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: GICHERU, AKIWUMI & SHAH, J.J.A.)

CIVIL APPEAL NO.287 OF 1997

BETWEEN

JOSEPH NGWELE NDUSWA.APPEALANT

AND

AHMED ABUBAKAR T/A BAJABER SERVICE STATION.....RESPONDENT

SHADRACK KASOA MWANGIRESPONDENT

**(Being an Appeal from the judgment of the High Court of Kenya at Nairobi (Justice J.V. Juma
Dated on 11th day of June, 1997**

In

Civil suit no.3009 of 1989)

RULING OF THE COURT:

We have before us a two- pronged application for striking out this appeal. The first limb of the application is that no notice of appeal was properly served, or at all on the respondent. The second limb of application is to the effect that the record of appeal as filed was filed out of time, as the appellant does not have the benefit of the proviso to rule 81(1) of the rules of this court.

The respondent to this application concedes that the notice of appeal was never personally served on the respondent to the appeal and that it was only sent by ordinary mail to be received by the respondent on 1st September 1997. Rule 17(1) of the rules of this court mandates a personal service of such a document as the notice of appeal, unless otherwise directed and we are told no such directions have been or are sought. The effective position therefore, is that to date there has been no effective service of the notice of appeal with the result that an essential step in the proceedings has not been taken.

As regards the filing of the appeal itself in the absence of a copy of the letter bespeaking copies of proceedings and judgment not having been sent to the respondent to appeal within 30 days, the benefit of the proviso to rule 81(1) does not enure to the appellant. The record of appeal is also therefore filed out of time without leave.

We are told from the bar that there was an application filed in this court by the appellant for extension of time to serve the notice of appeal and that application stands dismissed but there is a reference to full

court pending against that decision. The reference even if successful would not help the appellant as (we are so told)there is no application for directions to serve otherwise than in the mode prescribed by rule 17(1) of the rules of this court.

The upshot of all this is that an essential step not having been taken the appeal is ordered struck out. The applicant (respondent to the appeal) will have costs of application and the costs of the appeal) will have costs of the application and costs of the appeal.

Dated and delivered at Nairobi this 18th day of March 1998.

J.E. GICHERU

JUDGE OF APPEAL

A.M.AKIWUMI

JUDGE OF APPEAL

A.B.SHAH

JUDGE OF APPEAL

I certify that this is a

True copy of the original.

DEPUTY REGISTRAR