



REPUBLIC OF KENYA



KENYA LAW
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**Kwale International Sugar Company v Nyatigi (Civil Application
E089 of 2024) [2025] KECA 1821 (KLR) (7 November 2025) (Ruling)**

Neutral citation: [2025] KECA 1821 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E089 OF 2024
P NYAMWEYA, KI LAIBUTA & GW NGENYE-MACHARIA, JJA
NOVEMBER 7, 2025**

BETWEEN

KWALE INTERNATIONAL SUGAR COMPANY APPLICANT

AND

GODFREY JUMA NYATIGI RESPONDENT

(An application to strike out Notice of Appeal dated 22nd April 2024 and served on 16th July 2024 in respect of the judgment of the Employment and Labour Relations Court at Mombasa (M. Mbaru, J.) delivered on 11th April 2024 In ELRCA No. E099 of 2023)

RULING

1. We have been urged by Kwale International Sugar Company (the applicant herein) to strike out the Notice of Appeal dated 22nd April 2024 filed by Godfrey Juma Nyatigi (the respondent herein) for failure to serve it within the stipulated time. The applicant expounds on this prayer in its application by a Notice of Motion dated 22nd July 2024 and in the affidavit in support thereof sworn on even date by its advocate, Moses Njuru.
2. It is stated therein that the respondent's suit in ELRCA No. E099 of 2023 was dismissed by a judgment delivered by the Employment and Labour Relations Court (ELRC) at Mombasa (M. Mbaru, J.) on 11th April 2024. Thereafter, on 16th July 2024, the respondent served the applicant with a Notice of Appeal dated 22nd April 2024, which Notice of Appeal is defective since there was no evidence that the same was lodged with the Deputy Registrar, ELRC Mombasa, as required under Rule 77 (1) of the Court of Appeal Rules, 2022, as it is neither endorsed with the filing date, signed and does not bear a seal and/or a rubber stamp by the Deputy Registrar, which is necessary to authenticate when the same was lodged with the Deputy Registrar.
3. In addition, the Notice of Appeal was not served within seven (7) days of filing as prescribed under Rule 79 of the Court of Appeal Rules, 2022 and ought to be struck out with costs pursuant to Rule



- 84 of the Court of Appeal Rules. Lastly, that the applicant filed the instant application within the stipulated time of 30 days from the date of service as stipulated under Rule 86 of the Court of Appeal Rules, 2022.
4. The application is opposed by way of a replying affidavit sworn on 5th August 2024 by Philip W. Odhiambo, the respondent's advocate. His explanation was that he filed a notice of appeal on 22nd April 2024 on the same date electronically at the Mombasa ELRC registry, made payment on the same date, and was issued with an electronic receipt dated 24th April 2024 and charged the sum of Kshs Four Hundred and Fifty (Kshs.450/=). Further, the Judiciary through the CTS (Case Tracking System) issued an e-filing acknowledgement of the Notice of Appeal on 2nd May 2024, and the same was confirmed as received on 26th June 2024 before the judicial officer.
 5. It however took longer to have the Notice of Appeal signed by the registrar even with follow-up, and the respondent's advocate consequently served the applicant with the unsigned notice of appeal to put them on notice of the intended appeal, as he followed up on the duly lodged notice of appeal. The duly signed notice of appeal was subsequently uploaded on the Judiciary's CTS on 26th July 2024, whereupon the same was served upon the applicant on the same day together with a receipt evidencing when payments were actually made. Therefore, that the notice of appeal was filed on the 22nd April 2024, which was within the required time lines, and service of the notice was also within the required timelines as upon the same being signed and stamped, it was immediately served upon the applicant, and the seven-day period begins to run immediately the notice of appeal is lodged.
 6. A virtual hearing of the application was held on 28th April 2025. Learned counsel Ms Maina who was holding brief for Mr Njuru appeared for the applicant, while learned counsel Mr. P. Odhiambo appeared for the respondent. Ms Maina relied on written submissions dated 11th April 2025 in which the decisions of this Court in the cases of *Kombe & 11 others vs Mwebi & 10 others* [2023] KECA 980 (KLR) and *Daniel Nkirimpa Monirei vs Sayialel ole Koilel & 4 Others* [2016] eKLR were cited for the rationale for strict adherence to rules of practice and procedure as regards service of the notice of appeal. Counsel referred us to the email sent by the respondent's advocates to the applicant's advocates on 16th July 2024, and which was exhibited in their application to demonstrate that the respondent served the Notice of Appeal dated 22nd April 2024 on 16th July 2024 out of time.
 7. Mr. Odhiambo similarly relied on written submissions dated 12th April 2025 and reiterated the averments made in the respondent's replying affidavit to submit that failure by the Deputy Registrar to sign, stamp, date and upload the notice of appeal cannot be visited upon the respondent with a draconian order of striking out, and that we should make amendments to cater for the challenges and lapses brought about by the online filing system. Counsel cited various decisions on extension of time, which are not applicable in the circumstances of this application.
 8. We have considered the respective cases and arguments put forth by the applicant and the respondent. The issue in this application is whether the respondent's notice of appeal dated 22nd April 2024 was served upon the applicant within the prescribed time. Rule 77 of the Court of Appeal Rules of 2022 in this regard provides that a person who desires to appeal to this Court shall give notice in writing, which notice shall be lodged in two copies with the registrar of the superior court within fourteen days after the date of the decision against which from the appeal is lodged. Rule 79 further provides that an intended appellant shall, before or within seven days after such lodging of the notice of appeal, serve copies of the notice on all persons directly affected by the appeal.
 9. This Court in this respect held as follows in *Hanos (K) Ltd vs Shah* [2023] KECA 935 (KLR) with respect to the requirement in Rule 79 of the Court of Appeal Rules of 2022:



- “19. What this rule provides is that a Notice of Appeal may be served before it is lodged or, where it has been lodged, within seven days of its being lodged. To our mind, there is a very good reason for this provision. There may be occasions when due to reasons which an intending appellant cannot be faulted for, the Notice of Appeal is, for one reason or the other, not endorsed by the Deputy Registrar in good time to enable the intending appellant retrieve it and serve it with the prescribed timelines. If it were the rule that only the endorsed Notice of Appeal must be served, then such a party would be penalised notwithstanding the fact that he has taken all necessary steps towards the commencement of the appeal process. In that event this Court would be doing justice to such a party and yet a court of justice has no jurisdiction to do injustice. See *M Mwenesi vs. Shirley Luckhurst & another Civil Application No Nai. 170 of 2000* and *Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No Nai. 364 of 1999*.
20. It therefore follows that a Notice of Appeal that has been filed but not “lodged” may validly be served. Our view is supported by the decision in *Gulamhussein Noormohamed Cassam & another v Shashikant Ramji Sachania & another 1 KAR 24* in which the Court interrogated the then rule 74(1) and (2) of the Court of Appeal Rules which are in pari materia with the rules under consideration before us and concluded that: “Notice of Appeal may be served on the party directly affected by the appeal without it being signed by the Registrar, and without it also receiving any official recognition or sanction by the court either before or within seven days after lodging it in duplicate with the Registrar of the Superior Court who is required under rule 74 of the Court of Appeal Rules forthwith to send one copy thereof to the appropriate registry.”
21. Similarly, in *Shital Bimal Shah & 2 Others Vs. Akiba Bank Limited [2006] 2 EA 323*, Waki, JA, expressed himself as hereunder: “Rule 76 of the Court of Appeal Rules clearly shows that notice of appeal may be served on the party directly affected by the appeal without it being signed by the Registrar, either before or within seven days after lodging it. There is no prohibition in the Rules against serving notice of appeal even before it is lodged in the Superior Court.”
10. In the present application, the respondent availed a copy of the Notice of appeal dated 22nd April 2024 with an electronic acknowledgement showing that it was filed on 22nd April 2024 and the sum of Kshs 450/= paid. The respondent also exhibited a copy of the receipt evidencing payment of Kshs 450/= for the notice of appeal. The notice of appeal having been validly filed on 22nd April 2024 could still be validly served irrespective of the signing or endorsement by the Deputy Registrar on its lodging (the lodging of the Notice of Appeal). However, once lodged with the Deputy Registrar, it was required to be served within seven days under Rule 79 of the Court of Appeal Rules of 2022.
11. After filing the notice of appeal on 22nd April 2024 within time, the respondent first served the unsigned notice of appeal on the applicant by email on 16th July 2024 before it had been lodged with the Deputy Registrar, and later on 26th July 2024 upon its endorsement or lodging with the Deputy Registrar on the same day, which was within the seven days period required by Rule 79 of the Court of Appeal Rules of 2022. We cannot in the circumstances penalise the respondent for acts which were beyond his control, to the extent that he validly filed a Notice of Appeal on 22nd April 2024 on time, and the delay in lodging or endorsement of the Notice of Appeal was by the Deputy Registrar. In addition, while the respondent could have served the unsigned Notice of Appeal without the Deputy Registrar’s endorsement any time after its filing, the time limit of service within seven days in Rule 79 only started to run after the Notice of Appeal had been endorsed by the Deputy Registrar. We can only add that



this is certainly an area of the Court of Appeal Rules that may require some amendment to ensure clarity and consistency as regards the filing and lodging of a notice of appeal.

12. We therefore find that the Notice of Motion application dated 22nd July 2024 is not merited for the above stated reasons, and it is hereby dismissed with no order as to costs given the circumstances giving rise to the application.
13. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF NOVEMBER, 2025

P. NYAMWEYA

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JUDGE OF APPEAL

Dr. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

