

**IN THE COURT OF**  
**APPEAL AT MOMBASA**  
**(CORAM: MUSINGA (P), MURGOR & JAMILA MOHAMMED,**  
**JJ.A.) CIVIL APPLICATION NO. E125 OF 2024**

**BETWEEN**

**HUSSEIN SULEIMAN MASILA.....1<sup>ST</sup>**  
**APPLICANT LILIAN KAVUTI MUSYOKA.....**  
**2<sup>ND</sup> APPLICANT IBRAHIM LUGUSA ALUDA .....**  
**.....3<sup>RD</sup> APPLICANT**

**AND**

**KROTONITE ENTERPRISES**  
**LIMITED.....RESPONDENT/APPELLANT**

**(Being an application for striking out the Notice of Appeal dated 19<sup>th</sup> September, 2024 from judgment of the Environment and Land Court of Kenya at Mombasa (L. L. Naikuni, J.) dated 18<sup>th</sup> September 2024**

**in**

**ELC Misc. Application No. 31 of 2018 (O.S))**

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**\*\*\* RULING OF THE COURT**

**Background**

- Hussein Suleiman Masila, Lilian Kavuti Musyoka and Ibrahim Lugusa Aluda** (the applicants) moved this Court by way of an application dated 11<sup>th</sup> November 2024, seeking to strike out the notice of appeal lodged by **Krotonite Enterprises Limited** (the

respondent) on 25<sup>th</sup> September 2024 against the judgment delivered on 18<sup>th</sup> September 2024. The

application is premised on the ground that the respondent failed to serve the notice of appeal within the statutory period of seven (7) days, contrary to **rule 79(1)** of the **Court of Appeal Rules, 2022** (this Court's Rules).

2. The applicants aver that they only became aware of the said notice when they were served, by email, with the respondent's application for stay of execution dated 1<sup>st</sup> October 2024 on 5<sup>th</sup> November 2024, which annexed the notice of appeal. This was a delay of forty-one (41) days from the date of lodgment. It is contended that such delay is inordinate, inexcusable, and prejudicial to the applicants, hence prompting the instant application.
3. The application is supported by the affidavit of the 1<sup>st</sup> applicant, duly sworn and filed contemporaneously, which reiterates and expounds upon the above-stated grounds.
4. The following issues arise for determination:
  - a) Whether the notice of appeal dated 19th September 2024 was served within the time prescribed under the Court of Appeal Rules; and
  - b) If not, whether the notice of appeal ought to be struck out pursuant to rule 86 of the Rules.
5. **Rule 77(1)** of the **Court of Appeal Rules** provides that:

**“An intended appellant shall, before or within seven**

**days after lodging the notice of appeal under this  
Rule, serve**

**copies thereof on all persons directly affected by the appeal.”**

6. Further, **Rule 86** stipulates 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 of appeal 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 or the record of appeal, as the case may be.”**

### **Submissions by counsel**

7. At the hearing of the application, learned counsel for the applicants, **Mr.**

**Siminyu**, submitted that despite being served with the Court’s directions, the respondent failed to file any written response or submissions. Counsel asserted that the respondent’s conduct demonstrates a blatant disregard for the Rules and electronic case management directives.

8. It was further submitted that the delay in serving the notice of appeal

gravely prejudiced the applicants and undermined the objective of rule 77(1), which is to promptly notify the opposing party of an intention to

appeal. Counsel relied on the decision of **Daniel Nkirimpa Monirei v**

**Savialel Ole Koilel & 4 Others [2016] eKLR**, where the Court underscored that failure to serve a notice of appeal within the prescribed period fosters ambush litigation and contravenes principles of fairness and justice. The applicants therefore prayed that the application be allowed as prayed.

9. In response, learned counsel for the respondent, **Mr. Omollo**, submitted that a replying affidavit had been duly filed. Counsel contended that the notice of appeal was served on 25<sup>th</sup> September 2024, within time, but was inadvertently transmitted to an erroneous email address. It was urged that the application be dismissed.

### **Determination**

10. We have carefully considered the application, the rival submissions, the authorities cited, and the applicable law.

11. The record indicates that the notice of appeal was lodged by the respondent on 25<sup>th</sup> September 2024, yet was not served upon the applicants within the statutory period of seven (7) days prescribed under rule 77(1). The applicants only became aware of its existence upon being served with the respondent's application for stay of execution on 5<sup>th</sup> November 2024, over forty (40) days after lodgment.

12. The respondent has not furnished a satisfactory or plausible explanation for the delay. In the absence of such justification, the omission constitutes a fundamental procedural lapse. Although the respondent's advocate conceded that an incorrect email address was used to effect service of the notice of appeal, no effort was made to regularize that. The respondent's advocate could have sought leave to effect service out of time on the reason that he had inadvertently used an incorrect email address to serve the initial notice of appeal.

**13.** This Court, in **Daniel Nkirimpa Monirei v Savialel Ole Koilel & 4**

**Others** (supra), held that:

***“Whichever way one looks at it, there was no service of the notice of appeal on the applicant. The purpose of service is to alert the party being served that the matter has been escalated to the appellate level. Failure to serve a party within the prescribed time fosters ambush litigation and causes prejudice. This is why Rule 77(1) is couched in mandatory terms.”***

We find this dictum directly applicable to the present circumstances.

14. The application to strike out the notice, having been filed on 11<sup>th</sup> November 2024, falls within the thirty (30) days permitted under rule 86, reckoned from the date the applicants were served with the respondent's application annexing the notice of appeal. The application is thus properly before this Court.

15. In view of the foregoing, we find that the notice of appeal dated 19<sup>th</sup> September 2024 was not served in compliance with rule 77(1). No plausible justification having been tendered; the omission is fatal.

16. Accordingly, we find merit in the application. The notice of appeal dated 19<sup>th</sup> September 2024 is hereby struck out. The costs of this application shall be borne by the respondent.

17. It is so ordered.

**Dated and delivered at Mombasa this 13<sup>th</sup> day of March, 2025.**

**D. MUSINGA (PRESIDENT)**

.....  
**JUDGE OF APPEAL**

**A. MURGOR**

.....  
**JUDGE OF APPEAL**

**JAMILA**

**MOHAMMED**

.....  
**JUDGE OF APPEAL**

I certify that this is  
a true copy of the original

Signed

**DEPUTY REGISTRAR**