



Sanlam Kenya PLC v South Nyanza Sugar Company Limited & 2 others (Civil Application E161 of 2023) [2025] KECA 1160 (KLR) (20 June 2025) (Ruling)

Neutral citation: [2025] KECA 1160 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E161 OF 2023
MSA MAKHANDIA, F TUIYOTT & LK KIMARU, JJA
JUNE 20, 2025**

BETWEEN

SANLAM KENYA PLC APPLICANT

AND

SOUTH NYANZA SUGAR COMPANY LIMITED 1ST RESPONDENT

APA INSURANCE COMPANY LIMITED 2ND RESPONDENT

FT INSURANCE BROKERS LIMITED 3RD RESPONDENT

(Being an application seeking to strike out the notice of appeal dated 14th November 2023 lodged in respect of the judgment delivered by the High Court of Kenya at Kisii (Ougo, J.) dated 3rd November 2023 in Civil Case No. 87 of 2007)

RULING

1. Before us is a notice of motion dated 19th December 2023 in which Sanlam Kenya PLC (the applicant) seeks, as a substantive prayer, to have the notice of appeal dated 14th December 2023 filed by Sony Nyanza Sugar Company Limited (the 1st respondent) struck out.
2. The background to this motion is substantially common ground. The 1st respondent's suit against the applicant being Kisii HCCC No. 87 of 2007, was dismissed by Ougo, J in a judgment and decree delivered on 3rd November 2023. Aggrieved by that decision the 1st respondent lodged a notice of appeal dated 14th November 2023 before the superior court below on 15th November 2023 evincing an intention to challenge that judgment and decree. It was however not until 14th December 2023 at 8.49 a.m. that the said notice of appeal was served upon the applicant's counsel.
3. Rule 79(1) of the *Court of Appeal Rules*, 2022 requires that an intended appellant shall, before or within seven (7) days after lodging a notice of appeal, serve copies thereof on all persons directly affected by



the appeal. It cannot be contested that the notice of appeal was served outside the seven days prescribed by law which ended on 22nd November 2023.

4. In a response vide a replying affidavit sworn by Maurice Omondi Ng'ayo sworn on 12th November 2024, he explains that the lateness was caused by the delay in the Deputy Registrar of the High court sealing the notice of appeal, eventually done on 5th December 2023. Mr. Ng'ayo, who is the legal services manager and acting company secretary of the 1st respondent, also deposes that although the motion before court was filed on 19th December 2023, the 1st respondent was not served until 8th November 2024, 10 months and 19 days later. He asserts that to err is human, just like the notice of appeal was served late, so was the applicant's motion.
5. At plenary hearing learned counsel Mr. Aloo appeared for the applicant, while learned counsel Mr. Odero represented the respondents. Both highlighted their written submissions. On his part Mr. Maganga appearing for the 3rd respondent made brief oral arguments supporting the application.
6. We have looked at the notice of appeal and there is no doubt that while it was lodged in the registry on 15th November 2023, it was signed and sealed by the Registrar of the superior court below on 5th December 2023. Whether this should postpone the operative date from which service of the notice should be served to the date when the notice was sealed and signed is answered, in our view, by the decision of this Court in *Kenya Bus Services Ltd (Stage Coach Bus Service) v Muna Isaack* [2004] KECA 97 (KLR) Civil Appeal (Application) No. 223 of 2001 cited to us by counsel for the applicant. This Court held:

“Under rule 74 of the Rules, any person who desires to appeal to this Court shall give notice in writing which shall be lodged in duplicate with the registrar of the superior court. The date envisaged by the rule is the date upon which the Notice of Appeal is filed and the requisite fees paid for it. The date upon which the registrar endorses his signature and affixes the Seal of the Court is not material for the service of the Notice of Appeal.

The appellant had no reason whatsoever to file the Notice of Appeal on 22nd June, 2001, and wait for about 12 days before serving it upon the respondent. There is no requirement under the Rules that the Notice of Appeal should not be served upon persons affected by the appeal until the registrar appends his signature and the Seal on it.”

7. While the court was discussing the provisions under the now revoked *Court of Appeal Rules*, the position remains unchanged under the current rules, being *Court of Appeal Rules*, 2022.
8. The 1st respondent's attempt to seek refuge in the decision of the Court in *Daniel Nkirimpa Monirei v Sayialet Ole Koilel & 4 others* [2016] KECA 148 (KLR), is unhelpful because that decision was in regard to a certificate of delay which had not been duly 'sealed and signed'. A certificate of delay is a critical document because it gives authoritative certification regarding the period to be excluded taken up in preparation and delivery to the appellant of a copy of proceedings in the computation of time for institution of an appeal. For the certification to be authoritative, it has to be sealed and signed by the Registrar of the superior court below. This must be contrasted with a notice of appeal, which as explained in *Kenya Bus Services Ltd (supra)*, is envisaged as duly filed upon filing and payment of the requisite court fees. For purposes of service of the notice of appeal, the date when the Registrar signs and affixes the seal of the Court on the notice is immaterial.
9. Next, it is submitted, for the 1st respondent, that the lateness in service was just a few days, and it ought to be excused as it would be antithetical the overriding objective of the *Appellate Jurisdiction Act* and Article 159(2)(d) of the *Constitution*. Counsel cited the decision in this Court in *Nicholas Kiptoo Arap*



Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] and *Abdirahman Abdi v Safi Petroleum Products Ltd & 6 others* [2011] KECA 183 (KLR) in support of the proposition.

10. On our part, we think that the circumstances in *Nicholas Kiptoo arap Korir* are distinguishable. Writing for the majority, Ouko, JA (as he then was) reasoned: -

“In considering an application for striking out an election petition or an appeal arising from an election petition, the court concerned must bear in mind the fact that an election petition is not a matter in which the only persons interested are the candidates who competed against each other in the elections. The public are substantially interested in its outcome and that is an essential part of the democratic process. For instance, in this matter 115,931 citizens who voted for the 2nd respondent and 98,036 who voted the appellant are entitled to a fair judicial process in the determination of the election dispute all the way to this Court.”

11. The appeal that was spared the axe was from an election petition and the majority took the view that other than the respondent, the voting public who took part in the contested election would be entitled to a determination of the election dispute on merit.

12. The matter here, not being of a special genre like an election petition, then the approach taken by Kiage, JA (who was in the minority) is more apt. We quote the learned judge in extenso:

“In the architecture of our Rules, the notice of appeal occupies a central foundation place without which there can be no appeal. It is a jurisdictional document. In lodging the notice of appeal at the High Court, the appellant was without doubt acting in obedience to Rule 77, not merely playing it safe as was suggested to us by counsel. At any rate; that same caution that led the appellant to lodge the notice of appeal should logically have extended to service of the same on the respondents to this appeal, the applicants herein, by dint of Rule 77(1). Service is of course at the very core of the adversarial enterprise and is an emanation of the natural justice dictate that no party should be condemned unheard. Nor should he be ambushed by a record of appeal the notice whereof he had not been served with. An appellant who fails, omits or refuses to effect service of a notice of appeal can no more get away with it than would one who fails to serve a record of appeal. Both stand in such grave defaults that, absent proper and satisfactory explanation, their appeals shall be struck out on application under Rule 84.”

13. Given our understanding of the law, we would ordinarily find that the motion before us to be unanswerable. However, we cannot ignore an issue so forcefully raised by the 1st respondent. The motion, although filed on 19th December 2023, was not served upon the 1st respondent until 8th November 2024, 10 months and 19 days later. This long delay is neither controverted nor explained.

14. By dint of the proviso to Rule 86 an application to strike out a notice of appeal or appeal ought to be brought after the expiry of 30 days after the date of service of the notice of appeal or record of appeal, as the case may be. The objective of the rule is that a party who intends to bring an intended appeal or appeal to an end by a striking out motion ought to do so immediately on learning of the infirmity of the notice of appeal, or record, the days capped at 30 days. Any time after that period, the party will have been taken to have waived the right and should not be permitted to surprise the appellant with the matter at later stages of proceedings.

15. In this matter, the applicant filed the motion on time but was inordinately late in serving it upon the affected respondent. Can it be said that the applicant acted in conformity with the spirit of the proviso to Rule 86? We think not. As the applicant failed to promptly bring the appellant’s attention to the



application, then appellant can be excused for assuming that the issue of lateness of the service of the notice of appeal would never come to haunt it. Service of an application for striking out so late in the day is just as bad as filing it out of time. Indeed, the requirement of Rule 51(1) that a notice of motion and copies of all affidavits shall be served on all necessary parties within three days after the filing of the application unless otherwise directed is not idle.

16. The rationale for requiring prompt service of a notice of appeal are similar. This was explained by this Court in *Daniel Nkirimpa Monirei v Sayialet Ole Koilel & 4 others* [2016] KECA 148 (KLR) as follows:

“The purpose of service of a Notice of Appeal is to alert the parties being served that the case in question has not been concluded yet as the same has been escalated to another level. This enables the party to prepare and get ready for another fight, be it by way of gathering resources or just getting mentally prepared for defending the intended appeal. Failure to serve a party with a Notice of Appeal within the time prescribed by law gives a party false belief that the matter has been concluded, only to be ambushed later with the record of appeal in which the said notice is tucked away somewhere in the record. That occasions prejudice to the ambushed party, and it is in our view a habit that should not be countenanced in any fair and just process. That would explain why Rule 77(1) of the Court of Appeal Rules is couched in mandatory terms.”

17. What is good for the goose must be good for the gander. We agree with counsel for 1st respondent that this is a case of the pot calling the kettle black.
18. The upshot is that the notice of motion date 19th December, 2023 is hereby dismissed but with no order as to costs.

DATED AND DELIVERED IN KISUMU THIS 20TH DAY OF JUNE, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

