



**Mbarak v Registrar of Titles & 3 others; Omido & another (Interested Parties) (Civil Application E013 of 2020) [2024] KECA 687 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KECA 687 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPLICATION E013 OF 2020  
SG KAIRU, JW LESSIT & GV ODUNGA, JJA  
JANUARY 25, 2024**

**BETWEEN**

**HAMID ABDALLA MBARAK ..... APPLICANT**

**AND**

**THE REGISTRAR OF TITLES ..... 1<sup>ST</sup> RESPONDENT**

**RENE SCHILLER ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KILIFI ..... 3<sup>RD</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**WILL WM OMIDO ..... INTERESTED PARTY**

**JANET A OMIDO ..... INTERESTED PARTY**

*(An application to strike out the notice of appeal dated 23rd June, 2020 and filed on 24th June 2020 against the judgment of the Environment and Land Court at Malindi (Olola, J.) delivered on 17th June 2020 in ELC Petition No. 20 of 2017)*

**RULING**

1. Following a petition by the applicant Hamid Abdalla Mbarak, the Environment and Land Court at Malindi (J. O. Olola, J.) (ELC) delivered judgment on 17th June 2020 in which it declared that the property known as Kilifi Township Block IV/177 was designated public utility property and it was not therefore open to the Registrar of Titles to convert the same into private property without adhering to the law.
2. The interested parties, Will W. M. Omido and Janet A. Omido, were not satisfied with that judgment and lodged a notice of appeal dated 23rd June 2020. They did not however serve that notice of appeal



on the applicant until 6<sup>th</sup> October 2020 as conceded by their advocate Victor Olewe in his replying affidavit sworn on 28<sup>th</sup> September 2022.

3. Based on the late service of the said notice of appeal, the applicant filed the present application dated 13<sup>th</sup> October 2020 which was filed on 10<sup>th</sup> November 2020 seeking an order that the notice of appeal dated 23<sup>rd</sup> June 2020 and filed on 24<sup>th</sup> June 2020 be struck out. The application is presented under Rules 3, 42, 77(1) of 84 of the *Court of Appeal Rules*, 2020.
4. The application was initially fixed for hearing on 4<sup>th</sup> October 2022 but was dismissed on account of nonappearance of the parties. It was however reinstated by an order of the Court given on 20<sup>th</sup> February 2023 and was eventually heard 27<sup>th</sup> June 2023 when Ms. Azei, learned counsel held brief for Mr. Furaha for the applicant; and Mr.M. Munga, learned counsel held brief for Miss. Lutta for the 1<sup>st</sup> respondent. There was no appearance for the firm of Mbugua Mureithi & Co Advocates for the interested parties. That firm had however filed a replying affidavit sworn by Victor Olewe in opposition to the application to which we have already referred. Nor was there appearance for the National Land Commission, the 4<sup>th</sup> respondent despite service of notice of hearing. The 4<sup>th</sup> respondent had however, through its advocate John Andrew Kiilu, filed submissions in support of the application dated 30<sup>th</sup> September 2022. The Court was informed that Rene Schiller and the County Government of Kilifi, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively had not participated in the proceedings.
5. It is urged for the applicant that under Rule 77(1) of the *Court of Appeal Rules* (present Rule 79(1) of the 2022 Rules), it was incumbent upon the interested parties to serve the notice of appeal on the applicant within seven days of filing; that having failed to do so within the mandatory timelines stipulated by the law, the notice of appeal and the intended appeal are incompetent and should be struck out.
6. As already stated, the advocates for the interested parties in the replying affidavit sworn by Victor Olewe concede late service of the notice of appeal but assert that the present application was filed on 10<sup>th</sup> November 2020 but was only served on 30<sup>th</sup> August 2022; that it is odd for the applicant to raise the issue of late service while he is himself late in serving the present application; that the applicant is seeking to have the appeal dismissed on a technicality against the dictates of Article 159(2)(d) of the *Constitution*, which provides that justice shall be administered without undue regard to procedural technicalities.
7. It was deponed further by Victor Olewe that the interested parties are resident in Nairobi and that “commuting to and from Malindi and thereafter effecting service upon all the parties was an expensive affair” and therefore the advocates “took advantage to serve the notice of appeal when counsel was next in Mombasa for a matter that was on the 6<sup>th</sup> of October 2020” and that the present application has not been served on the 2<sup>nd</sup> respondent despite being the registered owner of the property.
8. For the 4<sup>th</sup> respondent it was submitted, on the strength of the decision in *Daniel Nkirimpa Monirei vs. Sayiaale Ole Koilel & 4 others* [2016] eKLR that the requirement of service within the time stipulated under Rule 77(1) (now Rule 79(1)) is mandatory and compliance is not optional and that the 4<sup>th</sup> respondent has never been served with the notice and neither have the interested parties applied for extension of time; and that the “blatant flouting of the rules...with not attempt to offer any explanation for the delay...should not be tolerated by this Honourable court.”



9. We have considered the application, the affidavits, and the submissions. Rule 77(1) of the Court of Appeal Rules, 2010 (now rule 79(1) of the 2022 Rules) Rule provides that:

77(1) “An intended appellant shall, before or within seven days after lodging the notice of appeal, serve copies thereof on all persons directly affected by the appeal.”

10. As this Court stated in Daniel Nkirimpa Monirei vs. Sayialel Ole Koilel & 4 others (above) that Rule is couched in mandatory terms and compliance with the same is not optional. The Court went on to explain in that case that:

“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.”

11. It is therefore somewhat confounding for counsel for the interested party to have taken the rather casual approach that service would be effected, ‘when next in Mombasa’ without any regard whatsoever to requirements of the rules regarding service. In Nicholas Kiptoo Arap Salat vs. Independent Electoral and Boundaries Commission and 6 others [2013] eKLR, Kiage, JA, in stressing the imperative of complying with the rules stated that:

“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.”

12. As learned Judge explained in that case, rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain, and even-handed. Article 159 of the Constitution on which the interested parties lean in urging the Court to decline the present application was not intended to eliminate rules of procedure.

13. Based on the foregoing, the application dated 13<sup>th</sup> October 2020 is merited and is accordingly allowed in terms of prayer 1 thereof with the result that the notice of appeal dated 23<sup>rd</sup> June 2020 filed by the interested parties is hereby struck out with costs to the applicant.

14. Orders accordingly.



**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY 2024.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

**G.V. ODUNGA**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

