



**Fourteen Falls Limited v Wanjiku & another (Civil Application E057 of 2023) [2024] KECA 194 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KECA 194 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E057 OF 2023  
P NYAMWEYA, KI LAIBUTA & GV ODUNGA, JJA  
FEBRUARY 23, 2024**

**BETWEEN**

**FOURTEEN FALLS LIMITED ..... APPLICANT**

**AND**

**BETH WANJIKU ..... 1<sup>ST</sup> RESPONDENT**

**REGISTRAR OF TITLES ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application to strike out the Notice of Appeal against the Ruling and Orders of the Environment and Land Court at Mombasa (Nelly A. Matheka, J.) dated 10th May 2023 in E.L.C. No. 24 of 2014)*

**RULING**

1. The 1<sup>st</sup> respondent (Beth Wanjiku) filed suit against the applicant (Fourteen Falls Limited) and the 2<sup>nd</sup> respondent (the Registrar of Titles) in the ELC. An *ex-parte* judgment in default was entered against the applicant on 3<sup>rd</sup> December 2019, which prompted the applicant to file an application dated 21<sup>st</sup> December 2022 seeking to have the *ex-parte* judgement set aside, and for leave to file its defence and defend the suit in terms of its draft defence annexed to its application.
2. The applicant's case was that summons to enter appearance were never served upon it, and that the 1<sup>st</sup> respondent proceeded to obtain an irregular order for substituted service. In its ruling dated 10<sup>th</sup> May 2023, the ELC allowed the applicant's application, set aside the impugned *ex-parte* judgment, and directed the applicant to serve its defence within 14 days.
3. Dissatisfied with the ruling of Nelly A. Matheka, J. dated 10<sup>th</sup> May 2023, the 1<sup>st</sup> respondent moved to this Court on appeal *vide* its notice of appeal dated 17<sup>th</sup> May 2023. The notice was lodged in the ELC on 24<sup>th</sup> May 2023 and allegedly served on the applicant on 5<sup>th</sup> June 2023.



4. By its Notice of Motion dated 4<sup>th</sup> July 2023 made under rules 77(1) and 84 of the *Court of Appeal Rules*, 2010 (rules 79(1) and 86 of the 2022 *Rules*), the applicant prays that the 1<sup>st</sup> respondent's notice of appeal be struck out on 10 grounds set out on the face of its Motion. The Motion is supported by the annexed affidavit of Robert Karuga Kaguthi (the applicant's Chief Executive Officer) sworn on even date, essentially deposing to the factual background and the grounds on which the application was made, namely: that the impugned ruling was delivered on 10<sup>th</sup> May 2023 setting aside the default judgment entered on 3<sup>rd</sup> September 2019; that the 1<sup>st</sup> respondent's notice of appeal dated 17<sup>th</sup> May 2023 was lodged on 18<sup>th</sup> May 2023 and belatedly served on the applicant on 5<sup>th</sup> June 2023, 10 days later than the due date for service; that the belated service was in breach of rule 77(1) of the *Rules* of this Court (now rule 79(1) of the 2022 *Rules*); that, since lodging and serving the notice of appeal, the 1<sup>st</sup> respondent has not taken any steps to "... regularise her documents;" that service of the notice of appeal outside the time limited for service contravenes the mandatory procedural requirements that go to the root of the intended appeal; that the delayed service was inordinate and unreasonable, and a mockery of the clear and mandatory procedural requirements; that the 1<sup>st</sup> respondent's delay does not demonstrate seriousness on her part to prosecute the intended appeal; and that the same amounts to abuse of the court process. The applicant contends that it has brought this application within 30 days of service upon it of the Notice of Appeal.
5. In their written submissions and list of authorities dated 20<sup>th</sup> November 2023, learned counsel for the applicant, M/s. Waweru Kihara & Company LLP, relied on the case of *Daniel Nkirimpa Monirei vs. Sayialet Ole Koilel & 4 Others* [2016] eKLR, submitting that rule 77(1) (now rule 79(1) of this Court's *Rules*) is couched in mandatory terms; that failure by an intended appellant to strictly comply therewith renders the intended appeal defective and, thus, the notice of appeal should suffer but only one fate: to be struck out; and that it is imperative that service of the notice of appeal must be within 7 days of filing.
6. The applicant's Motion is opposed vide the replying affidavit of learned counsel for the 1<sup>st</sup> respondent, Evans Fiki Kazungu, sworn on 22<sup>nd</sup> November 2023. Counsel depones that the 1<sup>st</sup> respondent filed her notice of appeal dated 17<sup>th</sup> May 2023 on 18<sup>th</sup> May 2023; that the notice was served on the "interested party" (the Registrar of Titles, who is the 2<sup>nd</sup> respondent herein) on 31<sup>st</sup> May 2023; that the applicant was served on 5<sup>th</sup> June 2023; that the notice was served 12 days after being lodged; that the delayed service outside the prescribed period was due to "the unfortunate oversight" on their part in the mistaken belief that the applicant had been served via email; that, even though counsel for the 1<sup>st</sup> respondent failed to adhere to the strict timelines for service of the notice, the applicant has equally failed to abide by the strict provisions of rule 86 of this Court's *Rules*, to wit, that the Motion was brought 32 days after service of the impugned notice without leave of the Court.
7. Notably, the 2<sup>nd</sup> respondent did not reply to the applicant's Motion or make any submissions in the proceedings before us.
8. The principal issue in the instant application is the effect of the alleged failure by the 1<sup>st</sup> respondent to comply with rule 79 of the *Court of Appeal Rules*, which provides:  
79.
  - (1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal:
9. We take to mind the fact that the 1<sup>st</sup> respondent's notice of appeal was admittedly served out of time in contravention of rule 79(1) of the *Rules* of this Court, and without leave. Consequently, it is



incompetent and doomed to suffer one and only fate: to be struck out on application under rule 86(a) or (b) or, otherwise, deemed to have been withdrawn as contemplated in rule 85(1) of this Court's Rules.

10. That said, we do not share the view held by counsel for the 1<sup>st</sup> respondent to the effect that her non-compliance with the strict timelines prescribed for service of the notice of appeal is excusable merely on the ground that the applicant's Motion was belatedly filed outside the 30 days' period allowed under the proviso to rule 86. To say the least, it is a gross misperception to entertain the view that mutual non-compliance by the parties with the mandatory provisions of this Court's Rules, or counsels' heartfelt apologies, would of themselves cure the admitted procedural infractions for which the applicant and the 1<sup>st</sup> respondent must bear the inescapable consequences.
11. This Court's unfettered discretion to strike out a Notice of Appeal in proper cases, or to deem it as having been withdrawn pursuant to rule 85(1) in such circumstances as demonstrate unexplained delay in taking such steps as are necessary to lodge an appeal, is predicated on the constitutional duty to ensure expedition in the administration of appellate justice. In Mae Properties Limited vs. Joseph Kibe & Another [2017] eKLR, this Court applied the deeming provision under Rule 85 to strike out the notice of appeal notwithstanding the fact that the Motion to strike out the notice was also incompetent having been filed outside the 30-day limit allowed under the Rules.
12. In its decision, the Court in Mae Properties Limited (ibid) observed that –  

“... this is a practical rule that is intended to rid our registry of merely speculative notices of appeal filed either in knee-jerk reaction to the decision of the court below, or filed in holding mode while the party considers whether or not to lodge a substantive appeal. Indeed, it is not uncommon and we take judicial notice of it, for such notices to be lodged *ex abundanti cautella* by counsel upon the pronouncement of decisions but to await instructions on whether or not to proceed full throttle with the appeal proper - with the attendant risks, prospects and consequences.”
13. Having considered the applicant's Motion, the affidavit in support thereof and in reply, the rival submissions of the parties, the cited authorities and the law, we find that the 1<sup>st</sup> respondent's notice of appeal dated 17<sup>th</sup> May 2023 is incompetent and hereby order and direct that the same be deemed as having been withdrawn pursuant to rule 85 of this Court's Rules. Each party shall bear their costs of the Motion.
14. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2024.**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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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**

