



REPUBLIC OF KENYA



**Barnge'tuny & 2 others v Ngetich (Civil Appeal (Application)  
E079 of 2023) [2024] KECA 597 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 597 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPEAL (APPLICATION) E079 OF 2023  
FA OCHIENG, LA ACHODE & WK KORIR, JJA  
MAY 24, 2024**

**BETWEEN**

**MARY BARNGE'TUNY ..... 1<sup>ST</sup> APPLICANT**

**PETER TALAM ..... 2<sup>ND</sup> APPLICANT**

**JOSEPH TALAM ..... 3<sup>RD</sup> APPLICANT**

**AND**

**STANLEY KIPRUTO NGETICH ..... RESPONDENT**

*(An application to strike out the Notice of Appeal arising from the  
Judgment of the Environment & Land Court Kenya at Kapsabet (M. N.  
Mwanyale, J.) dated 25th September 2023 in ELC Cause No. E023 of 2021)*

**RULING**

1. Before us is a Notice of Motion dated 8<sup>th</sup> December 2023. The applicants pray for orders that:
  - a) This application is certified urgent, its service dispensed with, and the same be heard on a priority basis at the first instance.
  - b. The Notice of Appeal dated 2<sup>nd</sup> October 2023 and lodged before the trial court on 3<sup>rd</sup> October 2023 be struck out for want of service.
  - c. The memorandum of Appeal dated 11<sup>th</sup> October 2023, and the attendant record of appeal be struck out for want of service.
  - d. The instant appeal is hereby struck out in limine.
  - b. Costs of the appeal are granted to the applicants.”



2. The application is premised on 22 grounds which we paraphrase as hereunder:
  - a. The impugned judgment was delivered on 25<sup>th</sup> September 2023, and a Decree was issued on 15<sup>th</sup> November 2023.
  - b. The respondent, being dissatisfied with the said judgment, lodged a notice of appeal on 2<sup>nd</sup> October 2023.
  - c. The notice of appeal was not served upon the applicants within seven (7) days as provided for under Rule 79(1) of this Court's Rules.
  - d. The said notice of appeal has not been formally served upon the applicants, two (2) months after being filed.
  - e. The applicants became aware of the notice of appeal on 14<sup>th</sup> November 2023 during the hearing of an application for a stay pending appeal.
  - f. The applicants also learned that a record of appeal had been lodged on 18<sup>th</sup> October 2023. The said record was not served upon the applicants within seven (7) days as provided for under Rule 92 of this Court's Rules.
  - g. The respondent seeks a stay of execution based on an unserved notice of appeal, with a view to frustrate the process of subdivision of the suit land, and the issuance of title deeds to the parties herein.
  - h. The 1<sup>st</sup> applicant is 79 years old, and any further delay in execution of the Judgment and Decree will be detrimental to her.
  - i. The applicants will suffer irreparably if the application is not heard urgently and the orders sought are granted.
  - j. The application has been filed without delay.
  - k. The Rules of this Court were not enacted in vain, they should be enforced to safeguard the integrity and the dignity of the proceedings.
  - l. The respondent has not made any efforts to seek the leave of this Court to effect service out of time.
3. The 3<sup>rd</sup> applicant in his supporting affidavit reiterated the grounds on the face of the application.
4. In his replying affidavit, the respondent deponed to 24 issues which we paraphrase as follows:
  - a. The notice of appeal was lodged on 2<sup>nd</sup> October 2023 but the Deputy Registrar endorsed it on 30<sup>th</sup> October 2023.
  - b. A memorandum of Appeal was lodged before this Court on 18<sup>th</sup> October 2023.
  - c. The applicants' claim that they were not served with the notice of appeal within seven (7) days from the date of filing the notice of appeal is misconceived and meant to divert the court's overriding objectives, to venture into procedural technicalities to the respondent's detriment.
  - d. This Court has unfettered discretion to grant leave and enlarge time for service of the notice of appeal and the record of appeal.



- e. Nothing can limit or otherwise affect the inherent power of this Court to issue the orders sought for the ends of justice to be met given that leave to serve proper pleadings can be extended by the court on its own motion.
  - f. The applicants have not demonstrated the prejudice they are likely to suffer in the event the appeal is heard on merit, and without unreasonable delay.
  - g. The respondent has since filed an application dated 8<sup>th</sup> December 2023 seeking enlargement of time to effect service on the applicants. The said application is pending directions from the court.
  - h. The respondent has not received certified copies of the proceedings despite applying for them on 25<sup>th</sup> September 2023.
  - i. There was no deliberate inaction by the respondent's counsel to serve the notice of appeal, the same was an oversight on the advocate's part and it should not be visited on the respondent.
5. When the application came up for hearing on 6<sup>th</sup> March 2024, Mr. Kenei, learned counsel appeared for the applicants, whereas Mr. Mabalalu learned counsel appeared for the respondent. Counsel relied on their respective written submissions.
  6. The applicants reiterated that they had not been served with either the notice of appeal or the record of appeal and that the respondent's claim that he had effected service within the stipulated timelines is frivolous and ought to be disregarded. Since the respondent had failed to adduce evidence of service, this Court should find that the applicants were not served within the prescribed timelines.
  7. The applicants pointed out that Rule 86 of this Court's *Rules* provides for the striking out of a notice of appeal and record of appeal where a party fails to comply with an essential step in the proceedings. In this instance, the applicants submitted that the failure by the respondent to serve them with the notice of appeal and the record of appeal was an essential step, and this Court is clothed with the power to strike out the notice of appeal on this ground.
  8. The applicants urged this Court not to lose sight of the fact that the relevant rules are couched in mandatory terms and departing from them should only be done in exceptional circumstances. However, such exceptional circumstances are not applicable in the instant appeal.
  9. The respondent submitted that since he has already filed a record of appeal in ELD CACA No E079 of 2023, this Court should administer justice based on fairness and in accordance with rules of natural justice and substance, as opposed to form.
  10. The respondent pointed out that despite filing the notice of appeal before the trial court promptly, it was not until 30<sup>th</sup> October 2023 that the said notice was signed by the Deputy Registrar. He laid blame on his counsel's oversight and the court in submitting that the notice could not have been practically served within seven (7) days. Therefore, the said mistake should not be visited upon him.
  11. While relying on the decisions in the cases of *Godfrey Kinuu Maingi & 4 others v Nthimbiri Farmers Co-op Society Limited & another* [2008] eKLR and *Kenya Bankers Co-operative & another v George Arunga Sino* [2010] eKLR, the respondent submitted that he had been honest and candid with this Court on the reason for the delay being an inadvertent mistake on the part of his counsel and the also the court.



12. The respondent pointed out that, in any event, the applicants were aware and in possession of the annexed copies of the Notice of appeal from 27<sup>th</sup> October 2023 when they were served with the respondent's application for stay of execution.
13. The respondent submitted that he is keen on prosecuting the appeal, and if this application is allowed, he will suffer prejudice, and lose the opportunity to have his appeal determined on merit.
14. While citing the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, the respondent pointed out that the law does not set out any minimum or maximum period of delay, provided that the delay should be satisfactorily explained.
15. The respondent urged this Court to exercise its discretion under Rule 4 and allow him to regularize the record and allow his appeal to be heard on merit.
16. The respondent invoked the provisions of Article 159(2)(d) of the *Constitution* and Sections 3A and 3B of the *Appellate Jurisdiction Act* to underscore the fact that the primary role of the court is to render substantive justice to the parties.
17. We have carefully considered the application and the affidavit in support thereof, the respondent's replying affidavit, the submissions by counsel, the authorities cited, and the law. The issue for determination is whether the notice of appeal ought to be struck out.
18. The applicants' main contention is that the notice of appeal was not served upon them within the stipulated timelines. It is common ground that the respondent did not serve the applicants with the notice of appeal dated 2<sup>nd</sup> October 2023. He attributed this delay to the oversight by his counsel, and the court for endorsing the notice on 30<sup>th</sup> October 2023.
19. Rule 79 of the *Court of Appeal Rules, 2022* provides that:
  - “(1) An intended appellant shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal:

Provided that the Court may, on application which may be made ex parte, within seven days after the lodging of the notice of appeal, direct that service need not be effected on any person who did not take part in the proceedings in the superior court.
  - (2) Where any person who is required to be served with a copy of a notice of appeal gave any address for service in or in connection with the proceedings in the superior court, and has not subsequently given any other address for service, the copy of the notice of appeal may be served on that person at that address, notwithstanding that it may be that of an advocate who has not been retained for the purpose of an appeal.”
20. The applicants submitted that the failure to be served with the notice of appeal on time amounted to an essential step in the proceedings not being taken. Rule 86 of the *Court of Appeal Rules* provides 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 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 record of appeal as the case may be.”

21. In the case of *Martin Kabaya v David Mungania Kiambi*, Nyeri Civil Application 12 of 2015, the court stated thus:

“The need for judicial proceedings to be concluded in a timely fashion is too plain for argument. It is a desideratum of a rational society. A justice that is too long in coming, encumbered by sloth or inattention on the part of those who seek it, is a pain and a bother. An expensive one at that. A justice that comes too late in the day is a tepid drop on parched lips that quenches no thirst. A justice delayed is a justice denied. Litigants, especially those summoned by plaints, petitions, applications or appeals are vexed when those who summoned them hence go to sleep yet the proceedings and processes they engendered remain alive but comatose, a burden to the mind and to the pocket. And they form part of the dead weight the Judiciary bears as backlog.”

22. It is evident from our perusal of the application that the respondent has not served the applicants with the notice of appeal to date. He has filed an application for enlargement of time to do so, which application is pending before this court. He urged us not to look at the technicalities and proceed to allow his appeal to be heard on merit given that the appeal has already been filed.

23. We find that the alleged appeal may not be properly before the court as the respondent on his own admission has informed this court that he is yet to receive certified copies of proceedings from the trial court and that the Deputy Registrar endorsed the notice of appeal on 30<sup>th</sup> October 2023 yet his record of appeal was lodged on 18<sup>th</sup> October 2023.

24. The applicants first saw a copy of the notice of appeal when it was annexed to the affidavit in support of the respondent’s application for stay of execution. In the case of *Daniel Nkirimpa Monirei v Sayialel Ole Koilel & 4 others* [2016] eKLR the court held that:

“...That notwithstanding however, learned counsel in his submission in Court insisted that there was service, saying that the said service was done on 13<sup>th</sup> July, 2015, along with the record of Appeal. We note however, that the said “service” was service of the Record of Appeal, in which there was a copy of the Notice of Appeal.

With due respect to learned counsel for the respondent, that cannot amount to proper service of the Notice of Appeal... In any event, even if, arguendo, such service was found to be acceptable, the same was done almost nine (9) months after the “filing” of the contested notice of appeal. There was no application for enlargement of time to serve the Notice of Appeal outside the seven (7) days provided for by the Rules.

Whichever way, one looks at it, there was no service of the Notice of Appeal on the applicant. 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...”

25. We find that, an annexure to an affidavit that is submitted to the trial court cannot be considered as a proper service of the notice of appeal, even if a copy of the notice of appeal is attached to it. When the respondent filed an application for a stay of execution, it was this application along with all its supporting documents that were served upon the applicants.
26. Therefore, it is our considered view that there has been an inordinate delay in effecting service of the notice of appeal upon the applicants.
27. Accordingly, this application succeeds and the notice of appeal filed on 2<sup>nd</sup> October 2023 is struck out.
28. As costs follow the event, and in compliance with Rule 85(2), the respondent shall bear the costs of this application.

Orders accordingly.

**DATED AND DELIVERED AT NAKURU THIS 24<sup>TH</sup> DAY OF MAY, 2024.**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**L. ACHODE**

.....

**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

