



REPUBLIC OF KENYA



KENYA LAW
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**Dima & another v Sarah (Civil Appeal (Application) 113 of 2020)
[2024] KECA 1224 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1224 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 113 OF 2020
DK MUSINGA, JW LESSIT & LA ACHODE, JJA
SEPTEMBER 20, 2024**

BETWEEN

HUSSEIN ALI DIMA 1ST APPELLANT

BALKHISA QAADIR 2ND APPELLANT

AND

SOFIA MOHAMED SARAH RESPONDENT

(Being an application to strike out the Notice of Appeal and Record of Appeal against the ruling and order of the High Court (Ochieng, J.) delivered on 29th January 2020 and order issued on 5th February 2020 in Miscellaneous Application No. 48 of 2019 (Formerly Naivasha High Court Misc. Application No. 119 of 2019))

RULING

1. Before us is a Notice of Motion brought by Sofia Mohamed Sarah, the applicant herein, dated 20th August 2020. It has been brought pursuant to rules 77, 84 and 90 of the Court of Appeal Rules 2010, now rules 79, 86 and 92 of The 2022 Court of Appeal Rules. The applicant seeks an order striking out of both the notice of appeal and record of appeal dated 30th January 2020 and 11th March 2020, respectively, filed by Hussein Ali Dima and Hussein Ali Dima, the respondents herein. It is supported by grounds captured on face of the application and in the supporting affidavit sworn by the applicant on even date together with the annexures thereto.

The application is opposed through a replying affidavit sworn on 20th September 2020 by Mr. Jaoko Alexander, learned counsel for the respondents, together with the annexures thereto, including the affidavit sworn by the Process Server, one Samuel Maina Wamugi, sworn on 4th September 2020.

2. The application was canvassed through the virtual platform of this Court on 24th July 2024. Only Mr. Jaoko for the respondents was present. The applicant was not represented despite service with the



- hearing notice upon her advocates on record on 2nd July 2024. The respondents' advocate relied on his written submissions written submissions dated 23rd July 2024 but did not wish to highlight them. The applicant's counsel also filed written submissions in support of the application.
3. In the applicant's written submissions, she laments that the impugned ruling was delivered on 29th January 2020 and although the notice of appeal was filed on 30th January 2020, it has not been served upon the applicant or her advocate. Further, that the memorandum of appeal lodged on 12th March, 2020 was served upon the applicant on 23rd July 2020; and that the record of appeal dated 11th March 2020 was filed on 12th March 2020 and served upon the applicant on 23rd July 2020. The applicant contends that the respondents failed to serve her with the letter bespeaking the proceedings as required by the Rules. The applicant contends that there is no proper appeal, that the appeal is incompetent and ought to be struck out. Further, that the applicant stands to be highly prejudiced if the appeal is allowed to stand.
 4. In the applicant's written submissions, Mr. Omwenga urges that the respondents flouted rule 79 of this Court's Rules that is coached in mandatory terms by failing to keep to the timelines on service of the application and also the memorandum and record of appeal. He urges the Court to note that non-service of the notice and record of appeal was admitted and no reasonable explanation given. He submits that the allegation that there was never a notice on his office door indicating closure of the office due to Covid-19 or at all. He relies on the case of *Simon Kimutai & Another vs. Sammy Makove & Another* [2018] eKLR for the proposition that proper explanation should be given to justify the delay and disruption of the appeal to be accepted, and that the respondent did not meet the threshold.
 5. In a rejoinder to the respondents' submissions, in his written submissions, Mr. Omwenga urges us to note that the respondents have admitted that there was a mistake and that they have asked the Court to overlook the mistake by applying the overriding principles and Article 159 (2)(d) of *the Constitution* of Kenya, 2010. He urges us to consider the case of *Murandula Suresh Kantaria vs. Suresh Nanalal Kantaria*, Civil Appeal No. 277 of 2005 (unreported), for the proposition that the overriding principles should not be called to aid a party who is seeking to avoid what he may find to be tedious compliance with the laid down procedures, or to subvert due process. Further, that the appellants have not endeavored to explain why the notice of appeal was not served upon the applicant within the set timelines, and neither have they given any reason as to why the letter bespeaking the proceedings was never served on the applicant.
 6. Mr. Jaoko for the respondents in his written submissions urges that upon being instructed by the appellants to lodge an appeal against the impugned ruling, he sent his process server, Samuel Maina Wamugi, who lodged the notice of appeal in Kajiado Court promptly on 30th January 2020. Counsel relies on the explanation given for the delay in the service of the notice of appeal in the annexed affidavit of the Process Server. We shall get to the affidavit later.
 7. Mr. Jaoko submitted that it was not until sometime on 23rd July 2020 when he perused the file for purposes of filing submissions in respect of the appeal that he noticed that there was no stamped copy of the notice of appeal by the applicant's advocate in the file. He also found that the record of appeal had also not been received by the applicant's advocate. That he instructed Samuel to proceed and effect service. Mr. Jaoko urges that the failure to effect service of the notice of appeal within the required timeframe was neither deliberate nor intended to prejudice the applicant.
 8. Counsel urges us to apply the principles of overriding objectives and take a broad view of justice as mandated by the overriding objectives principles. Relying on the case *Joseph Kiangoi vs. Wachira Waruru & 2 Others* [2010] eKLR, the appellants urge the Court to lean more towards sustaining the appeal by declining to strike out the record on a technicality and in the circumstances which practically



were out of the appellants' control. Counsel also relies on *Abdirahman Abdi vs. Safi Petroleum Products Ltd & 6 others* [2011] eKLR and urges us to consider the prejudice the respondent stands to suffer against that of the respondent and exercise discretion to save the appeal to be heard on merits, which appeal has been filed within the timelines prescribed by the Rules.

9. Mr. Jaoko urges this Court to apply the principles of overriding objective as well as Article 159 (2)(d) of *the Constitution* of Kenya, 2010 with a view to sustaining the appeal to be heard on merit instead of striking it out on a technicality. Furthermore, that there has been no delay in filing the notice of Appeal or the record of appeal as both were filed within the requisite time. In addition, he urges that the fault or error of the respondents' advocate should not necessarily debar a litigant from enforcing his rights.
10. We have also considered the affidavit sworn by the Process Server. He averred that he lodged the appeal on 30th January 2020; that on 4th February 2020 on the same day that the notice of appeal was endorsed he took a copy of the notice of appeal to the applicant's advocate's office and met the secretary; that she spoke with the advocate on phone then informed him he had the choice to take the notice the next day in order to serve it upon the advocate, or to leave it with her. The Process Server stated that he sought instructions from Mr. Jaoko, who advised him to serve it the next day. That he did not go back next day, because he forgot. However, he went back there on 23rd March 2020 when he found a notice on the door of Mr. Omwenga's office stating that the office was closed until further notice due to Covid-19 restrictions; that thereafter, he was instructed by Mr. Jaoko to effect service upon the applicant on 23rd July 2020, which he did on the same day.
11. We have given due consideration to this application and the supporting and replying affidavits together with their respective annexures, the submissions and cited authorities by both sides. The applicant has invoked rule 79, 86 and 92 of the Rules. Rule 79(1) prescribes:

“79. Service of notice of appeal on persons affected

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.”

12. On the importance of service of a notice of appeal, this Court in *Daniel Nkirimpa Monirel vs. Sayialel Ole Koilel & 4 Others* [2016] eKLR stated 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.”



13. Rule 86 provides for the striking out of a notice of appeal or the appeal, while rule 92 provides the timelines for the service of the memorandum and record of appeal as follows:

“86. Application to strike out notice of appeal or appeal.

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 after the date of service of the notice of appeal or record of appeal, as the case may be.

92. Service of memorandum and record of appeal

1. The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies thereof on each respondent who has complied with the requirements of rule 81.
2. The appellant shall, in addition to the service under subrule (1), serve copies of the memorandum of appeal and the record of appeal on such other parties to the original proceedings as the Court may, at any time on application or of its own motion, direct and within such time as the Court may appoint.”

14. Based on the foregoing provision, an applicant can seek an order striking out the notice of appeal on three grounds. Firstly, that no appeal lies; secondly that an essential step in the proceedings has not been taken; and thirdly that the essential step has not been taken within the prescribed time. This application is grounded on lack of service of the notice of appeal and for late service of the record of appeal.

15. The respondent is required to offer an explanation why the notice of appeal was never served upon the applicant; and further, why the record of appeal was served late. Learned

Counsel Mr. Jaoko endeavored to explain why the notice of appeal was not served. The respondent depended on the affidavit of service by the Process Server who stated that his attempt to serve the notice of appeal on the same day it was lodged in court on 30th January 2020 failed, as he was asked to return the next day to serve Mr. Omwenga in person. He averred that he forgot to return the next day, but made a further attempt at service on 23rd March 2020 when he found a notice on the advocate’s door stating the office was closed due to Covid-19 restrictions.

16. Mr. Omwenga denied that his office was ever closed due to Covid-19. He did not comment on the Process Server’s averment that his secretary called him on phone and passed the message that the Process Server should serve him personally with the notice of appeal on the next day. What is the probative value of Mr. Omwenga’s submissions denying closure of his office as alleged by the Process Server? As



stated by the Court of Appeal in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

17. It is trite that submissions cannot take the place of evidence. Mr. Omwenga should have filed an affidavit by his Secretary to comment on the allegation that the Process Server came as he alleged, and then he or his staff could have filed an affidavit to comment on closure of the office in March 2020. As it were, the respondent’s averment that an attempt to serve the application was made on 30th January 2020 and on 23rd March 2020 is uncontroverted.
18. The question is, does the fate of Mr. Omwenga’s submissions absorb the respondent of the omission to keep timelines regarding service? A consideration of what the respondent did next will determine if the respondent can be excused. The replying affidavit by Mr. Jaoko shows that he realized that the notice of appeal was never served as required by the timelines under the Rules on the 23rd July 2020. Upon that realization, Mr. Jaoko caused service of the record of appeal on the applicant’s counsel on the same day. He did nothing about the notice of appeal. Instead, the respondents have trivialized the requisite Rules of this Court by contending that service of the notice was simply meant to inform the parties of the appeal, and that this intention was achieved when they annexed a copy of the notice of appeal to their application for stay of execution that was served on the applicant. He urged us to invoke the inherent powers of this Court and the overriding objective under section 3A and 3B of the *Appellate Jurisdiction Act*, and Article 159 of *the Constitution*.
19. In the case of Ramji Davji Vekaria vs. Joseph Oyula [2011] eKLR, this Court held thus:

“Mr. Kitiwa urges us to exercise our discretion pursuant to the provisions of sections 3A and 3B of the *Appellate Jurisdiction Act*. With respect, this is not a matter in which those provisions can be invoked. This is an omission that goes to the root of the Rules i.e. whether or not a party can file an appeal out of time and without leave of the court. To invoke the provisions of sections 3A and 3B would result in a serious precedent being set which will mean utter confusion in the court corridors as there will no longer be any reasons for following the rules of the Court, even when they have been violated with impunity. Sections 3A and 3B were not meant for that.”
20. We note from several precedents that this Court invokes the overriding principle only in well deserving cases, and each case must be considered on its own peculiar circumstances. As pronounced in Murandula case (supra), this Court stated as follows:

“The overriding principle will no doubt serve us well but it is important to point out that it is not going to be the panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained.”
21. Further, the Supreme Court in Law Society of Kenya vs. Centre for Human Rights & Democracy & 12 Others [2014] eKLR stated that Article 159 (2)(d) of *the Constitution* is not a panacea for all procedural short falls as not all procedural deficiencies can be remedied by it.



- 22. We note that the respondent realized its failure to serve the notice of appeal and the record of appeal on 23rd July 2020. By that time, the notice was five months late for service while the record of appeal was four months late for service. Service of the notice of appeal as an annexure in the application for stay of execution was not acceptable service of the same.
- 23. What the respondent should have done was to seek enlargement of time or leave to serve the notice and record of appeal out of time under rule 4. It did not do so. A proper appeal is predicated upon filing and service of a notice of appeal within the prescribed timelines; failure to which there will be no valid appeal filed. As we started by noting, as expressed in Daniel Nkirimpa Monirel vs. Sayialel Ole Koilel, (supra), “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.”
- 24. From the foregoing, it is evident that the appeal as filed is incompetent for lack of service of the notice of appeal, and for late service of the record of appeal without leave. We find the applicant’s application dated August 20, 2020 has merit. The orders that commend themselves to us to make are as follows:
 - i. The notice of appeal dated January 29, 2020 and lodged on January 30, 2020 are hereby struck out;
 - ii. The record of appeal filed on March 12, 2020, and served on the July 23, 2023 be and is hereby struck out.
 - iii. The respondents will pay the costs of this application to the applicant.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar

