



**Murila v Langat & another (Civil Application 62 of 2020)
[2024] KECA 1667 (KLR) (22 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1667 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 62 OF 2020
DK MUSINGA, SG KAIRU & JM MATIVO, JJA
NOVEMBER 22, 2024**

BETWEEN

SUSAN MURILA APPLICANT

AND

RICHARD LANGAT 1ST RESPONDENT

BOARD TRUSTEES OF THE NATIONAL SOCIAL SECURITY

FUND 2ND RESPONDENT

(Being an application to strike out the notice of appeal from the judgment of the Employment and Labour Relations Court at Nairobi (M. Onyango, J.) dated 20th December 2019 in ELRC Cause No. 1153 of 2014)

RULING

1. By way of a notice of motion dated 3rd March 2020 which is brought under sections 3A and 3B of the *Appellate Jurisdiction Act* and rules 77(1), 83 and 84 of the Rules of this Court (2010), the applicant seeks an order that the notice of appeal dated 22nd January 2020 and lodged in the Employment and Labour Relations Court registry be struck out and that costs for this application be provided for.
2. The grounds in support of the application are laid down on the face thereof and in the affidavit in support sworn by Patricia Auma, her advocate on record. It is contended that judgment in the suit giving rise to this application to wit, Employment and Labour Relations Court Cause No 1153 of 2014 was delivered by the trial court on 20th December 2019, after which the respondents lodged their notice of appeal in the registry of the trial court on 22nd January 2020 and in this Court's registry on 30th January 2020. The crux of this application is that the said notice of appeal was served upon the applicant on 4th February 2020, which is 13 days after its lodgment and well outside the 7 days' period of service contemplated under the Rules of this Court.



3. It is further contended that service of the said notice of appeal was without leave of this Court; that the delay was inexcusable as the respondents were at all times aware of the applicable timelines for service; and that the delay is prejudicial to the applicant and amounts to abuse of the court process. We were therefore urged to strike out the said notice of appeal with costs.
4. The application is opposed by way of a replying affidavit sworn by Austin Ouko, the Acting General Manager, Corporate Affairs and Corporation Secretary of the 2nd respondent. He depones that the notice of appeal sought to be struck was filed timeously on 22nd January 2020 but was not served upon the applicant within the prescribed timeline owing to an error of a clerk who was instructed by their advocate on record to effect service thereof upon the applicant but who failed to act on the said instructions. It is further averred that upon realizing the said error on 4th February 2020, service was immediately effected upon the applicant. The delay in service according to the respondent was just 5 days and not 13 days as contended by the applicant, which is not inordinate.
5. The respondent further avers that the intention of a notice of appeal is to alert the party being served that the case in question has not been concluded yet, and that for the reason that the intended appeal is yet to be set down for case management or hearing, then the applicant shall have ample time and opportunity to prepare and defend the appeal and shall not be prejudiced in any manner. In any case, it is averred that the lapse in service does not affect the jurisdiction of this Court, and that it does not go to the root or substance of the intended appeal, and is curable by the application of the provisions of Article 159 (2) (d) of the *Constitution* and Section 3A and 3B of the *Appellate Jurisdiction Act*. The respondents contend that they have cogent grounds of appeal which transcend the interests of the parties herein, which this Court should hear and determine on merit. The Court was therefore urged to dismiss the application and allow the intended appeal to proceed for hearing and determination on merit.
6. At the hearing hereof, learned counsel Mr. Rao held brief for Senior Counsel Dr. Ojiambo for the applicant. The respondent was represented by Mr. Ondari, learned counsel. Although the applicant had not filed any written submissions, counsel made brief oral submissions, relying substantively on the provisions of rule 77(1) of the Rules of this Court which provides the timeline within which a notice of appeal ought to be served.

Counsel urged us to find that the notice of appeal was filed out of time and without leave.
7. On his part, Mr. Ondari made brief oral highlights of his client's written submissions. He acknowledged the delay in service but reiterated that it was for 5 days and not 13 days as alleged by the applicant and which delay had been sufficiently explained. He contended that no prejudice would be occasioned on the applicant if the application was declined. He relied on the decision of the Supreme Court in *Hamida Yaroi Shek Nuri v Faith Tumaini Kombe & 2 others* [2019] eKLR, where the Court declined to strike out a notice of appeal served 19 days outside the stipulated timeline on the ground that the applicant had not made a sufficient case for striking it out.
8. We have given due consideration to this application, the replying affidavit, the submissions and the applicable law. It is expressly provided in the Rules of this Court (2010) that a notice of appeal filed in terms of rule 75 must, in terms of rule 77 (1) be served upon all persons directly affected by the appeal before or within seven days after lodging it. Rule 77(1) stipulates thus:

“ 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.” [Emphasis added]



9. Rule 77 (1) is couched in mandatory terms. This Court in *Mistry Premji Ganji (Investments) Limited v Kenya National Highways Authority* [2019] eKLR while addressing itself to an issue almost similar to the one herein stated thus:

“...the Monirei case (supra) also settles it because Rule 77(1) is couched in mandatory terms that service of the Notice of appeal must always be effected upon the respondent in accordance with the Rule. This position is also supported by other decisions of this Court, see *Stephen Kinoro Kamau v Wanjiku Kinuthia & another* [2005 eKLR].”

10. The notice of appeal in this matter is dated 22nd January 2020.

It bears the stamp of the trial court’s registry for 22nd January 2020 and a lodging dated of 23rd January 2020. By dint of the provisions of rule 77 (1), the 7 days’ period began to run on 23rd January 2020 and were to lapse on 30th January 2020. It is a fact that service of the notice of appeal was effected upon the applicant on 4th February 2020, which, according to the respondent, was five days outside the period contemplated under rule 77(1).

11. On the face of it, the notice of appeal is incompetent by dint of service outside the prescribed period. The delay in serving the notice of appeal is attributed to an error of a clerk who was instructed by their advocate on record to effect service thereof but who nonetheless failed to act on the said instructions timeously. Have the respondents satisfied this Court that this delay was excusable? We think not. Our reason for not accepting the excuse given by the respondents is that save for attributing the delay on the said clerk, his details such as his name have not been given. In addition, the respondents who bear the onus of satisfactorily explaining the delay ought to have caused the said clerk to swear an affidavit in support of the averments as to the non-service of the notice of appeal in good time. In this regard, we note that the respondents have not deposed as to any difficulties or their inability to get hold of the said clerk to swear an affidavit in support of their position.

12. In the circumstances, the delay has not, in our view, been well explained. We hold the view that upon realizing the alleged error on the part of the said clerk, the respondents ought to have invoked the provisions of rule 4 of the Rules of this Court and sought extension of time to serve the notice of appeal upon the applicant. They did not do so. Consequently, this application is for allowing, which we hereby do, with the result that the notice of appeal dated 22nd January 2020 is hereby struck out with costs to the applicant.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2024.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

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



Signed

DEPUTY REGISTRAR.

