



**Wakenga & 3 others v Oyange & 2 others (Civil Application  
E039 of 2022) [2023] KECA 161 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KECA 161 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E039 OF 2022  
PO KIAGE, F TUIYOTT & JM NGUGI, JJA  
FEBRUARY 17, 2023**

**BETWEEN**

**OWUOR WAKENGA ..... 1<sup>ST</sup> APPLICANT  
RISPAR OMOLO ORONGE ..... 2<sup>ND</sup> APPLICANT  
NALICHANDRA DEVCHAND DODHIA ..... 3<sup>RD</sup> APPLICANT  
JAVECHAND DODHIA ..... 4<sup>TH</sup> APPLICANT**

**AND**

**CHARLES OYANGE ..... 1<sup>ST</sup> RESPONDENT  
VICTOR WILLIAMS ..... 2<sup>ND</sup> RESPONDENT  
PAUL ONYANGO ..... 3<sup>RD</sup> RESPONDENT**

*(An application to strike out the notice of appeal dated 21st December  
2021 against the ruling of the Environment and Land Court at Kisumu  
(Ombwayo, J.) dated 17th December, 2021 in ELC Case No. 55 of 2019)*

**RULING**

1. By the motion dated March 8, 2022, brought under rule 84 of the *Court of Appeal Rules 2010*, the 3<sup>rd</sup> and 4<sup>th</sup> applicants, seek to strike out the notice of appeal dated December 21, 2021. The motion is predicated on grounds on the face of it, and on the 3<sup>rd</sup> applicant's supporting affidavit sworn on his own behalf and on the 4<sup>th</sup> respondent's behalf on March 8, 2022.
2. The grounds are to the effect that, the notice of appeal was not served upon the applicants as required by law; the applicants' counsel learnt about the notice on February 23, 2022 when he was served with an application being civil application number 28 of 2022; the respondents having failed to take essential



steps in the proceedings as required by law, the notice of appeal should be struck out with costs to the 3<sup>rd</sup> and 4<sup>th</sup> applicants.

3. In response and opposition to the motion, Charles Oyange, the 1<sup>st</sup> respondent, swore a replying affidavit on behalf of all the respondents on October 3, 2022 in which he castigated the applicants and their counsel for failing to sign the application. He deposed that the notice of appeal was lodged at the High Court registry on December 21, 2021 but that it was not signed by the deputy registrar until December 30, 2021, because the courts were on christmas vacation. Majority of the law firms had also closed for the December holidays. The 1<sup>st</sup> respondent averred that their advocates on record collected the notice of appeal on December 30, 2021 and their process server effected service on the same day as evinced by the affidavit of service sworn by the process server on February 1, 2022. The notice was served by way of pinning it on the office door of the applicants' advocates. According to the respondents, this was proper service. They thus accused the applicants of taking advantage of the closure of their advocates' offices and the lack of a receiving stamp on the pinned notice to steal a march from them by denying service.
4. At the hearing of the motion, learned counsel for the applicants Mr PD Onyango and his learned counterpart, Mr Odeny sought to highlight their filed affidavits and submissions.
5. Mr PD Onyango contended that the affidavit of service was an afterthought meant to hoodwink the court. He argued that in line with the Practice Directions, 2020, service was supposed to be effected electronically. Counsel cited rule 77(1) of the Court of Appeal Rules, 2010 (now rule 79(1)) which requires an intended appellant to serve all parties directly affected by the appeal with the notice of appeal within 7 days of its lodging. Accordingly, he protested the failure of the respondents to serve the applicants with the notice of appeal dated December 21, 2021 and lodged on December 30, 2021. Mr PD Onyango cited the decision in Daniel Nkirimpa Monirei vs. Sayialel Ole Koilel & 4 others
6. [2016]eKLR where this court struck out a notice of appeal that had not been served on the opposing party. Similarly, he relied on this Court's decision in Africa Oil Turkana Limited & 2 Others v Edward Kings Onyancha Maina & 3 others [2016]eKLR where the court struck out a notice of appeal that had been served outside the stipulated time. In the end counsel urged us to allow the application and strike out the notice of appeal with costs to the applicants.
7. In response, Mr Odeny drew our attention to the affidavit of service which, he said, confirmed that the notice of appeal was served. To counsel, the service described in the affidavit of service is recognised by order 5 rule 14 of the Civil Procedure Rules and rule 17 of the Court of Appeal Rules. In the result counsel submitted that the application was unmerited and it should be dismissed with costs. The court sought to know whether the respondents had filed their record of appeal, to which counsel responded in the negative.
8. In response to the foregoing submissions, Mr PD Onyango contended that order 5 rule 14 was only applicable where due and reasonable diligence had been used in attempting to serve a party with no success.
9. We have carefully considered the application before us, the rival affidavits and submissions, the rules of this court and the law.
10. There is no dispute that by dint of rule 84 (now 86) of this court's rules, where there is default in taking an essential step in the proceedings, a person affected by an appeal may apply to strike out the notice or the appeal itself, if already instituted. It is under this rule that the applicants have moved us, asserting, that the respondents failed to take the essential step of serving them with the notice of appeal.



11. The applicants contend that the notice of appeal was not served upon them within 7 days of its being lodged, or at all, as required by rule 77(1) (now rule 79 (1)). They resist the respondents' claim that the notice was served by pinning it on the office door of their advocate. To the applicants, service should have been effected electronically pursuant to the [Practice Directions on Electronic Case Management, 2020](#). The appellants further oppose the respondents' reliance on order 5 rule 14 of the [Civil Procedure Rules](#) as a basis of serving them by pinning the notice on the door, asserting that that mode of service was only available where due and reasonable diligence had been used to access them to no avail.
12. The respondents maintain that the mode of service that they used was a proper one since advocates had closed offices for December holidays. Order 5 Rule 14 provides as follows;
 

“Where the serving officer, after using all due and reasonable diligence, cannot find the defendant, or any person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, together with an affidavit of service.” [Emphasis ours]
13. We are of the view that the respondents have not shown that they employed any reasonable diligence to find the applicants or their counsel so as to serve them and they failed at that. We think the respondents' reliance on the above provision as a basis of serving the applicants with the notice of appeal by the mode that they allegedly used is unfounded and misconceived. Besides, as rightly submitted by the applicant's counsel, pursuant to the [Practice Directions on Electronic Case Management, 2020](#) and for purposes of efficiency, we imagine the respondents should have served the applicants electronically, considering the limited time frame under which they were pursuing the appeal. We also think that even were we to exclude the days of the christmas vacation the respondents would still be at default as they just did not effect service.
14. In the result, we do not find the respondents to have provided a sufficient answer to the notice of motion. We accordingly grant the same and strike out the notice of appeal with costs as prayed. The 3<sup>rd</sup> and 4<sup>th</sup> applicants shall have the costs of the motion.

**DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF FEBRUARY, 2023.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

