



REPUBLIC OF KENYA



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**M'mboga v Mahmud (Civil Appeal (Application) E019 of 2020)
[2023] KECA 344 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KECA 344 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL (APPLICATION) E019 OF 2020
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
MARCH 31, 2023**

BETWEEN

MERCY CASSANDRA M'MBOGA APPELLANT

AND

SAID AHMED MAHMUD RESPONDENT

(Being an application seeking to strike out the Notice of Appeal against the Ruling delivered at Malindi by Olola, J on 2nd October, 2020 in Malindi ELC No.52 of 2014)

RULING

1. The application before us is the one dated December 12, 2020. The Respondent in the appeal has brought it against the Appellant in the appeal, pursuant to Rules 42, 75, (1) & (2), 77, 82, 83, and 84 of the *Court of Appeal Rules 2010*, now Rules 44, 76 (1) & (2), 79, 84, 85 and 86 respectively under the *Court of Appeal Rules 2022*, hereinafter the Rules. The application seeks to have the Notice of Appeal dated October 5, 2020 struck out. The application is premised on the grounds on the face of the application and in the affidavit sworn by the Respondent dated December 14, 2020. In brief, the Respondent contends that even though the Notice of Appeal was filed on October 5, 2020, three days after the ruling intended to be appealed was delivered, the Appellant did not serve it upon the Respondent until November 25, 2020, over 30 days after it had been lodged.
2. The application was heard through the virtual platform on the December 7, 2022. Present were learned counsels Mr Ole Kina for the Respondent and Ms. Waihenya for the Appellant. Both counsel relied on their written submissions dated November 29, 2021 and December 2, 2022 respectively.
3. Mr Ole Kina for the Respondent urged that the Appellant did not serve the Notice of Appeal until November 25, 2020. Counsel urged that since no leave was obtained to extend time, the Appellant flouted Rule 79 of the Rules that requires service of the Notice of Appeal, either on the Respondent or his advocate within 7 days after lodging it in Court. Further that the Appellant filed an application



seeking to extend time to serve the Notice of Appeal after the instant application. Counsel relied on this Court's ruling in *John Mwangi & 26 others v Mwenja Ngure & 4 others (2016) eKLR* for the proposition that timelines under the Rules are strict and must be observed.

4. Ms. Jacqueline Waihenya opposed the application. Counsel urged that the Appellant filed an application for stay pending an intended appeal from the impugned ruling of the High Court, and that the Notice of Appeal, which was annexure JW2 to the application, was served upon the Respondent together with the said application on the October 19, 2020. It is contended that in the circumstances there was constructive service of the Notice of Appeal, and urged that the delay should be excused. Counsel urged the Court to rely on the case of *Kamlesh Mansukhlal Dami Pattni v Director of Public Prosecutions (2015) eKLR* where this Court held that 1 or 2 days delay in service of Notice of Appeal was not fatal. Also relied on was *Mistri Premji Kanji (investment) LTD v Kenya National High Way Authority (2019) eKLR* where this Court held that failure to serve Notice of Appeal can be excused if good reason is shown. Counsel drew the court's attention to the fact that the Appellant's application dated January 28, 2021 seeking to enlarge time and deem the Notice of Appeal herein as duly served upon the Respondent is pending hearing and determination as it was adjourned to facilitate the hearing of the application.
5. We have considered this application, the submissions of both counsel to the parties as well as the cases cited in support of their respective positions. This application has been brought pursuant to several Rules of this Court. By dint of Rule 86 for instance, the application seeking to have a Notice of Appeal struck out must be brought within 30 days from the date of the service with the Notice of Appeal. The Notice of Appeal was served on November 25, 2020, while this application was filed on the December 21, 2020. We are satisfied that the Respondent brought this application within 30 days from the date of service with the Notice of Appeal and that it is therefore competent.
6. The issue before us is whether there was service of the Notice of Appeal upon the Respondent by the Appellant as required by Rule 79 of the *Rules*; and secondly whether the Notice of Appeal dated October 5, 2020 should be struck out.
7. The timelines set and the mode of service of the Notice of Appeal under Rule 79 of the Rules is as follows:
 - “79. Service of notice of appeal on persons affected
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 - (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..”
8. The rule requires that an intended appellant serve the notice of appeal on all persons directly affected by the appeal. The timelines for service is before or within seven days after lodging the notice of appeal. The ruling of the High Court intended to be appealed was delivered on October 2, 2020. The Appellant filed a Notice of Appeal on October 5, 2020, which was three days after the impugned ruling was delivered, and therefor within the time prescribed by the *Rules*. However, while the Respondent contends that there was no service of the Notice until November 25, 2020, the Appellant contends that there was constructive service on October 19, 2020, because a copy of the Notice of Appeal was an annexure to the affidavit sworn in support of the application dated October 19, 2020. In the application, the Appellant seeks to stay the impugned ruling, the subject matter of this application.



Going by the written submissions filed by the Appellant’s advocate in this application, that application was filed on October 19, 2020.

9. The application dated October 19, 2020 is not before us, and therefore the alleged supporting affidavit in which the Notice of Appeal was annexed is not before us. If the Appellant intended to rely on, there was no reason why he did not place it before this Court in response to the instant application. It is clear the Appellant intends to rely on it in support of the application to extend time. We say no more in that regard and we leave it to the single Judge who will hear the application to deal with that point. However, from what is placed before us, there is no evidence that the Notice of Appeal was served upon the Respondent as required under Rule 79 of the Rules.
10. The Appellant relied on two cases; *Kamlesh Mansukhlal Dami Pattni v Director of Public Prosecutions (2015) eKLR* for the proposition that where the delay in service of a Notice of Appeal is that 1 or 2 days the Notice of Appeal should not be struck out as the delay is not fatal. The Appellant also relied on the case *Mistri Premji Kanji (investment) LTD v Kenya National High Way Authority (2019) eKLR* and urged us to find that failure to serve Notice of Appeal can be excused if good reason is shown. As we have already observed, there is no affidavit sworn by the Appellant, neither has the (mode of) service the Appellant relies on been substantiated before us. As we have already stated, we note that there is a pending application before this Court for extension of time to serve the Notice of Appeal. It is a single judge application. All these matters about constructive service and reasonable excuse will be canvassed before the Judge who will hear the application who will determine them. We however wish to draw the attention of counsel to the decision of this Court (Shah, JA) *Fortune Finance Limited v Geoffrey Nguigi Gathaiya* Civil Application No Nai 22 of 1999 (UR), that service of the notice of appeal should be actual, deliberate and not accidental.
11. The Respondent’s counsel relied on the case of *John Mutai Mwangi & 26 Others v Mwenja Ngure & 4 Others [2016] eKLR* on the intent and purport of Rule 84 of the Rules as follows:

“That timeline is strict and is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispense justice in a timely, just, efficient and cost-effective manner.”
12. There are numerous authorities dealing with the issue of service of a Notice of Appeal. The Supreme Court in *Hamida Yaroi Shik Nuri v Faith Tumaini Kombe & 2 others [2019] eKLR* cited with approval a judgment of this Court and held:

“Being such an important document, the law provides on when it should be filed and served. We agree with the 3rd respondent that service of a Notice of Appeal is crucial as this Court noted in the case of *Zacharia Okoth Obado v Edward Akong’o Oyugi & 2 others [2014] eKLR* thus:

“[37] Service of a notice of appeal is crucial. Kiage, JA in *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR* states:

‘... I am not in the least persuaded that Article 159 of the *Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never



provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...’

We are persuaded by this dictum of the learned judge. The notice of appeal ought to be served as provided by the law and all subsequent legal procedures followed.”

13. We say no more. After due consideration of the application before us, we find that the Notice of Appeal dated October 5, 2020 was not served within 7 days from the date of filing of the same.

The order that commends itself to us is as follows:

1. The Notice of Appeal dated October 5, 2020 be and is hereby struck out.
2. The order in (1) above is suspended pending the outcome of the application pending before this Court for extension of time dated October 19, 2020.
3. The Respondent will have the costs of this application in any event.

DATED AND DELIVERED AT MOMBASA THIS 31ST DAY OF MARCH 2023

P NYAMWEYA

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JUDGE OF APPEAL

J LESIIT

.....

JUDGE OF APPEAL

G V ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

