



**Soft White Beach v Mumbo & 4 others (Civil Appeal (Application)
E024 of 2021) [2023] KECA 348 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KECA 348 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL (APPLICATION) E024 OF 2021
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
MARCH 31, 2023**

BETWEEN

SOFT WHITE BEACH APPELLANT

AND

JOSEPH KASHURU MUMBO 1ST RESPONDENT

MASUMBUKO YERRY KOMBE 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

THE CHIEF LAND REGISTRAR 4TH RESPONDENT

THE DISTRICT LAND REGISTRAR 5TH RESPONDENT

*(Being an application to strike out the appellant's notice of appeal dated 18th May 2020
and its record of appeal dated 17th May 2021 in Malindi Civil Appeal No. E15 of 2020)*

RULING

1. Masumbuko Yerry Kombe, the applicant in the present application dated June 21, 2021 is the 2nd respondent in related Malindi civil appeal No E15 of 2020. That appeal was instituted by Soft White Beach, the appellant therein and the respondent in the present application. In this application the seeks orders that the appellant's notice of appeal dated May 18, 2020 and its record of appeal dated May 17, 2021 in Malindi civil appeal No E15 of 2020 be struck out.
2. In his affidavit sworn in support of the application, Kobebe Kevin Advocate for the applicant, deposed that the appellant's notice of appeal dated May 18, 2020 and filed on May 20, 2020 was served on the applicant on October 28, 2020 which he says is 162 days late from the date of filing "way outside the requisite 7 days" under rule 77(1) of the *Court of Appeal Rules, 2010*; that the appellant obtained a certificate of delay on November 3, 2020 which was served on the parties by email dated January 5, 2021; that the appellant obtained yet another certificate of delay dated April 14, 2021; that over a



- year after filing the notice of appeal, the appellant failed to file the record of appeal within the time prescribed under rule 82 of the *Court of Appeal Rules, 2010* and the same was filed 372 days outside the permitted period.
3. In a replying affidavit in opposition to the application sworn by Zipporah Nyaguthii Gitonga, a director of the appellant, it is deponed that the notice of appeal was filed on May 20, 2020 and on the same day a request for typed proceedings was made; that on May 22, 2020, the appellant filed an application before the lower court for stay of execution in which the said notice of appeal was annexed; that the said application was transmitted to the applicant's advocates by email; that the notice of appeal was transmitted to the applicant's advocates by email to the address diro@diroadvocates.co.ke and that the email did not bounce and was received through the other office emails; that that email address was the email address that was used to transmit the application made before the lower court on May 22, 2020; that accordingly, the notice of appeal was served on the applicant twice through the email of May 22, 2020 and through email of May 27, 2020 transmitting the application for stay before the lower court; that in the circumstances it will be oppressive to strike out the appeal on account of none service.
 4. Zipporah Nyaguthii Gitonga deponed further that the certificate of delay was issued in accordance with the law and there was no communication to the appellant's advocates that the typed proceeding were ready earlier than when the advocates collected them; that the complaints by the applicant do not relate to the substance of the appeal but to technical lapses during the processing of the record of appeal; that if the court finds that there was delay, the same was not deliberate and the court should pardon the same.
 5. In a further affidavit sworn on May 11, 2022 in response to the said replying affidavit of Zipporah Nyaguthii Gitonga, Kokebe Kevin deponed that his email address is kokebe@diroadvocates.co.ke while his firm's email address is info@diroadvocates.co.ke which addresses were used throughout the proceedings before the lower court; that his firm and himself do not have any other email addresses; that he did not receive any email from the appellant's advocate on May 27, 2020 which the appellant has "conveniently" failed to produce; that despite the correct email address having been indicated on the face of the notice of appeal, it was not emailed to that address.
 6. Urging the application before us, learned counsel for the applicant Mr Kokebe submitted that the notice of appeal, though filed on May 20, 2020 was not served until October 28, 2020 which was way outside the prescribed time for service; that the notice of appeal ought to have been served by May 27, 2020; that the email address to which the notice of appeal was sent is not one of the applicant's advocates email addresses; that to the extent that the notice of appeal on which the record of appeal is founded is defective, the record of appeal is equally defective and should be struck out. In support counsel cited the case of *Mistry Premji Ganji (Investments) Limited v Kenya National Highways Authority* [2019] eKLR.
 7. Moreover, counsel submitted, the letter bespeaking typed proceedings was also served on October 28, 2020 outside the timeframe provided under rule 82(1) of the *Court of Appeal Rules, 2010*; that even if the court were to find that the second certificate of delay relied upon by the appellant is valid, the letter bespeaking proceedings in relation to that certificate was never copied to the applicant. In that regard, reference was made to the case of *Patrick Kiruja Kithinji v Victor Mugira Marete* [2015] eKLR. It was urged that the defects in this matter are not curable under article 159 of the *Constitution* as submitted by the respondent.
 8. Although Ms Lutta, learned counsel for the 3rd, 4th and 5th respondents, did not file submissions with respect to the application, she stated that she supported the application.



9. Learned counsel for the respondent/appellant Mr Munyithya reiterated in submissions that the notice of appeal was served on the very day it was filed by email; that in any event the notice of appeal was an annexure to the appellant's application for stay of execution before the lower court which was served, by an email which did not bounce back, on the applicant's advocates on May 27, 2020; that it would be oppressive, in the circumstances, to strike out the appeal; that if the court finds there was delay in serving the notice, such delay was not deliberate and is excusable as held in the case of *Credit Reference Bureau Africa Ltd v Harrison Kariuki Muru & another* [2021] eKLR.
10. It was submitted that on the same date the appellant filed the notice of appeal on May 20, 2020, it also applied for typed proceedings; that that request could not be processed as the court file was with the trial judge for consideration of the appellant's application for stay of execution, the ruling in respect of which was delivered on February 19, 2021; that thereafter the appellant's advocates followed up the proceedings which were made available on May 20, 2021 and a certificate of delay issued in accordance with the law and the applicant cannot be heard to say that the proceedings were ready for collection on November 3, 2020; that furthermore, there were limited visits to the court registry at the time due to covid-19 pandemic related restrictions. It was submitted further that "technical lapses during the processing of the record of appeal" do not go to substance and the appeal should not be struck out on that basis. The case of *Karl Webner Claasen v Commissioner of Lands & 4 others* [2017] eKLR was cited.
11. We have considered the application, the affidavits, and the submissions. The critical question is whether the appellant served the notice of appeal on the applicant in accordance with the requirements rule 77(1) of *Court of Appeal Rules, 2010* (presently rule 79(1) of *Court of Appeal Rules, 2022*) which stipulates that 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. Whether the appellant served the notice of appeal on the applicant within the seven days is largely a question of fact.
12. The appellant's response to the contention that it did not serve the notice of appeal within that period is two pronged. First, it says that it served the notice by email sent to the applicant's advocates at diro@diroadvocates.co.ke. Secondly, that in any event, the notice of appeal was an exhibit or annexure in appellant's application for stay of execution that was filed before the lower court.
13. The applicant on the other hand disclaims the email address to which the notice was sent and contends that service of an application in which the notice of appeal may have been an exhibit is not service of the notice of appeal.
14. As regards the claim that the notice of appeal was served by email sent to the applicant's advocates on May 22, 2020, it is clear from that letter that it was sent to diro@diroadvocates.co.ke, an email address that has been disowned by the applicant's advocates who have maintained that their email addresses are either kokebe@diroadvocates.co.ke for the advocate concerned, and info@diroadvocates.co.ke for the law firm. It is noteworthy that the email address for the applicant's advocates appearing in the appellant's notice of appeal dated May 18, 2020 is clearly printed as kokebe@diroadvocates.co.ke. Why the email transmitting that very notice of appeal to the applicant's advocates was sent to the address, diro@diroadvocates.co.ke and not to the email address appearing on the notice of appeal is not explained.
15. Beyond stating that the email did not bounce back, the appellant's counsel does not state the source of that address. On the face of the contention by the applicant's advocates that the email addresses it used throughout the proceedings in the lower court are kokebe@diroadvocates.co.ke and info@diroadvocates.co.ke, it was incumbent upon the appellant to demonstrate that the email address to which it sent the notice of appeal is indeed the applicant's address. It did not do so. We are therefore



not satisfied that the appellant has demonstrated that the notice of appeal was served on the applicant on May 22, 2020.

16. The appellant has made the claim that the notice of appeal was in any case part of the appellant's application for stay of execution dated May 22, 2020 that was made before the lower court and which application was said to have been served on the applicant. Curiously, although in the affidavit of service relating to that application, Joseph Manzi Munyiya deposed that on May 27, 2020 he forwarded the said application to the applicant's advocates by email, the said email of May 27, 2020 was not exhibited, and it is therefore not clear to which email address of the appellant's advocates it was sent.

17. We are nonetheless not persuaded that that is the form or mode of service (if it can be referred to as such) envisaged under rule 77(1) of *Court of Appeal Rules*. We adopt the words of the court in *Kericho Technical Institute v Finmax Community Based Group & 3 others* [2016] eKLR where the court in holding that a notice of appeal had not been served stated:

“The respondents did not serve the notice of appeal within the required period. No satisfactory explanation has been given for this failure. Instead the respondents have trivialized the rule 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.”

18. Based on the foregoing the eventual service of the notice of appeal on the applicant's advocates on October 28, 2020, was well out of time, without leave of the court having been obtained. As stated by the court in *Patrick Kiruja Kitbinji v Victor Mugira Marete* (above) “whether or not an appeal is filed on time goes to the jurisdiction of this court”. While in *Mistry Premji Ganji (Investments) Limited v Kenya National Highways Authority* (above) the court expressed that:

“Indeed, a record of appeal founded on a defective notice of appeal cannot stand. This is because, an appeal is instituted by the notice of appeal and once the same is found to be fatally defective (as is the case herein) the fate of the record of appeal is equally sealed.”

19. Jurisdiction is a substantive matter. It is not a technical matter on which the appellant can seek refuge under article 159 of the *Constitution*. We have said enough. The applicant's application dated June 21, 2021 succeeds. The appellant's notice of appeal dated May 18, 2020 and its appeal, being civil appeal No E15 of 2020 are hereby struck out.

20. The applicant will have the costs of the application.

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

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

