



**Chepyegon v Chepyegon (Civil Application E061 of 2022)  
[2023] KECA 798 (KLR) (30 June 2023) (Ruling)**

Neutral citation: [2023] KECA 798 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPLICATION E061 OF 2022  
F SICHALE, FA OCHIENG & LA ACHODE, JJA  
JUNE 30, 2023**

**BETWEEN**

**WILSON CHEPYEGON ..... APPLICANT**

**AND**

**KIMOSOP CHEPYEGON ..... RESPONDENT**

*(An application to strike out or withdraw a Notice of Appeal from the judgment of the Environment and Land Court at Eldoret (Kibunja, J.) dated 9th February 2022) IN (ELC Case No. 372 OF 2014)*

**RULING**

1. Wilson Chepyegon (the applicant herein), has vide a motion dated April 26, 2022, brought pursuant to the provisions of Rule 77 (1) and 84 of the Court of Appeal Rules, section 3A of the Appellate Jurisdiction Act and all other enabling provisions of the law moved the Court to strike out the Notice of Appeal dated February 21, 2022 filed by the respondent. In the alternative, the applicant seeks an order that the said Notice of Appeal be deemed withdrawn.
2. The motion is supported on the grounds on the motion and a supporting affidavit sworn by the applicant who deposed inter alia that the trial court delivered a judgment the subject of the intended appeal on February 9, 2022, and that being dissatisfied with the aforesaid judgment, the respondent lodged a Notice of Appeal dated February 21, 2022 and failed to effect service of the same on the applicant or his advocates within the stipulated timelines.
3. He further deposed that the delay in service of the appeal or to file the appeal was inordinate, unreasonable and prejudicial and that it was in the interests of justice for the application to be allowed.
4. The motion was opposed vide a replying affidavit sworn by the respondent on November 14, 2022, who deposed inter alia that after delivery of the impugned judgment he became unwell and had gone to hospital for treatment of a chronic illness which had afflicted and incapacitated him since 2017 and



that as such, he could not raise funds and that further failure to serve the Notice of Appeal/appeal was not intentional but due to illness aforesaid.

5. When the matter came up for plenary hearing on March 20, 2023, Mr. Tororei learned counsel appeared for the applicant whereas Mr. Chebii appeared for the respondent. Both parties relied on their written submissions dated November 7, 2022 and March 1, 2023 respectively.
6. It was submitted for the applicant that the instant motion had been filed within 30 days in compliance with Rule 84 of the *Court of Appeal Rules* and that despite the respondent filing his Notice of Appeal within time, he did not effect service on the applicant until April 20, 2022, which was close to 60 days from the date of filing the Notice of Appeal in blatant violation of Rule 77 (1) of the *Court of Appeal Rules* and that further, no good reason had been advanced for failure to effect service on time. It was further submitted that to date the respondent had not served the applicant with any appeal.
7. On the other hand, the respondent reiterated that failure to serve the Notice of Appeal within the prescribed time was inadvertent which was excusable as he had been afflicted by poor health coupled with failure to communicate with his counsel leading to the late service of the Notice of Appeal and the appeal within the prescribed time.
8. We have carefully considered the applicant's motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival submissions by the parties, the cited authorities and the law.
9. It is indeed common ground that the impugned judgment was delivered on February 9, 2022, while the Notice of Appeal was filed on February 23, 2022, which was well within time. Subsequently thereafter the Notice of Appeal was served on the applicant on April 20, 2022 which was approximately 52 days from the date of filing in flagrant breach of Rule 77 (1) of this court which provides;  

“77(1) “An intended appellant shall, before or within seven days after lodging the notice of appeal, serve copies thereof on all persons directly affected by the appeal.”
10. It is imperative to note that the above Rule is couched in mandatory terms. Whereas the respondent contends that failure to serve the Notice of Appeal was on account of ill health and we sympathize with him, the respondent could not on one hand be heard to be saying that he filed the Notice of Appeal within the stipulated timelines and contend on the other hand that he was unable to serve the same on account of ill health. We are not satisfied by the explanation given by the respondent.
11. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR, Kiage JA succinctly stated:

“In the architecture of our Rules, the notice of appeal occupies a central foundation place without which there can be no appeal. It is a jurisdictional document. In lodging the notice of appeal at the High Court, the appellant was without doubt acting in obedience to Rule 77, not merely playing it safe as was suggested to us by counsel. At any rate; that same caution that led the appellant to lodge the notice of appeal should logically have extended to service of the same on the respondents to this appeal, the applicants herein, by dint of Rule 77(1). Service is of course at the very core of the adversarial enterprise and is an emanation of the natural justice dictate that no party should be condemned unheard. Nor should he be ambushed by a record of appeal the notice whereof he had not been served with. An appellant who fails, omits or refuses to effect service of a notice of appeal can no more get away with it than would one who fails to serve a record of appeal. Both stand in such grave



defaults that, absent proper and satisfactory explanation, their appeals shall be struck out on application. under Rule 84.”

12. We fully agree and associate ourselves with the sentiments expressed by the Learned Judge in the above case.
13. It is in view of the foregoing that we find merit in the applicant’s motion dated April 26, 2022, which we accordingly allow and strike out the respondent’s Notice of Appeal dated February 21, 2022 with no order as to costs.

It is so ordered.

**DATED AND DELIVERED AT NAKURU THIS 30<sup>TH</sup> DAY OF JUNE, 2023.**

**F. SICHALE**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

