



REPUBLIC OF KENYA



KENYA LAW
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**Kuria & 19 others v Nyota (Civil Application 11 of 2019)
[2023] KECA 797 (KLR) (30 June 2023) (Ruling)**

Neutral citation: [2023] KECA 797 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION 11 OF 2019
F SICHALE, FA OCHIENG & LA ACHODE, JJA
JUNE 30, 2023**

BETWEEN

EDDY KURIA	1ST APPLICANT
CHRISTOPHER M. KAMAU	2ND APPLICANT
MARGARET WANJIRU	3RD APPLICANT
DAVID ADAMS MBUGUA	4TH APPLICANT
DAVID MBURU GITHERE	5TH APPLICANT
W.K KIBET	6TH APPLICANT
CATHERINE KOSKEI	7TH APPLICANT
BEATRICE WANGARI	8TH APPLICANT
AUGUSTINE LOMONGIN	9TH APPLICANT
JACQUELIN ADHIAMBO	10TH APPLICANT
STEPHEN NJOROGE KANYORA	11TH APPLICANT
MOHAMMED OSMAN HASSAN	12TH APPLICANT
GLADYS WAIRIMU GICHANGA	13TH APPLICANT
EMMANUEL NJAU	14TH APPLICANT
JANE CHAKU NDIGA	15TH APPLICANT
SUSAN K. CHESIALE	16TH APPLICANT
EVERLYN NYAMBURA	17TH APPLICANT
S.K KOSGEY	18TH APPLICANT
AGNES WANJIKU KARIUNGI	19TH APPLICANT



LEAH NJERI KARANJA 20TH APPLICANT

AND

HARRISON MWANGI NYOTA RESPONDENT

(Being an application to strike out a Notice of Appeal dated 24th December 2018, against an intended appeal of the decision of Wendoh J dated 20th December 2018) IN (Nakuru HCCC No. 110 OF 1998)

RULING

1. The applicants herein have vide a motion dated March 7, 2019, brought pursuant to the provisions of section 3A of the Appellate Jurisdiction Act cap 9 of the Laws of Kenya, rules 42, 43, 77 and 84 of the Court of Appeal Rules 2010, moved the court to strike out the notice of appeal dated and filed on December 24, 2018, for want of service upon the applicants.
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Kahiga Waitindi, learned counsel who has the conduct of this matter on behalf of the applicants. He deponed inter alia, that the judgment intended to be appealed against was delivered by Wendoh, J. on December 20, 2018 and that the impugned notice of appeal was lodged in the High Court on December 24, 2018; that to date, the applicants have never been served with the said Notice of Appeal and that they were not even aware that the respondent had preferred an appeal against the decision delivered on December 20, 2018.
3. He further deposed that the applicants only became aware that the respondent had preferred an appeal and filed Notice of Appeal when the firm was served with an application for stay of execution dated January 18, 2019, on February 24, 2019.
4. When the matter came up before us for plenary hearing on March 27, 2023, Mr. Karanja learned counsel appeared for the applicants. There was no appearance on part of the respondent despite the parties having been served with the hearing notice on March 1, 2023 at 2:19 PM. Mr. Karanja further intimated to court that he had served the respondent with the application on March 14, 2019, but there had been no response. According to him, the applicants' motion therefore was not opposed. None of the parties filed written submissions.
5. We have carefully looked at the applicants' motion, the grounds thereof, the supporting affidavit and the law. We have perused the impugned notice of appeal dated and lodged in the court on December 24, 2018 and there is no evidence on record to show that the same was ever served upon the respondent as provided under rule 77 (1) of the Court of Appeal 2010 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.”

6. It is instructive to note that the above Rule is couched in mandatory terms. Additionally, 5 years down the line no appeal has ever been filed by the respondent to date.



7. Faced with a similar situation in the case of *Daniel Nkirimpa Monirei v Sayialel Ole Koilel & 4 others* [2016] eKLR, this Court stated as follows:

“Whichever way, one looks at it, there was no service of the Notice of Appeal on the applicant. The purpose of service of a Notice of Appeal is to alert the parties being served that the case in question has not been concluded yet as the same has been escalated to another level. This enables the party to prepare and get ready for another fight, be it by way of gathering resources or just getting mentally prepared for defending the intended appeal. Failure to serve a party with a Notice of Appeal within the time prescribed by law gives a party false belief that the matter has been concluded, only to be ambushed later with the record of appeal in which the said notice is tucked away somewhere in the record. That occasions prejudice to the ambushed party, and it is in our view a habit that should not be countenanced in any fair and just process. That would explain why rule 77(1) of the *Court of Appeal Rules* is couched in mandatory terms.”

8. We fully associate ourselves with the above position and reiterate the same. In view of the circumstances in this case, we have no hesitation to strike out the notice of appeal dated December 24, 2018, which we hereby do. Accordingly, the notice of appeal dated December 24, 2018, is hereby struck out with costs to the applicants.

It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 30TH DAY OF JUNE, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

