



Baluchi v Giriama Central Properties Association & 2 others (Civil Application E034 of 2022) [2023] KECA 646 (KLR) (9 June 2023) (Ruling)

Neutral citation: [2023] KECA 646 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E034 OF 2022
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
JUNE 9, 2023**

BETWEEN

AYUB SHERO BALUCHI APPLICANT

AND

GIRIAMA CENTRAL PROPERTIES ASSOCIATION 1ST RESPONDENT

OMAR MOHSEN AHMED MOHAMMED 2ND RESPONDENT

MWASAKA LIMITED 3RD RESPONDENT

(An application for striking out a Notice of Appeal lodged on 25th April 2022 in the Environment and Land Court against the judgment of the Environment and Land Court at Mombasa (Munyao J.) delivered on 13th April 2022 in ELC No. 216 of 2012)

RULING

1. The Applicant herein, Ayub Shero Baluchi, in his Notice of Motion dated May 23, 2022 brought pursuant to rule 77, 84 and 104(b) of the *Court of Appeal Rules* (now Rules 79, 86 and 107(b) of the 2022 Rules, hereinafter the Rules) seeks to have the notice of appeal dated April 25, 2022 struck out for failure to take necessary steps in regard to service of a notice of appeal on all persons directly affected by the appeal. It also seeks the costs of the application. The application is supported by the affidavit sworn by Josephine Waithera Kimani, an Advocate of the High Court seized with conduct of the matter, dated May 23, 2022.
2. It is deposed on behalf of the Applicant that the Learned Trial Judge delivered judgment in Malindi Environment and Land Court (hereinafter ELC) 216 of 2012, dismissing the suit filed by the 1st respondent. That being dissatisfied with the judgment, it filed and served their notice of appeal upon the applicant and the 3rd respondent, leaving out the 2nd respondent. It is deposed that the name of the 2nd respondent was struck out by an order of the trial court made on April 2, 2012. That the 2nd



respondent was directly affected or likely to be affected by the judgment should it be reversed by the Court of Appeal. That at the trial, the 1st respondent's witness testified that 10% of the purchase price was received by the 2nd respondent. That if any payment was made, it was not by the applicant as he was out of the Country. Further, without service of the notice of appeal on the 2nd respondent, the notice of appeal cannot stand as the contract was executed between the 2nd respondent (through the office of the 3rd respondent) and the 1st respondent.

3. It is deposed that the applicant will be prevented from raising an objection under rule 104 (b) of the Court of Appeal, 2010 if no application was filed by the 1st respondent seeking to effect service, or for any reason dispense with service on the 2nd respondent.
4. The 1st respondent opposed the application vide their replying affidavit sworn on August 25, 2022 by Paul Buti, an advocate of the High Court. He deposed that the suit in ELC No. 216 of 2012 was commenced by a plaint dated December 7, 2012. That the 2nd defendant in the suit, Omar Mohsen Ahmed Mohammed (the 2nd respondent herein) caused a memorandum of appearance dated May 30, 2013 to be filed on his behalf by Stephen Macharia Kimani advocate. That the memorandum of appearance was served upon the 1st Respondent on the same day. That on May 31, 2013, Stephen Macharia Kimani advocate filed a Notice of Motion on behalf of the 2nd respondent that sought to have the plaint struck out for not disclosing a reasonable cause of action against the 2nd respondent. The 1st respondent, the Plaintiff in the case did not oppose it, and the application was allowed on April 2, 2014. Consequently, the 2nd respondent ceased to be a party and did not take any part in the proceedings, and the judgment that followed did not affect him either directly or indirectly. He deposed that the application had no limbs on which to stand.
5. The application was heard virtually on the February 8, 2023. Present at the hearing was learned counsel Mr. S.M. Kimani for the Applicant and learned counsel Mr. Paul Buti for the 1st respondent. There was no appearance for the 3rd Respondent despite service of the hearing notice upon counsel on record for them. Mr. Buti drew the court's attention to fact the 2nd respondent was represented by Mr. Kimani, counsel for the applicant at the commencement of the trial in the ELC, and therefore may not have been served with the application.
6. Mr. Kimani relied on his written submissions dated January 20, 2023, and highlighted three points. The first point was that the 2nd respondent was a necessary party and the fact he ceased to be a party is no reason not to include his name in the record of appeal; that if on appeal the judgment of the ELC was overturned, or the applicant were required to refund monies paid in the transaction the subject matter of the suit, the applicant would have been deprived a remedy by way of indemnity. Secondly, while placing reliance on the case of *Ahmed A.K. Kusais vs. Syed Abdulla Fadhal* (1958) EA 60, counsel urged that the object of joining a party directly affected by an appeal was to protect such party from potential damage in case orders are made against them. Thirdly that this court should interpret rule 79 (1) of the Rules liberally by reading into it the provisions of order 42 rule 22 of the Civil Procedure Rules and adjourn the appeal to allow the joining of an omitted party to the appeal in order to give all the parties an opportunity to be heard and appropriate orders made.
7. Mr. Buti for the 1st respondent urged that the notice of motion application was incompetent for failing to comply with the mandatory provision of rule 42 (1) of 2010 Rules that were applicable at the time the application was filed. Secondly, that Mr. Kimani acted for the 2nd Respondent at the trial before the ELC, and applied to have him, his client then, struck out of the plaint on the grounds no cause of action was disclosed in the pleadings, or had accrued to the 1st respondent. the impugned notice of appeal is annexed to the replying affidavit. He urged that the 2nd respondent was removed from the



record before he filed any defence. That the said order striking out the suit against the 2nd Respondent was made in 2014, and the 1st Respondent had no intention of appealing against the order. He urged that the application had no merit and should be dismissed.

8. We have considered this application, the affidavits for and against the Motion together with the submissions by counsel. The application is brought pursuant to rule 79 of the Rules, which requires service of a notice of appeal on all parties directly affected by the appeal. (See *Daniel Nkirimpa Monirel vs Sayialel Ole Koilel & 4 others* [2016] eKLR). It also invokes Rule 86 of the Rules, which empowers a person affected by an appeal to apply to have it struck out on ground no appeal lies, or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. Finally, it invokes rule 107 of the Rules that precludes a party in an appeal from challenging the competence of an appeal on grounds other than those contained in a memorandum of appeal or notice of cross-appeal, or on grounds that might have been raised by application under rule 86 of the Rules.

9. The primary and essential object of a requirement of service of any proceedings must be that they are to be brought to the attention of the person concerned so that he has an opportunity of putting his case, if he wants to, before the court. This Court considered what the phrase “directly affected by the appeal” means in *Joseph Kiangoi vs. Wachira Waruru & 2 others* [2010] eKLR, and delivered itself thus:

“At the outset, it is clear to us that, the heart of this application is the meaning we attach to the phrase “directly affected by the appeal.” In our construction, we do not have to re-invent the wheel in that in the case of *Daniel Odindo Waga vs Nabil Hassan* [2009] e KLR Civil Appeal No. 159 of 2009 this court defined the phrase as follows:-

“The phrase “directly affected by the appeal “does not have a technical meaning. It is a question of fact whether a party shall or shall not be affected by the outcome of an appeal. The test we think, must be whether if the appeal were to succeed, the result will adversely affect that party.”

10. The question whether the 2nd respondent will be directly affected by the appeal is a question of fact. It has been urged, and is therefore a common ground that the applicant who was a defendant in the case before the ELC, filed a notice of motion before that court, brought under order 4 (1), (2), (3), (4) & (6) and order 50 rule 1 and successfully had the plaint filed by the 1st Respondent herein struck out as against the 2nd respondent. The grounds he relied on was principally that the plaint did not disclose any cause of action against the 2nd respondent. The ELC heard and dismissed the 2nd respondent’s suit. The applicant is now back, seeking to have the appeal filed by the 1st respondent struck out for leaving out the 2nd respondent as a party and for failing to serve him.

11. The applicant should have demonstrated why he argues that the 2nd respondent will be directly affected by the appeal and should have been named as a respondent. As noted by the 1st Respondent no grounds have been given on the face of the application, a procedural defect under rule 44 of the rules, which is coached in mandatory terms. The only grounds that can be gleaned are those contained in the supporting affidavit. They demonstrate that the 2nd respondent was sued alongside the applicant, both who were represented by the same advocate that is still acting for the applicant in this appeal. On his application, the 2nd respondent was removed from the record. From these facts, it is clear to us that the applicant is approbating and reprobating on the issue whether the 2nd respondent was a party that was ‘directly affected’. We think that the applicant has changed goal posts without giving any grounds to support that shift. We find no basis upon which we can allow this application.



12. We have concluded that this application is for dismissal Accordingly, we dismiss the notice of motion dated May 23, 2022 with costs to the 1st respondent.

13. Those are our orders.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF JUNE 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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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

