



**Loita Development Limited v Keke & another (Civil Application
E091 of 2021) [2023] KECA 707 (KLR) (9 June 2023) (Ruling)**

Neutral citation: [2023] KECA 707 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E091 OF 2021
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
JUNE 9, 2023**

BETWEEN

LOITA DEVELOPMENT LIMITED APPLICANT

AND

JUMA MOHAMED KEKE 1ST RESPONDENT

HAMISI DZILE HAMISI 2ND RESPONDENT

(An application for an order to strike out the Notice of Appeal dated 5th October, 2021 filed from the judgment and decision of the Environment and Land Court at Mombasa by Hon. Justice C.K Yano and delivered on the 23rd September, 2021 by Hon. Lady Justice N. Matheka, in ELC No. 167 of 2012)

RULING

1. Before us is the Notice of Motion dated November 25, 2021 expressed to be brought pursuant to Rules 77(1) and 84 of the [Court of Appeal Rules 2010](#), now Rules 79 (1) 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, 2021 struck out. The application is premised on the grounds on the face of the application and is supported by an affidavit sworn by Natalie Ongeso Akwanalo, the advocate for the Applicant herein, on November 25, 2021.
2. According to the deponent, on September 23, 2021, the Environment and Land Court delivered its judgement and granted the orders sought in the Amended Plaint dated 28th August, 2021. Being dissatisfied with the said judgement, the Respondent lodged a Notice of Appeal dated October 5, 2021 together with a letter dated October 5, 2021 addressed to the Deputy Registrar and copied to the deponent's firm requesting for copies of the proceedings and judgement.



3. The said Notice of Appeal was however served on the deponent's firm on October 28, 2021 outside the 7 days prescribed by Rule 77(1) of the Rules for such service. It was therefore averred that the 1st and 2nd Respondents failed to take an essential step in the proceedings within the prescribed time.
4. On November 18, 2022 a replying affidavit was filed on behalf of the Respondents which was purportedly sworn by Hamisi Dzile Hamisi, the 2nd Respondent herein. We say purportedly because the Applicant has taken issue with the same. According to the said affidavit, being dissatisfied with the said judgement, he, on 2September 3, 2021 instructed his advocates who filed Notice of Appeal dated October 5, 2021 and applied for copies of the proceedings on October 8, 2021. In his affidavit, the deponent referred to an affidavit sworn by George Otieno Scott, which was annexed to the said replying affidavit.
5. According to George Otieno Scott, a Legal Clerk in the firm of M/s Marende Necheza & Company Advocates, on or around the October 6, 2021 he was instructed by the said firm to file, on behalf of the Respondents, a Notice of Appeal dated October 5, 2021 which he did the same day and left copies thereof for the Deputy Registrar's signature. On 8th October, 2021 he collected the same from the Court for the purposes of effecting service the following week on October 12, 2021, since he was scheduled to proceed on leave on October 18, 2021 and there was a public holiday in between. However, he was unable to report to work because he fell sick and only returned to the office on October 19, 2021. He deposed that due to his indisposition, he forgot about the said Notice and therefore did not inform or seek assistance of his colleague to assist him effect service.
6. He further deposed that despite being still weak he, on October 19, 2021, went to the office with the intention of handing over and to collect his leave allowance and out of intuition, he went through his desk and realized the mistake upon finding the envelope containing the Notice inside his desk drawer. He averred that he promptly gave the Notices to his colleague to effect service on the Applicant and that service was duly effected on the October 21, 2021 since October 20, 2021 was a public Holiday. The delay in effecting the service, according to him, by his colleague, was due to the fact that Respondent's offices were outside the town and due to workload. It was further explained that since 23rd and October 24, 2021 were weekends, his colleague managed to effect service on the Applicant on the October 28, 2021. According to the deponent, the failure to effect service was a pure unintended mistake which he had never committed before. He pleaded with the Court not to penalize the Applicant for his mistake since the matter involved land ownership which ought to be determined on merits. According to the deponent, no prejudice is likely to be caused to the Applicant if the application is not allowed.
7. By way of rejoinder the Applicant filed a supplementary affidavit sworn by Hugh Rule, the Applicant's director, in which the deponent disputed the signature appearing in the replying affidavit stating that the same does not belong to the deponent of the said affidavit based on the deponent's known signatures from the documents produced during the hearing.
8. At the virtual hearing of this application on February 7, 2023, Learned Counsel Mr Uswin Khanna held brief for Ms Wanjiku Mohamed for the Applicant while there was no appearance for the Respondent despite service. Mr Khanna relied on the written submissions in which it was contended that since service of the Notice of Appeal dated October 5, 2021 out of time was not disputed by the 1st and 2nd Respondents and as there was no order extending time, the said notice of appeal is deemed to be incompetent in which event this Court has no jurisdiction to hear and determine the matter. In this regard reference was made to Banking Insurance and Finance Union v. Murata Sacco Society Ltd (2018) eKLR. The applicant distinguished this case from the case of Abdirahman Muhammed Abdi v Safi Petroleum Products Limited & 6 Others (2011) eKLR where the delay was only for one day as opposed to the instant case where the delay is for 14 days. In view of the issue taken with the authenticity of



the signature appearing in the replying affidavit, this Court was urged to order investigation into the matter.

9. Regarding the affidavit sworn by George Otieno Scott, it was submitted that there were contradictions regarding whether he was to proceed on leave and yet went back to the office on October 19, 2021. It was further noted that though the said George Otieno Scott referred to his colleague, the name of the said colleague was not disclosed.
10. Though there was no representation of the Respondent at the hearing, the Respondents filed written submissions in which the averments in the replying affidavit were reiterated. In support of the same the Respondents relied on *Belinda Murai & Other v Amoi Wainaina* [1978] KLR and *Abdirahman Muhammed Abdi v Safi Petroleum Products Limited & 6 Others* (2011) eKLR, and urged that the inadvertent mistake and error of the Advocate's clerk should not be visited upon the Respondents to occasion a miscarriage of justice. It was argued that striking out the Notice of Appeal would be a draconian approach in the circumstances as there was no inordinate delay and the Court was urged not to grant the orders sought.
11. We have considered the application, the affidavits both in support of and in opposition to the application and the submissions made. In this case it is not in doubt that there was a delay of 14 days in serving the Notice of Appeal. While the same is admitted, the Respondents explained that the delay was as a result of illness on the part of the concerned court clerk. In *John Mutai Mwangi & 26 Others v Mwenja Ngure & 4 Others* [2016] eKLR the strict timelines, it was explained:

“...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. The Supreme Court in *Hamida Yaroi Shek Nuri v Faith Tumaini Kombe & 2 others* [2019] eKLR has had an occasion to explain the importance of the Notice of Appeal by holding that:

“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...’

(38) 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. In our view a person who runs/falls afoul of the law ought to speedily take remedial measures before the other party takes action to have the process nullified. In this case, the Notice of Appeal was filed on October 6, 2021. The instant application was filed on 2November 5, 2021, more than a month later. By then, no step had been taken by the Respondents to legitimize the said Notice of Appeal, assuming it was capable of being remedied. In fact, by the time we heard the application on February 7, 2023, more than one year later, no such step had been taken. To our mind a party who has defaulted in complying with the procedural stipulations should not merely tell the Court, when confronted with an application to strike out its processes, that no prejudice has been occasioned and that its cause ought to be determined on merits. This Court in *Sukwinder Singh Jutley v. Prudential Association Co of Kenya Ltd & Another* Civil Appeal (Application) No 62 of 2004 held that:

“In procedural rules that lack clarity, the Court is at liberty to lean on constructions which aid the course of justice but not in clear rules which have been interpreted many times by the Court as to depart from the rule without changing it would be an aberration that would confound and confuse litigants and should not be countenanced even for a solitary unintentional omission.”

14. The rationale for strict adherence to rules of practice and procedure was explained in *Chelashaw v Attorney General & Another* [2005] 1 EA 33, where it was held that without rules of practice and procedure the application and enforcement of the law and the administration of justice would be chaotic and impossible and their absence or non-adherence would lead to uncertainty of the law and total confusion since laws serve a purpose and they enhance the rule of law. That enforcement of such rules is imperative was emphasized by this Court in *Onjula Enterprises Ltd v Sumaria* [1986] KLR 651, where it was held that:

“The rules of the court must be adhered to strictly and if hardship or inconvenience is thereby caused, it would be that easier to seek an amendment to the particular rule. It would be wrong to regard the rules of the court as of no substance. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to disregard of the principle involved. See *London Association for the Protection of Trade & Another v Greenlands Limited* [1916] 2 AC 15 at 38.”

15. This Court in *Taracisio Githaiga Ruitibibo v Mbutia Nyingi* Civil Appeal No 21 of 1982; [1984] KLR 505, cautioned that no court, particularly this one, should wish away the Rules of Court so ignobly.

16. In our view, a party in default ought not to seek to justify that default by simply saying that the period of default is short. What is a short period is subjective and once the Court starts making determinations



based on subjective consideration we cannot tell with certainty where those considerations will stop. Such views may end up diluting the requirements for compliance with the Rules, a practice which, we must respectfully decry, has of late been taking root where, instead of parties expeditiously taking remedial steps, they simply sit back and when confronted with applications for striking out, tell the Court that there is no prejudice caused and that the Court ought to determine matters on merits and not on technicalities by ignoring non-compliance with procedural stipulations as to timelines.

17. In the case before us no remedial step has been taken with a view to having the time prescribed for serving the Notice of Appeal extended. We have not been told when, if at all, it will ever be taken.

In those circumstances can this Court simply sit back and wait in the hope that one day the Respondents will take that step? With due respect to the Respondents while the reasons given may be good reasons for extending time within which a necessary step ought to be taken, we find them not good enough to sustain an otherwise incompetent Notice of Appeal or Record of Appeal.

18. In the premises, we find merit in the Notice of Motion dated November 25, 2021. We hereby strike out the Notice of Appeal dated October 5, 2021 with costs.

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

