



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Hanos (K) Ltd v Shah (Civil Application 110 of 2018)
[2023] KECA 935 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 935 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 110 OF 2018
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
JULY 28, 2023**

BETWEEN

HANOS (K) LTD APPLICANT

AND

DHIREN MOHANLAL SHAH RESPONDENT

(Being an application for an Order to strike out the Notice of Appeal dated 22nd October, 2018 from the judgement and Decision of the Environment & Land Court at Mombasa (Honourable Justice C. Yano) and delivered on the 18th October, 2018 in Mombasa ELC Case No 52 of 2016 [Formerly Misc Application No. 667 (OS) of 2018])

RULING

1. Before us is a Notice of Motion dated November 15, 2018 taken out by the Applicant, Hanos (Kenya) Limited against the Respondent, Dhiren Mohanlal Shah seeking that the Respondent's Notice of Appeal dated October 22, 2018 be struck out on the ground that no appeal lies and that necessary steps in the appeal have not been taken within the prescribed time or at all.
2. The Motion was supported by a supporting affidavit and a supplementary affidavit sworn by Ushwin Khanna, the Applicant's advocate on November 15, 2018 and September 25, 2020 respectively.
3. According to the Applicant, Judgement the subject of the said Notice of Appeal was delivered on October 18, 2018 by which the orders sought in the Originating Summons filed by the Applicant against the Respondent were granted. Aggrieved by the said decision, the Respondent filed a Notice of Appeal on October 22, 2018 against the whole decision which Notice was served on October 30, 2018. In substance, it is the Applicant's contention that the said Notice was never lodged as required under Rule 77 of the [Court of Appeal Rules](#) at the time it was being served; that the said Notice was served out of time, the time for service having lapsed on October 29, 2018; and that no appeal lies from Order 37 Rule 7 of the [Civil Procedure Rules](#) without leave.



4. According to the deponent, on October 14, 2019 just before the hearing of Civil Application No 59 of 2019 dated July 24, 2019 (hereafter referred to as the stay application), he was served with a Notice of Appeal dated and filed on the October 22, 2018 which was subsequently signed by the Deputy Registrar of the High Court on the September 5, 2019, 11 months after the same was filed together with a copy of the supplementary Record of Appeal filed on September 19, 2019. It was averred that the said Notice of Appeal was not properly before this Court when the stay application was heard but was introduced into the Court record without leave being sought and obtained hence was an abuse of the process of the Court. As a result, it was averred, the Applicant suffered grave prejudice as the Court in the said stay application relied on the said document when granting the orders sought by the Respondent. It was therefore sought that the said supplementary record of appeal be expunged from the record.
5. In response the Respondent relied on an affidavit sworn by Terrence Omondi, a court process server who deposed that on October 22, 2018, he received, among other documents a Notice of Appeal dated October 22, 2018 with instructions to serve the same upon M/S Anjarwala and Khanna Advocates. He then proceeded to the ELC Registry, Mombasa where he filed the same pending signature from the Deputy Registrar. However, between October 23, 2018 and October 25, 2018 when he visited to the said Registry to pick the sealed and signed Notice of Appeal, he found that the same had not been signed or sealed by the Deputy Registrar. Noting that time was running out to serve the said documents, he served an extra copy of the unsigned and unsealed Notice of Appeal and the letter dated October 22, 2018 on the Applicant's Advocates.
6. According to the deponent, the delay in effecting service of the said Notice was due to the fact that since October 22, 2018 to May 29, 2019, the file was not available in the registry for any action since the file had been in the typing pool; that on July 13, 2019 the court file revealed that the Notice of Appeal had not been signed or sealed though the Certificate of delay had been signed and sealed; that several visits in the last two weeks month of July were unsuccessful; that it was not until August 20, 2019 that he was informed that the reason the Notice of Appeal had not been sealed was because the Notice was showing the date as 2018 instead of 2019; that on August 23, 2019 the Firm amended the Notices as ordered and forwarded the same for signing vide a letter dated August 23, 2019; and that the Deputy Registrar amended the said Notice of Appeal.
7. The Court's attention was drawn to the fact that during the hearing for the stay application, the Applicant raised the issues herein that the Notice of Appeal contested in this Application was defective, and that this Court gave its Ruling on the issue in which it determined that the Respondent herein cannot be faulted at all for serving the Notice of Appeal in the manner it did and that no prejudice was suffered by the Applicant. In addition, this Court ruled that it was unable to find that no Appeal lies as urged by the Applicant herein.
8. The Respondent's view, therefore was that having already been determined that the Notice of Appeal was properly filed and served against the Applicant, and that an Appeal lies, the application herein was rendered Res Judicata, moot and should be withdrawn or dismissed forthwith.
9. This application was argued before us on this Court's virtual platform on 20th March, 2023 during which Learned Counsel, Mr Ushwin Khanna, appeared for the Applicant while Learned Counsel, Mr Mutuku Mbithi appeared for the Respondent. Both counsels relied on their written submissions which they highlighted.
10. According to Mr Khanna, the Notice of Appeal was filed and served out of time and that this was appreciated in the stay application. It was further contended that the said Notice was neither lodged nor endorsed by the Deputy Registrar of the High Court and that as the same was never lodged by



the time of its service, extension of time ought to have been sought. Further, it was averred that the endorsed Notice was not served until after 5 weeks of its endorsement and that this rendered the Notice incompetent and prejudiced the Applicant. According to Learned Counsel, the service of the un-endorsed Notice was not only prematurely done but was an abuse of the Court process as this was contrary to Rules 77 and 79 of the Rules of this Court. In this regard reliance was placed on [*Salama Beach Hotel Ltd & 3 others vs. Kenyariri & Associates*](#) [2016] eKLR.

11. It was submitted that since the appeal arises from a decision made in Originating Summons, leave of the Court was required without which the Notice and Record of Appeal were both incompetent. In this regard, reliance was placed on [*Postal Corporation of Kenya vs. Kamconsult Limited & Another*](#) Civil Appeal No 42 of 2003 and [*Kenya Commercial Bank Limited vs. Tony Manaseh Esipaya*](#) Civil Appeal No 105 of 1998.
12. According to the Applicant, the Respondent was the registered owner of 2 plots which proprietorship was extinguished by the operation of law. Therefore, it was contended, the appeal would be an academic exercise since the titles cannot be reversed. Learned Counsel explained that by virtue of Rule 74 of the [*Court of Appeal Rules*](#), the issue of leave to appeal was not raised during the stay application.
13. Mr Mbithi, on behalf of the Respondent relied on the replying and further affidavit sworn and filed in response to the Motion as well as the submissions filed, and reiterated that the issues raised in the present application had been raised and were determined in the stay application and that the said determination has not been reviewed. It was submitted that the Court found that the delay was sufficiently explained. He relied on the case of IEBC and the Court was urged to apply the overriding objective and strive to achieve substantive justice since the Applicant was aware that the Respondent intended to appeal and no prejudice was occasioned by the delay which was due to the Deputy Registrar's failure to sign the Notice which was filed and served within time. According to Learned Counsel, his submissions were restricted to the Notice of Appeal since there was a pending application being Civil Application No 64 of 2019, seeking to strike out the appeal itself.

Analysis and Determination

14. We have considered the application, the affidavits, both in support of and in opposition to the Motion, the submissions made and the authorities relied upon.
15. The Motion before us is expressed to be brought under Rules 75, 77(1), 83 and 84 of the [*Court of Appeal Rules, 2010*](#). To our mind the provision that provides for the striking out of a Notice of Appeal, which is what is being sought in this application is Rule 84 of the 2010 [*Rules*](#) (now Rule 86 of the 2022 [*Rules*](#)). That rule provides that:

A person affected by an appeal may, at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground—

- i. that no appeal lies; or
- ii. that some essential step in the proceedings has not been taken or has not been taken within the prescribed time:

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days after the date of service of the notice of appeal or record of appeal, as the case may be.



16. In this case, it is contended that the said Notice was never lodged as required under Rule 77 of the [Court of Appeal Rules](#) at the time it was being served; that the said Notice was served out of time on time for service having lapsed on October 29, 2018; that no appeal lies from Order 37 Rule 7 of the [Civil Procedure Rules](#) without leave; and that the appeal has been overtaken by events.
17. As is clear from the above rule the fact of an appeal having been overtaken by events is not one of the grounds for striking out a Notice of Appeal or an appeal under the said rule. It is contended that the appeal has been overtaken by events due to the fact that titles have been issued pursuant to the impugned judgement. In our view, the fact that execution of a decree being appealed against has been undertaken does not necessarily bar a person aggrieved by a decision from exercising his undoubted right of appeal. Before this Court in [Machakos District Co-Operative Ltd. vs. Nzuki Kiilu](#) Civil Application No Nai 17 of 1997, it was argued that since the decretal sum had been paid, the right of appeal had been lost. The Court (Shah, JA) however had no hesitation in holding that the fact that the decretal sum has been paid does not deprive a party of the right of appeal. Accordingly, that ground must fail both on procedural infirmity and in substance.
18. The next ground is whether the fact of service of an un-lodged Notice of Appeal rendered such service incompetent. Rule 79(1) of the [Court of Appeal Rules, 2022](#) (formerly Rule 76(1) of the 2010 [Rules](#)) provides that:
- An intended appellant shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal.
19. What this rule provides is that a Notice of Appeal may be served before it is lodged or, where it has been lodged, within seven days of its being lodged. To our mind, there is a very good reason for this provision. There may be occasions when due to reasons which an intending appellant cannot be faulted for, the Notice of Appeal is, for one reason or the other, not endorsed by the Deputy Registrar in good time to enable the intending appellant retrieve it and serve it with the prescribed timelines. If it were the rule that only the endorsed Notice of Appeal must be served, then such a party would be penalised notwithstanding the fact that he has taken all necessary steps towards the commencement of the appeal process. In that event this Court would be doing justice to such a party and yet a court of justice has no jurisdiction to do injustice. See [M Mwenesi vs. Shirley Luckhurst & another](#) Civil Application No Nai. 170 of 2000 and [Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others](#) Civil Application No Nai. 364 of 1999.
20. It therefore follows that a Notice of Appeal that has been filed but not “lodged” may validly be served. Our view is supported by the decision in [Gulambusein Noormohamed Cassam & another v Shashikant Ramji Sachania & another](#) 1 KAR 24 in which the Court interrogated the then rule 74(1) and (2) of the [Court of Appeal Rules](#) which are in pari materia with the rules under consideration before us and concluded that:
- “Notice of Appeal may be served on the party directly affected by the appeal without it being signed by the Registrar, and without it also receiving any official recognition or sanction by the court either before or within seven days after lodging it in duplicate with the Registrar of the Superior Court who is required under rule 74 of the Court of Appeal Rules forthwith to send one copy thereof to the appropriate registry.”



21. Similarly, in *Shital Bimal Shab & 2 Others Vs. Akiba Bank Limited* [2006] 2 EA 323, Waki, JA, expressed himself as hereunder:

“Rule 76 of the Court of Appeal Rules clearly shows that notice of appeal may be served on the party directly affected by the appeal without it being signed by the Registrar, either before or within seven days after lodging it. There is no prohibition in the Rules against serving notice of appeal even before it is lodged in the Superior Court.”

22. Delivering itself on the stay application in Civil Application No 59 of 2019, this Court on 7th February, 2020 identified the issues before it as the competency of the appeal on the ground that the notice of appeal was not signed by the Deputy Registrar and lodged before it was served; whether the notice was served out of time; whether the applicant had locus standi to institute the application, the suit properties having been registered in the names of the respondents, months before the application was filed; and whether the appeal lies. In its ruling, the Court found that the appellant (the Respondent in this application) could not be faulted for serving the notice as it was and that the two days delay had been sufficiently explained and was not prejudicial to the respondent (the Applicant in this application).

23. There is no doubt at all in our mind that two of the issues raised before us: whether service of the notice before it was lodged was proper and whether the notice of appeal was served out of time were placed before this Court at the time of the hearing of the stay application and were duly dealt with. If the applicant is aggrieved by the decision, the option is not to challenge it by way of another application.

24. As regards the third issue whether an appeal lies from a decision made on originating summons, we are of the view that the issue was not substantially in issue before the Court at the time of the hearing of the stay application. It was not therefore dealt with.

25. The Applicant’s contention that an order or decision made under Order 39 is not appealable as a matter of right. In our view, an Originating Summons is a suit as opposed to an application. The resultant product of such proceedings where a determination is made on merit finally disposes of the suit and is therefore appealable as of right. Section 66 of the *Civil Procedure Act* provides that:

Except where otherwise expressly provided in this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie from the decrees or any part of decrees and from the orders of the High Court to the Court of Appeal.

26. This Court in *Ishmael Ithongo v Geoffrey Ithongo Thindiu* Civil Appeal No 37 of 1980 held that since an adjudication of the Court on an Originating Summons conclusively determines the rights of the parties with regard to all or any of the matters in controversy a decree has to be filed. Similarly, it was held in *Roy Shipping SA and Others v Dodoma Fishing Co. Ltd (1)* [1995-1998] 1 EA 293 that as a general rule, orders which conclusively determine the rights of the parties on all or any of the matters in controversy in a suit or matter are appealable as of right.

27. Having considered the issues raised in this application we find no merit in the Motion dated November 15, 2018 which we hereby dismiss with costs to the Respondent.

28. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY 2023.

P. NYAMWEYA

.....



JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

