



**Imwatok (MCA) v Nairobi City County & 7 others (Civil Appeal
(Application) 300 of 2018) [2023] KECA 993 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 993 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 300 OF 2018
HM OKWENGU, LA ACHODE & JM MATIVO, JJA
JULY 28, 2023**

BETWEEN

HON PETER A IMWATOK (MCA) APPELLANT

AND

NAIROBI CITY COUNTY 1ST RESPONDENT

HE MIKE MBUVI SONKOO 2ND RESPONDENT

MRS VESKA KANGOGO 3RD RESPONDENT

MR STEPHEN LEBOO MORINTAT 4TH RESPONDENT

**THE DIRECTOR GENERAL, PUBLIC PROCUREMENT OVERSIGHT
AUTHORITY 5TH RESPONDENT**

THE CONTROLLER OF BUDGET 6TH RESPONDENT

AAR INSURANCE KENYA LIMITED 7TH RESPONDENT

BLISS GVS HEALTHCARE LIMITED 8TH RESPONDENT

*(Being an application to strike out the notice of appeal,
and record of appeal in Civil Appeal No. 300 of 2018)*

RULING

1. H.E. Mike Mbuvi Sonko, Stephen Leboo Ole Morintat, and Veska Kangongo who are the applicants herein, are the 2nd, 3rd, and 4th respondents respectively in an appeal filed by the appellant Hon Peter A. Imwatok (MCA), who is the respondent to the applicant's motion. In order to avoid confusion, we shall refer to Hon. Imwatok as the appellant. The appeal is against a ruling of the



High Court (Ong’undi J), delivered on June 13, 2022, striking out a petition that had been filed by the appellant.

2. In the notice of motion which is dated June 19, 2019, the applicants are seeking to invoke rule 84 of the *Court of Appeal Rules* 2010, in striking out the notice of appeal and record of appeal filed in this court by the appellant, due to lack of service. In the alternative, the applicants pray that the appeal filed against them be deemed as withdrawn. The application is supported by grounds stated on the motion and an affidavit sworn by Veska Kangongo.
3. The affidavit and the grounds stated on the motion are fairly lengthy but boil down to the following assertions: that contrary to rule 77(1) of the *Court of Appeal Rules* 2010, no notice of appeal has ever been served upon the applicants either directly or through their advocate on record; that the record of appeal was only served on their advocate on 29th May 2019 after an order was made by the Registrar of the Court for service to be so effected; that thereafter the applicants lodged their notice of motion for striking out the notice of appeal and the record of appeal on 19th June 2019; that Rule 84 requires such a motion to be filed within 30 days from the date of service; and that the motion was filed within time as time for filing the motion for striking out started running on May 29, 2019, the date on which their advocate was served with the record of appeal.
4. The application is opposed through a replying affidavit sworn by the appellant/respondent. He deposes that the applicants’ motion is incompetent and bad in law, as it has been brought after more than 30 days from the date of service of the notice of appeal; that the notice of appeal was served on all parties through their advocates who were on record in the High Court proceedings, as no other address for service had been provided; that all the advocates served, received the notice of appeal by stamping with their official stamps and signing thereto; that the record of appeal was similarly filed and served upon all parties either directly or through their advocates.
5. The appellant contends that the applicants’ motion is an afterthought and is made in bad faith; that the parties appeared before the Deputy Registrar for case management conference in regard to the appeal on two occasions, and the applicants did not raise any complaint regarding the alleged non service; and that it was on the third mention that the complaint was raised.
6. During the hearing of the motion, Mr. Harrison Kinyanjui was present for the applicants, Mr. Ashioya for the appellant, Mr. Mokuia for the 1st respondent in the appeal and Mr. Munyua Ezekiel holding brief for Mr. Arua for the 6th and 8th respondents to the appeal and Mr. Nyamu for the 7th respondent to the appeal. There was no appearance for the 5th respondent.
7. Mr. Kinyanjui reiterated that the applicants were not served with the notice of appeal; that the failure to serve the applicants was not a mere technicality as it compromised their right to a fair trial; that the burden was upon the appellant to prove service and they failed to discharge this burden; that the record of appeal which was dated 23rd August 2018 was not served on the applicants until May 29, 2019 after the Registrar had ordered that the applicants be served.
8. Mr. Mokuia for the 1st respondent opted to leave the matter to the court, whilst Mr. Munyua supported the application relying on the applicant’s submissions.
9. Mr. Ashioya for the appellant strenuously opposed the motion. He referred to a copy of a return of service which was filed on September 12, 2020, showing that service was effected on all the respondents to the appeal. He maintained that the applicants were served with the notice of appeal through their advocate Harrison Kinyanjui on June 27, 2018. He explained that the applicants were served with the record of appeal on 31st August 2018 through the Nairobi City County as the 2nd respondent was the



governor and 3rd and 4th respondents were working for Nairobi City County, and the appellant was not sure whether they were retaining the same counsel that they had in the original suit.

10. We have carefully considered the notice of motion, the affidavit in support, and the contending arguments. Rule 84 of the repealed *Court of Appeal Rules* 2010 now rule 86 of the *Court of Appeal Rules* 2022, gives the Court powers to strike out a notice of appeal or a record of appeal where two circumstances are satisfied. First, an essential step in the proceedings has not been taken or has not been taken within the prescribed time; and secondly, an application for striking out is made within 30 days from the date of service of the notice of appeal or record of appeal as may be applicable.
11. The applicants have moved the Court for striking out the notice of appeal and the record of appeal contending that an essential step, that is service of the notice of appeal upon them within the 14 days provided under section 77(2) of the Civil Procedure Rules, has not been done. The question that arises is whether the applicants were served with a notice of appeal, and if so, whether the notice of appeal was served within the required time.
12. The appellant has maintained that the notice of appeal was served upon all parties through their advocates who were on record and that all the respondents including the 4th respondent, through their respective advocates, received the notice of appeal by stamping their official stamps. A copy of the notice of appeal attached to the appellant's affidavit shows several 'received stamps'.
13. The notice which is dated June 18, 2018 and lodged in the High Court on June 25, 2018 has a 'received stamp' of J. Harrison Kinyanjui advocates duly signed, acknowledging receipt of the notice on June 27, 2018 at 12 p.m. It also has 'received stamp' from other advocates indicating service on the same date, June 27, 2018. At page 2 of the notice is another 'received stamp' from J. Harrison Kinyanjui & Co. Advocates duly signed, acknowledging service on May 29, 2019 at 2.30 p.m.
14. Although the applicants denied having been served with the notice of appeal before May 29, 2019 when they were served following orders made by the court, the applicants have not given any explanation regarding the 'received stamp' acknowledging service on June 27, 2018. In particular, there is no affidavit from the applicants' advocate denying the averments made on oath by the appellant regarding service on that day. The affidavit of Veska Kangongo denying service of the notice of appeal, relying on information from Mr. Harrison Kinyanjui, advocate is to this extent, hearsay information.
15. In the circumstances, we have no reason to doubt the appellant's assertions that the applicants were duly served with the notice of appeal. We find that the applicants were actually served with the notice of appeal on June 27, 2018, two days after the notice of appeal was lodged. In accordance with rule 77(2), of the *Court of Appeal Rules*, that was proper service.
16. In this regard, the applicants' notice of motion filed on September 16, 2019 for striking out the notice of appeal, is incompetent having been filed way out of the 30 days provided. The application also lacks merit as the applicants were properly served with the notice of appeal.
17. As regards the record of appeal, the appellant contended that the same was filed in court on 24th August 2018 and that it was thereafter served on all the respondents on record, either directly or through their advocates. The appellant has not availed any affidavit of service confirming when the record of appeal was served on the applicants. However, in a letter dated May 23, 2019, Mr. Ashioya counsel for the appellant contends that since the applicants did not file any notice of address of service upon being served with the notice of appeal, service of the record of appeal was effected upon them directly through their places of employment.



18. The applicants' advocate claimed that they were appointed in the High Court by a notice of appointment dated 4th May 2018. Although they have not said anything about filing an address for service for purposes of the appeal, rule 79(2) of the *Court of Appeal Rules* 2022 provides that:
- “Where any person who is required to be served with a copy of a notice of appeal gave any address of service in or in connection with the proceedings
- in the superior court, and has not subsequently given any other address for service, the copy of the notice of appeal may be served on that person at that address, notwithstanding that it may be that of an advocate who has not been retained for the purpose of an appeal.”
19. Therefore, the record of appeal ought to have been served on the applicants through their advocates, J. Harrison Kinyanjui, just in the same manner that the notice of appeal was served. Once again Mr. Kinyanjui has not filed any affidavit denying service. However, the record indicates that on May 14, 2019, the parties appeared before the Deputy Registrar for case management, on which date the Deputy Registrar directed that the applicants be served within 14 days and also granted leave to the applicants to file an appropriate application upon being served. This is an indication that the applicants did raise the issue of service before the Deputy Registrar, hence the orders made.
20. The fact that the appellant's advocate made some vague reference to service upon the applicants in person, also confirms that the applicants were indeed not served with the record of appeal through their advocates J. Harrison Kinyanjui advocates. The alleged personal service on the applicants is also doubtful as no affidavit of service has been produced. In the circumstances, we find that the applicants were not served with the record of appeal.
21. In regard to service of the record of appeal, rule 92 of the *Court of Appeal Rules*, 2022 formerly Rule 90 of the repealed Court of Appeal Rules 2010 provides that:
- “(1) The appellant shall before or within 7 days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies thereof on each respondent who has complied with the requirements of Rule 81.
- (2) The appellant shall in addition to the service under sub-rule (1), serve copies of the memorandum of appeal and the record of appeal on such other parties to the original proceedings as the court may, at any time on application or of its own motion, direct and within such time as the court may appoint.”
22. Thus, the record of appeal was required to be served on the applicants within 7 days from the date it was lodged in the Registry. However, the applicants had not provided any address for service in the Court of Appeal as required under rule 81 of the *Court of Appeal Rules* 2022 and, therefore, the 7 days prescribed under rule 92(1) could not apply. The issue of service of the record of appeal having been raised before the Deputy Registrar of the Court and an order made for service of the applicants within 14 days, and the applicants having been served with the record of appeal within 14 days as ordered, the applicants must be taken to have been properly served with the record of appeal, under rule 92(2) of the *Court of Appeal Rules* 2022.
23. For the above reasons, we find no merit in the applicants' motion dated June 19, 2019. It is accordingly dismissed.

Dated and delivered at Nairobi this 28th day of July, 2023.



HANNAH OKWENGU

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

