



REPUBLIC OF KENYA



**Kirimi & another v Standard Digital & another (Civil Application
E109 of 2020) [2023] KECA 1039 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 1039 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E109 OF 2020
W KARANJA, J MOHAMMED & LK KIMARU, JJA
JULY 28, 2023**

BETWEEN

JOEL MUTUMA KIRIMI 1ST APPLICANT

SHARON CHEPKORIR KOSKEI 2ND APPLICANT

AND

THE STANDARD DIGITAL 1ST RESPONDENT

THE STANDARD GROUP LIMITED 2ND RESPONDENT

(An application to strike out/deem as withdrawn the Notice of Appeal lodged before the Superior Court on 22nd June, 2020 resulting from the judgment of the High Court of Kenya at Meru (Mabeya, J.) dated on 18th June, 2020 in HCCC No. 9 of 2019)

RULING

1. On June 18, 2020 the High Court sitting at Meru (Mabeya, J) rendered a judgment in favour of the applicants herein as against the respondent whereby the applicants were each awarded Kshs 4,400,000 as damages for defamation. The appellants (respondents in the application) immediately lodged a Notice of appeal on June 22, 2020. Learned counsel for the applicants, nonetheless, claim that the said notice of appeal was never served on them as demanded by Rule 77(1) of the Rules of this Court. Counsel for the respondents also filed an application before the High Court seeking stay of execution of the said judgment after warrants of attachment were issued towards execution of the decree.
2. The learned Judge (Mabeya, J) granted the orders sought but on condition that the respondents deposited 8.8 million in a joint interest earning account in the joint names of the parties' advocates within 14 days in default of which the stay orders would be vacated.
3. It would appear that after getting the stay orders the respondents failed to pursue the substantive appeal to the applicants' prejudice as they are unable to enjoy the fruits of their judgment.



4. The applicants have moved this Court vide the notice of motion dated November 16, 2020 under Rule 83 of the Rules of this Court seeking in the main orders that:
 - i. The respondents notice of Appeal dated June 19, 2020 and lodged in court on June 22, 2020 be deemed as withdrawn/struck out; and that the stay of execution orders issued on the August 12, 2020, and varied on October 24, 2020 be discharged.
5. The application is predicated on the grounds on its face and supported by the affidavit of Joel Mutuma Kirimi dated November 16, 2020. The gist of the grounds on the face of the application, and the depositions in the supporting affidavit, is that the appellants served the Notice of appeal out of time; the letter requesting for proceedings was sent out of time and the Record of appeal was also filed 148 days out of time without leave of the Court.
6. According to the applicants, as at the time they filed the application now before us, the Record of appeal had not been lodged or served on them, and the delay of 148 days has not been explained. Hence the prayers sought.
7. The application is opposed through the replying affidavit sworn by Millicent Ngetich, the Company secretary and Head of legal department of the appellants on the January 20, 2023. She depones that a copy of the notice of appeal and the letter requesting for the proceedings were copied to the applicants on June 19, 2020, and on June 22, 2020. Annexed to her affidavit is the email sent to the Deputy Registrar of the High Court requesting for proceedings. The said email is copied to counsel for the respondents. There is also an mpesa receipt sent to the court for payment made to court for the typing of the proceedings.
8. There is also on record a hard copy of a letter dated 19th June addressed to the Deputy Registrar requesting to be supplied with the proceedings and a copy of the judgment only a day after delivery of the impugned judgment, which letter was sent to the respondents' counsel as an attachment to the email. It is the respondents' case that the Notice of appeal was served by email and so was the letter bespeaking proceedings and the Notice of appeal were both filed and served in time as reflected in their annexures.
9. Ms Ngetich avers that their counsel on record continued following up on the proceedings, but they were not informed that the proceedings were ready for collection until they learnt from the respondent through a replying affidavit they filed in respect of another application before the High Court. They immediately wrote to the court and requested to be supplied with the said proceedings for purposes of preparing a certificate of delay. They contend that, if, indeed, there was any delay, then that can only be blamed on the Deputy Registrar of the High Court, and not on counsel for the respondent. After several correspondences between counsel for the respondents and the Registrar of the High Court, a certificate of delay was finally issued on December 11, 2020. The certificate of delay annexed to the replying affidavit indicates that the proceedings were ready for collection on September 25, 2020. This would mean that the respondents had 60 days from September 25, 2020 within which to file the record of appeal. The Record of appeal was filed on November 24, 2020, which fell within the 60 days permitted by Rule 84 of the [Court of Appeal Rules 2022](#).
10. Both parties filed submissions pursuant to directions given by the Court. At the plenary hearing of the application on January 31, 2023 learned counsel Mr Walukwe appeared for the applicants while Mr Bwire appeared for the respondents. They both made brief highlights of their submissions. We have considered the application in its entirety along with the written and oral submissions and the applicable law.



11. From the record before us, it is clear that this matter was one of the very early appeals that was subjected to e-filing following Covid -19. The new process was still on trial mode and had not been perfected. This is clear from the correspondence which shows that there was some confusion as to stamping documents served through email. The confusion around the sudden shift from manual filing and service to the unfamiliar e-filing cannot be visited on any of the parties herein.

Counsel for the respondents complied with the directions issued by the Court on e-filing and on line service of documents. From our appreciation of the annexures we have mentioned above, we are satisfied that the Notice of appeal and the letter bespeaking proceedings were filed and served on time. We also find that the certificate of delay was properly issued and that from the computation, the Record of appeal was actually filed on time, as submitted by counsel for the respondents.

12. In view of our findings above, there is no basis for us to deem the record of appeal as withdrawn or to strike it out. This application is devoid of merit, and it is accordingly dismissed with costs to the respondents.

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF JULY 2023

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

