



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njeru & another v Mbutei (Civil Appeal (Application) 231 of 2018)  
[2023] KECA 1605 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KECA 1605 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL (APPLICATION) 231 OF 2018  
W KARANJA, LK KIMARU & AO MUCHELULE, JJA  
SEPTEMBER 22, 2023**

**BETWEEN**

**IRERI NJERU ..... 1<sup>ST</sup> APPELLANT**

**PETER MUGO IRERI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ITUMU MBUTEI ..... RESPONDENT**

*(Being an application to strike out the Notice of Appeal and Record of Appeal lodged on 26th October, 2018 and 11th December, 2018, respectively, pursuant to the judgment and decree of the Environment and Land Court of Kenya at Embu (Angima J.) in ELC Case No. 146 of 2015)*

**RULING**

1. Before the Court is a notice of motion dated 26<sup>th</sup> January, 2019 brought under Rules 77, 84 and 90 of the *Court of Appeal Rules* (2010), Sections 3, 3A, and 3B of the *Appellate Jurisdiction Act*, and all other enabling provisions, substantively seeking orders to strike out the appellants' notice of appeal dated 26<sup>th</sup> January, 2019, and the record of appeal lodged on 11<sup>th</sup> December, 2018, with costs to the applicant.
2. The application is supported by grounds on its body and a supporting affidavit by the applicant sworn on the same date, together with annexures thereto. The applicant contends that the appellants lodged the notice of appeal before this Court on 26<sup>th</sup> October, 2018, but failed to serve the same upon him or his advocates. He avers that due to the failure by the appellants to serve him with the said notice of appeal, he went ahead and executed the decree issued by the Environment and Land Court (Angima, J.) on 6<sup>th</sup> November, 2018, in ELC Case No. 146 of 2015. The applicant states that the appellants afterwards filed the record of appeal on 11<sup>th</sup> December, 2018, and only served the same upon the applicant on 23<sup>rd</sup> January, 2019. This was outside the period stipulated by the Rules, without leave of this Court. According to the applicant, the instant appeal has already been overtaken by events as the suit parcel of land, Land Reference No. Embu/Gangara/764, no longer exists as it has been sub-



- divided into twelve portions, with each portion holding an individual title. The applicant urged this court to allow the application as prayed.
3. The application was opposed. The 2<sup>nd</sup> appellant/respondent filed a replying affidavit sworn by himself on 12<sup>th</sup> February, 2019. He stated that he filed the notice of appeal on 26<sup>th</sup> October, 2018. He deposed that at this point, he was acting in person. He averred that he picked the notice of appeal from court registry on 30<sup>th</sup> October, 2018 and proceeded to the applicant's advocate's office where he served the notice upon a lady clerk. He states that he only had one copy of the notice of appeal when he served it upon the applicant's advocate. He then filed and served upon the applicant an application to stay the judgment of the ELC dated 12<sup>th</sup> November, 2018, which application was pending ruling, which had been scheduled to be delivered in March, 2019. He contended that the applicant filed a replying affidavit on 13<sup>th</sup> November, 2018 in response to the said application. According to the respondent, the suit property is still intact. He stated that he has a right of appeal, and urged us to dismiss the applicant's application.
  4. The application was canvassed by way of written submissions filed by the applicant which were later orally highlighted. No written submissions were filed on behalf of the respondent. During the hearing of the application, learned counsel for the respondent, Mr. Momanyi, elected to rely on the replying affidavit filed by the respondent.
  5. It is the applicant's submission that Rule 77 of the *Rules of this Court* (2010) dictated that a party who has lodged a notice of appeal with the Registrar is required to serve the same upon persons affected by the appeal within seven days after filing same. The applicant's case is that the respondent's notice of appeal lodged on 26<sup>th</sup> January, 2019 was never served upon them. The applicant contends that the assertion by the 2<sup>nd</sup> appellant that he had served the notice upon his advocates is unfounded as he has not provided any proof of service. The applicant maintains that he only became aware of the notice after he was served with record of appeal, as the notice formed part of the record.
  6. It was further the applicant's case that the record of appeal lodged by the respondent on 11<sup>th</sup> December, 2018, ought to be struck out for violating the provisions of Rule 90 (1) of the *Rules of this Court* (2010), which required an appellant to serve the memorandum of appeal and record of appeal upon the respondent within seven days upon filing the same. The applicant has deposed that the respondent served the record of appeal upon his advocates on 23<sup>rd</sup> January, 2019 which was outside the statutory timelines provided by the *Rules of this Court*.
  7. Thirdly, it was the applicant's submission that the notice and record of appeal filed by the respondent ought to be struck out, as the instant appeal had been overtaken by events. The applicant avers he has already executed the decree issued by the court in ELC Case No. 146 of 2015, and that he had subdivided the suit land into twelve plots, each holding a respective title deed. The applicant urged this Court to strike out the notice of appeal and record of appeal lodged by the respondent with costs to the applicant.
  8. We have considered the application, the response thereto, the submissions on record, and the law.
  9. It is not disputed that the respondent lodged the notice of appeal against the decision of the ELC on 26<sup>th</sup> October, 2018. While the applicant claims that the respondent never served him with the said notice, it's the respondent's contention that he did serve the notice upon the applicant's advocate on 30<sup>th</sup> October, 2018. The respondent has, however, not provided any proof of such service.



10. Rule 77 (1) of the *Court of Appeal Rules* (2010) stipulated as follows:

“An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal.”
11. This Court in *Mistry Premji Ganji (Investments) Limited v Kenya National Highways Authority* [2019] eKLR observed as follows:

“Rule77(1) is couched in mandatory terms that service of the Notice of Appeal must always be effected upon the respondent in accordance with the Rule. This position is also supported by other decisions of this Court, see *Stephen Kinoro Kamau v. Wanjiku Kinuthia & Another* [2005] eKLR). However, we hasten to add that failure to serve the Notice of Appeal on time may be excused for good reason(s), if the appellant is able to satisfy the Court that the same was excusable in the circumstances.”
12. In the instant case, the applicant states that he became aware of the notice of appeal on 23<sup>rd</sup> January, 2019, after the respondent served him with the record of appeal, to which the notice of appeal was attached. The respondent has not given any reasons why the notice of appeal was served upon the applicant out of the required timelines. Instead, the respondent insists, without proof, that he served the notice of appeal on time. We, therefore, find that the respondent failed to serve the applicant with the notice of appeal within the timeline provided by the *Rules*.
13. This Court, in *Daniel Nkirimpa Monirei v Sayialel Ole Koilel & 4 Others* [2016] eKLR, faced with similar circumstances, where a party claimed to have served the notice of appeal since it was annexed to the record of appeal, observed as follows:

“Whichever way, one looks at it, there was no service of the Notice of Appeal on the applicant. The purpose of service of a Notice of Appeal is to alert the parties being served that the case in question has not been concluded yet as the same has been escalated to another level. This enables the party to prepare and get ready for another fight, be it by way of gathering resources or just getting mentally prepared for defending the intended appeal. Failure to serve a party with a Notice of Appeal within the time prescribed by law gives a party false belief that the matter has been concluded, only to be ambushed later with the record of appeal in which the said notice is tucked away somewhere in the record. That occasions prejudice to the ambushed party, and it is in our view a habit that should not be countenanced in any fair and just process. That would explain why Rule 77(1) of the *Court of Appeal Rules* is couched in mandatory terms.”
14. Further, Rule 90 (1) of the *Rules* (2010) is clear that a record of appeal should be served within seven (7) days of the same being filed in court. It is clear to this Court that the respondent served the record of appeal upon the applicant, after a period of over one month from the date of filing. The respondent filed the record of appeal on 11<sup>th</sup> December, 2018, but only served the same upon the applicant on 23<sup>rd</sup> January, 2018. Just as in the case of the notice of appeal, the record of appeal was inexcusably served out of time, and without leave of this Court.
15. It is our finding that the respondent did not serve the notice of appeal upon the applicant, even as at the time the application before us for striking out the appeal for non-service of the notice of appeal was lodged. Further, the record of appeal was served upon the applicant over a month after it was lodged in court. The respondent did not make any attempt to rectify the situation by filing an application before this to extend time for service of the notice of appeal or the record of appeal. We agree with this



Court's decision in *Disbon Ochieng v SDA Church, Kodiaga* [2012] eKLR, where the Court had this to say, regarding an application where the record of appeal was served out of time:

“There is no dispute that the record of appeal was filed three days late, without leave of the Court...These facts are not in dispute, and Mr. B. O. Odeny, learned counsel for the respondent, while admitting the delay, simply relied on Section 159 of the *Constitution*, and Sections 3A and 3B of the *Appellate Jurisdictions Act* to cure the omission. We agree with Mr. I. E. N. Okero, learned counsel for the applicant, that these provisions of the law would not help the respondent circumvent the Rules of the Court.”

16. On whether the appeal ought to be struck out because the suit parcel of land has already been subdivided, we hold that execution of a decree cannot be used as an excuse to defeat an aggrieved party's right of appeal.
17. From the foregoing, it is evident that the application dated 26<sup>th</sup>, January, 2019 is merited. The notice of appeal dated 26<sup>th</sup> October, 2018, and the record of appeal filed on 11<sup>th</sup> December, 2018, are hereby struck out with costs to the applicant.

**DATED AND DELIVERED AT NYERI THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2023.**

**W. KARANJA**

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**.. JUDGE OF APPEAL**

**L. KIMARU**

.....

**JUDGE OF APPEAL**

**A. O. MUCHELULE**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

