



**Chelagat v Kabarak University (Civil Appeal (Application)
E037 of 2023) [2023] KECA 1496 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1496 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) E037 OF 2023
MSA MAKHANDIA, FA OCHIENG & WK KORIR, JJA
DECEMBER 8, 2023**

BETWEEN

REBECCA JEBICHII CHELAGAT APPLICANT

AND

KABARAK UNIVERSITY RESPONDENT

*(An application to strike out a Notice of Appeal arising from the
Judgment of the Employment & Labour Relations Court at Nakuru (D.
Nderitu, J.) dated 16th March, 2023 in ELRC Cause No. 28 OF 2020)*

RULING

1. The application before us is dated May 3, 2023. It is an application seeking the striking out of the notice of appeal dated March 23, 2023 which was lodged in court on March 31, 2023.
2. The sole ground upon which the application is founded is that the notice of appeal had not been served upon the applicant.
3. The application was supported by the applicant's affidavit, which was sworn on May 3, 2023. By the said affidavit, the applicant sets out the facts preceding the application. She told this court that she was the claimant in Nakuru ELRC Cause No 28 of 2020, wherein she had sued the respondent, seeking compensation for unlawful termination of her employment.
4. It is common ground that the judgment was rendered by the trial court on March 16, 2023. The learned trial judge awarded the applicant the sum of Kes 2,132,736/- as compensation following her dismissal from employment, in a manner which the trial court found to be wrongful, unfair and unlawful, for lack of procedural fairness.
5. On 23rd May, 2023 the learned trial Judge reviewed the judgment and corrected the arithmetic error which was apparent on the face of the said judgment. As a result of the said review, which was effected



pursuant to rule 34 of the [ELRC \(Procedure\) Rules, 2016](#), the total award was reduced from Kes 2,132,736/- to Kes 1,977,407.20.

6. The respondent was dissatisfied with the judgment, and decided to lodge an appeal to challenge it. A copy of the said notice of appeal was exhibited before us, and it bears the date of March 31, 2023 as the date when it was lodged in court.

7. Rule 86 of the [Court of Appeal Rules, 2022](#) 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—

a. that no appeal lies; or

b. 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.”

8. Notwithstanding the filing of the notice of appeal, the same was never served upon the applicant. Pursuant to rule 79(1) of the [Court of Appeal Rules](#);

“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:

Provided that the Court may, on application which may be made ex parte, within seven days after the lodging of the notice of appeal, direct that service need not be effected on any person who did not take part in the proceedings in the superior court.”

9. The respondent did not refute the assertion of non-service of the notice of appeal.

10. First, the respondent blamed its advocate for failing to effect service.

11. Secondly, when the respondent filed submissions in answer to the application, it attributed the delay to the alleged failure of the Registrar of the court, to sign the notice of appeal.

12. In the submissions, the respondent stated that the registrar only signed the notice of appeal on March 30, 2023.

13. We note that the explanations given by respondent are not consistent. We so find because if the notice of appeal had not been signed by the registrar until March 30, 2023 it would follow that the said notice could not have been served to the applicant prior to that date. In those circumstances, no blame could be attributable to the respondent’s advocate. But considering that the respondent attributes the delay in service, to the failure of its advocates, that suggests that the notice of appeal was ready within time, but that it was the respondent’s lawyers who did not take appropriate action in a timeous manner.

14. In any event, even if it be assumed that the notice of appeal was only signed by the learned deputy Registrar on March 30, 2023 we find that the respondent has not given any explanation why the said notice was not served upon the applicant.

15. The applicant first saw a copy of the notice of appeal when it was annexed to the affidavit of advocate Mr Koome Gitonga, which was in support of the application dated April 26, 2023 and filed on the



same date before the ELRC, Nakuru; and it sought an extension of the orders for stay of execution. In the case of *Daniel Nkirimpa Monirei v Sayialet Ole Koilel & 4 others* [2016] eKLR the court held that:

“...That notwithstanding however, learned counsel in his submission in Court insisted that there was service, saying that the said service was done on July 13, 2015, along with the record of appeal. We note however, that the said “service” was service of the record of appeal, in which there was a copy of the notice of appeal.

With due respect to learned counsel for the respondent, that cannot amount to proper service of the notice of appeal... In any event, even if, arguendo, such service was found to be acceptable, the same was done almost nine (9) months after the “filing” of the contested notice of appeal. There was no application for enlargement of time to serve the notice of appeal outside the seven (7) days provided for by the rules.

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 ...”

16. In our considered opinion, an annexure to an affidavit filed at the trial court, cannot constitute service of the notice of appeal whose copy constituted the annexure. When the application for extension of the orders for stay of execution was served, it was the said application and the supporting documents that were served upon the applicant.
17. There has been an inordinate delay in effecting service of the notice of appeal, and there has been no attempt made by the respondent to seek any orders which could regularize the default.
18. Accordingly, there is merit in the application herein. We therefore strike out the notice of appeal.
19. The respondent will pay the applicant, the costs of the application.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 8TH DAY OF DECEMBER, 2023.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

.....

F. OCHIENG

JUDGE OF APPEAL

.....

W. KORIR

JUDGE OF APPEAL

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



Signed

DEPUTY REGISTRAR

