



Nzai & 57 others v Invesco Assurance Co. Ltd (Miscellaneous Civil Application 51 of 2019) [2022] KECA 66 (KLR) (21 January 2022) (Ruling)

Neutral citation: [2022] KECA 66 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
MISCELLANEOUS CIVIL APPLICATION 51 OF 2019
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JANUARY 21, 2022**

BETWEEN

DAMA CHARO NZAI & 57 OTHERS APPLICANT

AND

INVESCO ASSURANCE CO. LTD RESPONDENT

(Being an application to strike out Notice of Appeal dated 27th February, 2019 in respect of insolvency Cause No. 1 of 2018)

RULING

1. The application before us is dated 3rd July 2019 brought pursuant to Rule 77 and 84 of the Court of Appeal Rules. It seeks orders to strike out the Notice of Appeal dated 27th February, 2019 for being served out of time, and for costs. The application is premised on the grounds that the Notice of Appeal was filed on the 27th February, 2019 but was not served until 21st June, 2019 four months later, which delay was inordinate. It is contended in addition that the respondent had not applied for the proceedings and if so, the applicant was not served with a letter to that effect.
2. The application was supported by the affidavit of Geoffrey Kilonzo, advocate for the applicants, who averred that he acts for the applicants and in that capacity on the 21st June 2019, he was served with a Notice of Appeal dated 27th February 2019 which clearly showed that the notice was lodged in the court on 27th February 2019. He averred that the notice was served out of time, and that the delay involved was inordinate and unreasonable.
3. The applicants filed their submissions in support of this application which were highlighted virtually before us by their counsel, Mr. Wambua. In the submissions, counsel urged that the respondent was aggrieved by a ruling of the court in Malindi High Court Insolvency Cause No. 1 of 2018 rendered on the 21st February, 2019 and thus lodged a Notice of Appeal dated 27th February 2019 and lodged in court on the same date, but served upon the applicants' advocate on the 21st June 2019. Counsel



urged that the notice should have been served within 7 days from date of lodging it, and that the delay in service of four months less six days was in contravention of Rule 77(1) of this court's rules.

4. Mr. Wambua submitted that the provisions of Rule 77 are couched in mandatory terms and their compliance cannot be wished away unless there exist an exceptional situation that prevented compliance. Counsel cited some cases including *Mistry Premji Ganji Investments limited v Kenya National Highways Authority (2019) eKLR* for the proposition that where no explanation is given for delay in service of the Notice of Appeal and for noncompliance with the rules, the same should be inexcusable and result in striking out of the Notice of Appeal.
5. Mr. Wambua submitted that no explanation was forthcoming from the respondent for the inordinate delay in service of the Notice of Appeal and urged that the court should strike out the said notice and in effect order the intended appeal by the respondent debtor deemed withdrawn.
6. It was submitted that though the respondent contends that they did not serve on time as they intended to revive negotiations with the applicant, there is nothing to show the court to prove it, and neither were their intentions communicated to the applicants with whom the said negotiations were to be made.
7. Mr. Kibet for the respondent did not attend the proceedings despite being served. Furthermore, the respondent did not file any replying affidavit even though there is reference of such a document in the submissions. However, Kibet Rop filed written submissions on behalf of the respondent dated 23rd April, 2021. In the submissions it was urged that the application is fatally defective as the same is not a pleading recognized in law. That it is a stand-alone application, and has not been filed within an appeal as is required by law.
8. It was the respondent's case that the application was not filed under the appeal after its registration, which would have been a proper way to challenge the Notice of Appeal. With due respect to the learned counsel the law and the case cited does not apply and neither do they support the respondent's submission.
9. It was further submitted that the issue of failure to serve the Notice of Appeal is not a substantive issue that merits the application to strike it out and that failure to serve the Notice of Appeal is explained in the replying affidavit sworn by Paul Kibet Rop, Advocate on 16th July, 2019. They contend that Rule 4 of this Court's rules gives the court jurisdiction to extend time, or grant leave so as to assist parties overcome challenges brought about by technicalities in the course of practice.
10. It was further submitted that the rules of practice remain subservient to the Constitution and Statutes. It was submitted that Article 159 (2) (d) of the [Constitution](#), Section 14 (6) of the [Supreme Court Act](#), Section 3A and 3B of the [Appellate Jurisdiction Act](#), Section 1A and 1B of the [Civil Procedure Act](#) and Section 80 (1) (d) of the [Elections Act](#) place heavy premium on substantive justice as opposed to undue regard to procedural technicalities.
11. We have considered this application, together with the filed submissions of the parties as well as the cases relied upon. It is clear from the Notice of Appeal served upon the applicants' advocate, and annexed to the supporting affidavit that it was served upon the applicants' advocate almost four months after it was lodged in court. Rule 77(1) of this Court's rules is couched in mandatory terms and stipulates thus:

“77((1) 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:



Provided that the Court may on application, which may be made ex parte, within seven days after lodging the notice of appeal, direct that service need not be effected on any person who took no part in the proceedings in the superior court.”

12. We are mindful of the fact that there is no minimum or maximum period of delay set by law. [See *Stanley Kabura Mwangi & 2 others v Kanyamwi Company Limited, Nakuru Civil App No. 287 of 2014* and *George Kagima Kariuki v George Gichimu and 2 others (2014) eKLR*]. Even then, we are of the view that it is incumbent upon the respondent to offer some explanation for the delay, which is not only reasonable but plausible. The respondent did not file any affidavit, and thus there is no explanation offered for the delay in the service of the notice, and further the application is not contested. The only attempt made to explain anything was contained in the written submissions of the respondent. One of them being that the respondent intended to revive negotiations with the applicant, but nothing was provided to establish that such an intention existed. In any event, such proof ought to have been introduced to court in the form of affidavit evidence.
13. The respondent has not filed any application for extension of time. Its submission that this court has power to extend time cannot come to its aid.
14. The respondent urged us to find the application was defective for not having been filed in the respective appeal file. The application has been brought pursuant to Rule 84 of this Court’s rules which provides as follows:

“ 84. 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 that no appeal lies or 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 from the date of service of the notice of appeal or record of appeal as the case may be.”
15. Mr. Kibet in his written submissions urged that the application contravenes the provisions of Section 19 of the *Civil Procedure Act*, and Order 3 Rule 1 (i), and Order 4 Rule 1 (i) and (2) of the *Civil Procedure Rules*. Counsel also relied on *Samuel Chege Thiari & Another v Eddah Wanjiru Wangari & 3 others (2018) eKLR*.
16. We have considered the law cited by the respondent and the case relied upon. The rule provides that a party affected by an appeal may apply. Although it specifies that the application should be made by way of motion, it does not require the application be filed in the appeal file. None of the provisions of the law and the rules cited relate to filing of applications for striking out appeals pursuant to Rule 77 (1) and Rule 84 of this Court’s rules.
17. The other laws cited including Article 159 of the Constitution cannot come to the aid of the respondent in all the circumstances of the case. The respondent failed to comply with procedural laws coached in mandatory terms, and failed to give any excuse for its actions. This was blatant disregard of procedural law and smacks of indifference.
18. This court has numerously pronounced itself on the consequences of noncompliance with the above prerequisites. We adopt the case of *Patrick Kiruja Kithinji vs. Victor Mugira Marete [2015] eKLR*, for the proposition that the issue as to whether or not an appeal is filed on time is a fundamental issue as it goes to the jurisdiction of the Court. Second, that the Court only has jurisdiction to entertain appeals filed within the requisite time and or appeals filed out of time but with the leave of the Court.



19. The Notice of Appeal was filed timeously. We are of the view that the service of the Notice of Appeal almost four (4) months after it should have been done was both inordinate and unreasonable delay. Failure to offer any explanation for the delay can only lead to one conclusion, that the failure to serve as required in the rules was in blatant disregard to the rules. That renders the appeal as filed invalid.
20. Consequently, in light of the above assessment and reasoning, we find that the application is meritorious. Consequently, we allow the application. Accordingly, both the notice and the record of appeal be and are hereby struck out with costs to the applicant.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF JANUARY 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

