



**Said v Chome (Civil Appeal (Application) 152 of 2019)
[2022] KECA 19 (KLR) (4 February 2022) (Ruling)**

Neutral citation: [2022] KECA 19 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL (APPLICATION) 152 OF 2019
A MBOGHOLI-MSAGHA, SG KAIRU & P NYAMWEYA, JJA
FEBRUARY 4, 2022**

BETWEEN

HUSSEIN ABDALLA SAID APPLICANT

AND

YAWA CHOME RESPONDENT

(An application to strike out the appellant's record of appeal filed on 22nd November 2019 against the judgment and decree of the Environment and Land Court at Malindi (Olola, J.) dated 26th June 2019 in ELC Case No. 52 of 2010)

RULING

1. In an application dated 14th September 2020 made under Rule 84 of the *Court of Appeal Rules*, among other cited provisions, Yawa Chome Shume, the respondent/applicant, seeks an order that the appellant's record of appeal filed on 22nd November 2019 be struck out.
2. In the supporting affidavit sworn by Simon P.M. Mutugi, counsel for the applicant, and in the submissions made before us by learned counsel Mr. Mkomba, it has been demonstrated that the judgment of the Environment and Land Court (ELC) appealed from was delivered on 26th June 2019; that the notice of appeal, though filed within the prescribed time period, was never served on the applicant; that the record of appeal, though filed on 22nd November 2019 was not served on the applicant until 2nd September 2020, almost a year later.
3. In the replying affidavit sworn by the appellant who is the respondent in the application, Hussein Abdalla Said, to which learned counsel Mr. Ahmed referred in the course of his submissions before us, the appellant has alluded to "the corona virus pandemic" and associated closure of registries, delay in obtaining copies of proceedings, and introduction of new e-filing system as the reasons for the omissions in complying with the legal requirements regarding service.



4. According to learned counsel Mr. Ahmed, the respondent/appellant is also victim of unfortunate circumstances attributable to different law firms having handled the matter on his behalf; that a certificate of delay was in any case issued on 14th November 2019 and the record of appeal filed shortly thereafter, eight days later. Counsel urged us to decline the application so that the appeal may be heard on merits.
5. It was also Mr. Ahmed's submissions before us that the present application is incompetent because it was not filed within the time stipulated under Rule 84 of the Court of Appeal Rules. In response Mr. Mkomba maintained that the application was filed within 30 days of service of the record of appeal and is therefore competent.
6. We have considered the application, the affidavits and submissions by learned counsel. As already mentioned, the impugned judgment was delivered by the ELC on 26th June 2019. A notice of appeal was promptly filed, in accordance with Rule 75(2) of the Court of Appeal Rules, on 1st July 2019. However, it was never served as required under Rule 77(1). The record of appeal, though filed on 22nd November 2019, was not served until 2nd September 2020. It has been demonstrated that it was upon service of the record of appeal in September 2020 that the applicant became aware, for the first time, that the judgment of the ELC delivered well over a year earlier was under challenge.
7. The circumstances in this case are not very different from those in the case of [*Daniel Nkirimpa Monirel vs. Sayialele ole Koilel & 4 others \[2016\] eKLR*](#) where this Court stated:

“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. That would explain why Rule 77(1) of the Court of Appeal Rules is couched in mandatory terms.

14. From the above analysis, it is clear that there is no valid Notice of Appeal on record, to clothe us with the requisite jurisdiction to entertain the appeal herein. We have no hesitation in striking out the Notice of Appeal dated 30th October, 2014.”

8. We respectfully agree. Similarly in the present case, the respondent made no application for extension of time. The impugned judgment, as indicated, was delivered on 26th June 2019. The notice of appeal was filed on 1st July 2019. The record of appeal was filed on 22nd November 2019. All those events were well before the declaration of the Covid 19 pandemic. It is difficult to fathom how the pandemic prevented the respondent/appellant from effecting service of either the notice of appeal or the record of appeal within the stipulated time frames.



9. As for the competence of the application, the proviso to Rule 84 of the Court of Appeal Rules provides that:

“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.”

10. As already mentioned, the record of appeal was served on 2nd September 2020 even though it had been filed way back on 22nd November 2019. The present application was filed on 16th September 2020 which was within 30 days of service of the record of appeal. It is competent.

11. We therefore allow the application dated 14th September 2020. Consequently, the appellant’s record of appeal filed on 22nd November 2019 is hereby struck out with costs to the applicant/respondent.

12. Orders accordingly.

Dated and delivered at Mombasa this 4th day of February 2022.

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

