



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwangi v Karanja & 2 others (Civil Application 15 of 2019)  
[2022] KECA 425 (KLR) (4 March 2022) (Ruling)**

Neutral citation: [2022] KECA 425 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION 15 OF 2019  
RN NAMBUYE, S OLE KANTAI & MSA MAKHANDIA, JJA  
MARCH 4, 2022**

**BETWEEN**

**JERUSHA WANGARI MWANGI ..... APPLICANT**

**AND**

**BEATRICE MUTHONI KARANJA ..... 1<sup>ST</sup> RESPONDENT**

**MAINA KARANJA ..... 2<sup>ND</sup> RESPONDENT**

**NICHOLAS GITAU KARANJA ..... 3<sup>RD</sup> RESPONDENT**

*(An application to strike out a Notice of Appeal in an intended appeal from the decision of the Environment & Land Court of Kenya at Nakuru (D.O. Obungo, J.) dated 20th December, 2018 in ELC Case No. 316 of 2012 Formerly HCCC No. 51 of 2012)*

**RULING**

1. Before us is a notice of motion dated 11<sup>th</sup> February 2019 brought under Section 3A of the *Appellate Jurisdiction Act* and Rules 42, 43, 77(1), 79(3) & 84 of the *Court of Appeal Rules*. The application in the main seeks for an order that this Honorable Court be pleased to strike out the Respondents Notice of Appeal dated 11<sup>th</sup> January 2019 and filed in court on 17<sup>th</sup> January 2019 for being served out of time.
2. The application is premised on the grounds that the judgment sought to be appealed against was delivered on the 20<sup>th</sup> December 2018. The respondent filed a notice of appeal on 17<sup>th</sup> January 2019 and served it on the applicant on 30<sup>th</sup> January 2019, a whole 13 days after it was lodged in the High Court. That as per the Provisions of Rule 77 (1) of the Court of Appeal Rules, Service of the notice on the respondent should have been effected within Seven (7) days of filing. However, the respondent breached the provision which is couched in mandatory terms. The application is further supported by an affidavit sworn by Kahiga Waitindi, counsel for the applicant which affidavit merely reiterates and expounds on the grounds aforesaid.



3. The application is opposed through the replying affidavit of David N. Ikua, the respondent's counsel and grounds of opposition dated 15<sup>th</sup> and 16<sup>th</sup> January 2021 respectively. According to the respondents, the notice of appeal was served on the applicant's advocates offices on 21<sup>st</sup> January 2019 but the same was not acknowledged as received until the 30<sup>th</sup> January 2019. That it was therefore the applicant who caused the delay in receiving the notice. That it was the applicant who chose to receive the notice on 30<sup>th</sup> January 2019 as opposed to 21<sup>st</sup> January 2019 when it was served. The respondents maintained that Rule 77(1) of this Court Rules required service to be effected within seven days of filing but does not address the issue of receipt of a notice of appeal.

The application was canvassed by way of written submissions with limited oral highlights. However from the record it is only the applicant who filed and served his written submissions. It was the applicant's submission that Rule 77(1) of the Court of Appeal Rules is couched in mandatory terms and must be adhered to.

Counsel relied on the case of *Daniel Nkirimpa Monirei Vs. Sayieel Ole Koilel and 4 Others [2016] eKLR* which authority emphasizes the need to serve the notice of appeal within the prescribed time. The respondents having failed to observe the mandatory requirements of the rule, the notice of appeal was incompetent and therefore a ripe candidate for striking out.

4. Having considered the application, the rival affidavits, the submissions on record and the law, this is our take on the application. For avoidance of doubt, Rule 77 (1) stipulates 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.” (Emphasis added)

No doubt the provision is couched in mandatory terms. We also appreciate that the cases of *Daniel Nkirimpa Monirei [supra]* and *Stephen Kinoro Kamau Vs. Wanjiku Kinuthia & Anor [2005] eKLR*, settled the consequences of non-service of the notice of appeal in time, which is to strike out such notice. We however hasten to add that failure to serve the Notice of Appeal in time may be excused for good reason(s), if the appellant is able to satisfy the Court that the same was excusable. (See *Kamlesh Mansukhalal Damji Pattni Vs. Director of Public Prosecutions & 3 Others [2015] eKLR* and *Nicholas Kiptoo Arap Korir Salat Vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR* and also *Francis Mwanza Mulwa Vs. Pamela Mary Kikumu [1995] eKLR*).

5. Coming to the application at hand, we have contrasting positions as to when the notice of appeal was served on the respondents. The respondent has argued that there was no delay as the notice was served on the respondents' advocates offices on time save that the respondents refused to acknowledge receipt of the same on the date of service until the 30<sup>th</sup> January 2019 when they stamped the same received. This assertion by the respondents has not been countered or controverted sufficiently by the applicant. We are inclined to believe the position taken by the respondents that the applicant deliberately acknowledged receipt of the documents late with the sole intent of undermining the intended appeal. We have no basis to hold that the respondents swore a false affidavit to that effect.
6. The upshot of all the above is that we find no merit in the application and the same is hereby dismissed with no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF MARCH, 2022.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**



**ASIKE–MAKHANDIA**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

