



Kikambala Development Company Limited & 4 others v Director of Public Prosecutions & 4 others; Kikambala Development Company Limited & 10 others (Interested Parties) (Civil Application 183 & 184 of 2020 (Consolidated)) [2022] KECA 1374 (KLR) (16 December 2022) (Ruling)

Neutral citation: [2022] KECA 1374 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 183 & 184 OF 2020 (CONSOLIDATED)
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
DECEMBER 16, 2022**

BETWEEN

**KIKAMBALA DEVELOPMENT COMPANY LIMITED 1ST APPLICANT
JANE NJERI KARANJA 2ND APPLICANT
FREDRICK OTIENO OYUGI 3RD APPLICANT
SELINE CONSULTANTS LIMITED 4TH APPLICANT**

AND

**THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT
ETHICS & ANTI-CORRUPTION COMMISSION 2ND RESPONDENT
THE CHIEF MAGISTRATE'S COURT, MOMBASA 3RD RESPONDENT
JOSEPH KARANJA KANYI T/A KANYI & COMPANY
ADVOCATES 4TH RESPONDENT**

**AS CONSOLIDATED WITH
CIVIL APPLICATION 184 OF 2020**

BETWEEN

**JOSEPH KARANJA KANYI T/A KANYI & COMPANY
ADVOCATES APPLICANT**

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT



ETHICS AND ANTI-CORRUPTION COMMISSION 2ND RESPONDENT
CHIEF MAGISTRATE'S COURT, MOMBASA 3RD RESPONDENT

AND

KIKAMBALA DEVELOPMENT COMPANY LIMITED INTERESTED PARTY
JANE NJERI KARANJA INTERESTED PARTY
FREDRICK OTIENO OYUGI INTERESTED PARTY
MAURICE MILIMU AMAHWA INTERESTED PARTY
EPHRAHIM MAINA RWINGO INTERESTED PARTY
SELINE CONSULTANTS LIMITED INTERESTED PARTY
JOAN ZAWADI KAREMA INTERESTED PARTY
RENSON THOYA JUMA INTERESTED PARTY
HARRY JOHN PAUL ARIGI INTERESTED PARTY
JOY KAVUTSI MUDAVADI ALIAS JOY K. ASIEMA INTERESTED PARTY
KENYA PORTS AUTHORITY RETIREMENT BENEFITS
SCHEME INTERESTED PARTY

(An application to strike out the Notice of Appeal dated 20th May, 2020 against the judgment of the High Court at Mombasa (E. Ogola, J) delivered on 12th May, 2020 in Anti-Corruption and Economic Crimes, Division Constitutional Petition No. 1 of 2019 and Civil Application No. 184 of 2020)

RULING

1. These two applications are related having arisen out of the same case. The background of the Civil Application No 183 of 2020 and 184 of 2020 [hereinafter No 183 and 184 respectively] was a conveyance whereby the 1st applicant in No 183, Kikambala Development Company Limited [which is also the 1st interested party in No 184] [hereinafter Kikambala] retained the applicant in No 184, Joseph Karanja Kanyi, an Advocate of the High Court [hereinafter Mr Kanyi] to represent it in a conveyance transaction for purchase and later sale of land. The first transaction was a conveyance the subject matter of which was an agreement for sale of land in which Kikambala purchased several parcels of land from one Amkeni Farm Ltd. Thereafter Kikambala entered into an agreement for the sale of the same parcels of land with Kenya Ports Authority Retirement Benefits Scheme [hereinafter KPARBS], the 11th interested party in No 184 As part of the services rendered to Kikambala by Mr Kanyi, Mr Kanyi gave a professional undertaking to Cootow & Associates, a firm of advocates representing KPARBS, that saw Cootow advocates transfer to Mr Kanyi the sum of 70,000,000/-, being the agreed deposit of the purchase price. That transaction did not materialize as the sale fell through.
2. The failure of this second transaction attracted the Ethics and Anti-Corruption Commission that commenced investigations into what it considered loss of public funds, which culminated in the filing of a civil suit against Mr Kanyi, Kikambala and the 2nd to the 11th interested parties in No 184. What followed was a flurry of litigation, with filing of criminal charges in both Chief Magistrates Court and civil suits before Milimani Commercial Anti-Corruption and Economic Crimes Division among



others. At the same time negotiations for recovery of the funds involved were going on between these parties and the Ethics and Anti- Corruption Commission [EACC].

3. Eventually Mr Kanyi filed a Constitutional Petition No 1 of 2019 before the Mombasa Anti-Corruption and Economics Crimes Division, challenging the actions of EACC for instituting asset recovery and other actions against him; and those of DPP in instituting criminal prosecution against him. The respondents in the Petition were the DPP, EACC and the Chief Magistrate's Court Mombasa. The applicants in No 183 were among interested parties in Mr Kanyi's Petition. The judgment was concluded in favour of Mr Kanyi and by extension the interested parties. That judgment, delivered by Ogola, J on May 12, 2020 is the subject of the Notice of Appeal which is the subject matter of both applications No 183 and 184.
4. The Notice of Motion applications in No 183 of 2020 and No.184 of 2020 are dated the same day, and have invoked the same law. They are dated 26th June 2020, brought pursuant to Rules 3 ,42, 77(1) & 84 of the *Court of Appeal Rules, 2010* (now 3, 46, 79 and 86 of the 2022 Rules) and section 57 of the *Interpretation and General Provisions Act*. The applicants herein are seeking to have the Notice of Appeal dated 20th May 2020 and lodged on May 22, 2020 against the judgment of the High Court at Mombasa, (E Ogola, J) delivered on May 12, 2020 be struck out. The applications were argued separately but the Court indicated to counsel that we may write one ruling in respect of the two applications, being related as afore shown.
5. The cases were heard virtually on the July 19, 2022. In No 183 of 2020 learned counsel Mr Adhoch for the applicant, learned counsel Mr Owiti for the 1st respondent, learned counsel Mr Gikandi holding brief for learned counsel Mr Omwenga for the 1st to 6th interested parties, learned counsel Mr Henry Kariuki holding brief for learned counsel Mr Munyao for the 7th respondent were all present and ready to proceed.
6. Mr Adhoch for the applicants urged the court to strike out the Notice of Appeal for non-service to the respondents in violation of Rule 79 of the Rules. He urged that the notice was served on the 11th day. The affidavit in support of the application reiterated the grounds contained in the notice of motion and revealed that the applicants were served with the impugned notice on 3rd June, 2020 without leave allowing it to serve outside the stipulated time under Rule 79(1) of the Rules of this Court. Counsel urged that the 1st respondent had not explained the delay, and placed reliance on the case of *Daniel Nkirimpa Monirei v Sayialei Ole Koilel & 4 Others* (2016) eKLR for the proposition that unexplained delay in service of the Notice of Appeal was reason to allow the application and strike out the same.
7. Mr Owiti for the 1st respondent in his submissions admitted that the 1st respondent was late in serving the Notice of Appeal, but urged that it was only by three days. Counsel urged Court to invoke Rule 22 (3) and (4) and enlarge time submitting that the 3 days delay was not inordinate and inexcusable. Cited was the case of *Mistry Premji Ganji (Investments) Limited v Kenya National Highways Authority* (2019) eKLR for the proposition that it would be against public policy to strike out the Notice of Appeal on a technicality of an excusable 3-day delay, and that the applicants and the interested parties would suffer no prejudice if the time for service is enlarged so that the Notice of Appeal is deemed served within the enlarged time.
8. Mr Gikandi on behalf of the 4th respondent and the 1st to 6th interested parties submitted that the application was supported. Counsel urged that failure to abide by the Rules of the Court must have consequences, and urged that the overriding objective and Article 159 cannot be relied on. He urged us to strike out the notice.



9. In No 184 of 2020 learned counsel Mr Gikandi for the applicant, learned counsel Mr Owiti for the 1st respondent, and holding brief for learned counsel Mr Makori for the 2nd respondent, learned counsel Mr Adhoch for the 1st, 2nd, and 6th interested parties and learned counsel Mr Omwenga for the 3rd, 4th, 7th and 10th interested parties were present and ready to proceed.
10. Mr Gikandi in his submissions started by saying that the 1st respondent had admitted that the Notice of Appeal was filed 3 days out of time. Counsel urged us to give effect to the law, Rule 79 of the *Rules*, and rule that the Notice of Appeal is invalid and incompetent and thus amenable to striking out. Counsel urged that the only way the 1st respondent could succeed was by giving a good explanation as to why they served late. Mr Gikandi urged that it was unreasonable for the 1st respondent to blame covid-19 as it could have used email to serve the notice. He raised issue with the 1st respondent's counsel allegation that he did not know his physical address stating that he could have emailed the notice instead. *Mr Gikandi relied on the case of Daniel Nkirimpa Monirei v Sayialei Ole Koilel & 4 Others* (2016) eKLR and urged that the unexplained delay in service of the Notice of Appeal was reason to allow the application as prayed.
11. Mr Owiti for the 1st respondent relied on the replying affidavit dated January 3, 2020, written submissions and list and bundle of documents. He urged that it was admitted that the notice was served 3 days late, but that it had been filed on time. Counsel clarified that the address the 1st respondent did not have was the email address, that by the time of service, the covid-19 containment measures were in operation and they could not move to serve physically. Mr Owiti urged the court to find that the 1st respondent had given a good and sufficient reason for the delay. He urged us to find that the delay was not inordinate and invoke Article 159 to administer justice without undue regard to technicalities. He relied on the case of *Mistry Premji Ganji (Investments) Limited v Kenya National vb Highways Authority* (2019) eKLR, and urged that it would be against public policy to strike the Notice of Appeal on a technicality of an excusable 3-day delay.
12. Relying on his written submissions, Mr Owiti brought to the court's attention that there was an application for enlargement of time filed by the 1st respondent which was pending, being Civil Application No 59 of 2020. It was submitted that the Notice of Appeal was filed within time and the same was deemed duly served by enlargement of time under Rule 4 of the Rules of this court. To counsel it would be draconian and not an administration of substantive justice to strike out the notice of appeal; that the 3-day delay has been explained and it would prejudice the 2nd respondent if it is locked out of accessing its right of appeal against the judgement that was rendered on May 12, 2020. The court was urged to allow the DPP's application for enlargement of time and dismiss the instant application. With respect, the application for extension of time is not before us and we cannot therefore delve into the merits of it.
13. We have considered the applications in both cases, No 183 of 2020 and 184 of 2020, as well as the submissions by counsel, affidavits for and against the applications as well as the cases relied on. There is no dispute that the 1st respondent served the Notice of Appeal 3 days late in contravention of Rule 79 (1) of the *Rules*. It is also not disputed that the 1st respondent had not obtained extension of time at the time it served the notices, urging that pending was their application for extension of time. The issue for determination that is before us is whether failure to serve the Notice of Appeal on time is a fatal defect.
14. Rule 79 (1) of the *Rules* provides:

79 (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.”

15. On the issue whether failure to serve a Notice of Appeal in time is fatal or not, the law is now settled. Rule 79(1) is couched in mandatory terms that service of the Notice of Appeal must always be effected upon the respondent and all parties affected by it in accordance with the Rule. Failure to serve within the period prescribed by Rule 79 (1) is fatal. Cases abound from this court which support this position, Including *Stephen Kinoro Kamau vs. Wanjiku Kinuthia & another* [2005] eKLR.
16. Having taken all these issues into consideration the order that commends itself to us is as follows:
 1. The Civil Application No 183 of 2020 and 184 of 2020 dated June 26, 2020 is allowed.
 2. The order allowing the applications dated June 26, 2020 in (1) above is suspended pending the outcome of Civil Application No 59 of 2020 filed by the 1st Respondent.
 3. The Civil Application No 59 of 2020 be fixed for hearing on a priority basis by the registry.

Dated and delivered at Mombasa this 16th day of December 2022.

S. GATEMBU KAIRU (FCI Arb)

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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

