



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MUSINGA, & GATEMBU, JJ.A.)

CIVIL APPLICATION NO. 260 OF 2019 (UR.239 /2019)

BETWEEN

FRED ONYONI NYABUTO.....APPLICANT

AND

KIMANI WALTER alias WALTER NGUGI KIMANI.....RESPONDENT

(An application to strike out the Notice of Appeal against the Judgment of the High Court of Kenya at Nairobi

(B. Thurairaja Jaden, J.) dated 26th June, 2019

in

H.C.C No. 358 of 2014.)

RULING OF THE COURT

1. The applicant's Notice of Motion dated 2nd August 2019 seeks the striking out of the notice of appeal filed on 9th July 2019 on the ground that the respondent failed to serve it on the applicant's advocates within seven days of its filing as required under **rule 77(1)** of this **Court's Rules**.
2. **Ms Lubanga Catherine Fancy**, the respondent's advocate, conceded in her replying affidavit that the notice of appeal was not served within the stipulated period of time. That was due to an inadvertent error on the part of her clerk, whom she had instructed to serve it immediately after its filing. She urged the Court not to punish the respondent for his advocate's mistake, saying that no prejudice had been occasioned to the applicant by the late service, while on the other hand the respondent will be highly prejudiced if the notice of appeal is struck out as he will not be able to pursue his appeal.
3. Both parties filed their respective submissions and bundles of authorities. When the application came up for virtual hearing on 27th January 2021, only the respondent's advocate was in attendance, and she chose to rely on her submissions entirely.
4. We have considered the application, the affidavits, the submissions and the cited authorities. **Rule 77** requires that a notice of appeal be served within seven days from the date of filing. It was not disputed by the respondent that the notice was served out of time. The respondent's advocate urged us to exercise our discretion in a manner that will provide substantial justice to both parties by declining to strike out the notice of appeal so that the intended appeal may be heard and determined on its merits. The applicant on the other hand urged us to interpret **rule 77** strictly and strike out the notice of appeal so that he can reap the fruits of his judgment.
5. In **Abdirahman Abdi also known as Abdirahman Muhumed Abdi v Safi Petroleum Products Ltd & 6 Others [2011] eKLR** where a notice of appeal was served out of time without leave of the Court, upon being asked to strike it out, the Court observed that :-

"The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantial justice..."

In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9

Laws of Kenya, and later, Article 159(2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2)(d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.”

We adopt the same position in this application.

6. The delay in service of the notice of appeal was not inordinate and no prejudice has been occasioned to the applicant by that delay.

We are satisfied with the explanation proffered by the respondent’s advocate. We decline to strike out the notice of appeal. Consequently, we dismiss the application but award costs thereof to the applicant.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb.

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR