



**IN THE COURT OF APPEAL**

**AT MALINDI**

**CORAM: NAMBUYE, ASIKE-MAKHANDIA & KANTAL, JJA**

**CIVIL APPLICATION NO. 65 OF 2019**

**BETWEEN**

**JULIUS KABARUKU NDUNDI**

**JONATHAN KENGA THETHE**

**CHANGAWA KABARUKU NDUNDI.....APPLICANTS**

**AND**

**NAJMUDIN NOORALI MOHAMMEDALI (As legal representative of the estate of**

**MohammedAli Essajee Bhaijee and the estate of Noorali M. E. Bhaijee)**

**THE ESTATE OF MANIKLAL PALATHBHAI DALAL.....RESPONDENTS**

(Being an application for striking out the Notice of Appeal against the judgment of the

Environment and Land Court at Malindi (Hon. Angote J.) dated 12<sup>th</sup> June 2019 and

delivered on 26<sup>th</sup> June 2019, in **Malindi ELC No. 174 of 2012 (OS)**

**heard with Malindi ELC No. 204 of 2013 (OS)**

**RULING OF THE COURT**

Before us is a motion on notice dated 30<sup>th</sup> July 2019 brought under **Rules 75, 77 and 84** of the **Court of Appeal Rules**, (“the Rules”), substantively seeking that:

**“a. The notice of appeal dated 28<sup>th</sup> June 2019 and any record of appeal premised on it are struck out for want of service on the applicants on time, as prescribed by the rules of the court.”**

It is supported by grounds on the body of application and a supporting affidavit sworn by **Julius Kabaruku Ndundi** together with annexures thereto.

In summary, the applicant deposed and submitted that the respondents lodged a notice of appeal on 1<sup>st</sup> July 2019 dated 28<sup>th</sup> June 2019 and served the same upon the applicants on 26<sup>th</sup> July 2019, which was way out of the seven (7) statutory days required under the rules and no explanation for the delay has been proffered by the respondents. The respondents did not file any papers in opposition to the application.

**Rule 75** of the Court’s Rules provides as follows:

**75. Notice of appeal**

**1. Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.**

2. Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.

Rule 77 provides as follows:

**77. Service of notice of appeal on persons affected**

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.

2. Where any person required to be served with a copy of a notice of appeal gave any address for service in or in connection with the proceedings in the superior court, and has not subsequently given any other address for service, the copy of the notice of appeal may be served on him at that address, notwithstanding that it may be that of an advocate who has not been retained for the purpose of an appeal.

In this instant matter, the respondent satisfied the prerequisite of **Rule 75** of the of the rules. However, they failed to satisfy the requirements of **Rule 77**.

**Rule 84** of the Court **Rules** provides 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.”

This being an application for striking out the notice of appeal and any record of appeal premised on it for reason that the same was served upon the applicant on, way out of the prescribed seven (7) statutory days and the applicant having filed this application dated 30<sup>th</sup> July 2019, which application was filed within the thirty-day statutory window, the application is merited.

In the case of **MAE PROPERTIES LIMITED V. JOSEPH KIBE & ANOTHER [2017] eKLR** this court whilst emphasizing the need to strictly adhere to the timelines set out in the rules stated;

**“We have said on numerous occasions that the Rules of Court exist for the purpose of orderly administration of justice before this Court. The timelines appointed for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals that come before us. The Rules are expressed in clear and unambiguous terms and they command obedience.”**

Consequently, we are satisfied that the respondents failed to serve the notice of appeal within the prerequisite seven (7) statutory days thus rendering the subsequent appeal incompetent. Accordingly, the notice of appeal and any record of appeal premised on the same be and is hereby struck out with costs.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF APRIL, 2021**

**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**