



IN THE COURT OF APPEAL

AT KISUMU

[CORAM: F. SICHALE, J.A IN CHAMBERS]

CIVIL APPEAL (APPLICATION) NO. 20 OF 2020

BETWEEN

MUNICIPAL COUNCIL OF KISUMU.....APPLICANT

AND

TELEPOSTA PENSION SCHEME

REGISTERED TRUSTEES.....1ST RESPONDENT

COMMISSIONER OF LANDS.....2ND RESPONDENT

DISTRICT LAND REGISTRAR, KISUMU.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

MABEL OKWISA OMONDI.....5TH RESPONDENT

JULIUS NYABUDI.....6TH RESPONDENT

MAUREEN OLEL.....7TH RESPONDENT

JARED GILO OPUL.....8TH RESPONDENT

BENARD ODHIAMBO.....9th RESPONDENT

ERICK OUMA OTUOMA.....10TH RESPONDENT

JOHN ANDREW OGELE NYAKUNA.....11TH RESPONDENT

MONICA ANYANGO ORWA.....13TH RESPONDENT

JACKTON OKITA OCHORE.....14TH RESPONDENT

ASTERI ANGOLO.....15TH RESPONDENT

CORNEL OPIYO OSANO.....16TH RESPONDENT

PAUL MOSES OMONDI.....17TH RESPONDENT

SEVENT DAY ADVENTIST CHURCH EAST AFRICA

UNION LIMITED (VICTORIA SDA CHURCH).....18TH RESPONDENT

JOSEPH SHADRACK ONGONGNO.....19TH RESPONDENT

MINISTER FOR FINANCE

KREP BANK LIMITED.....20TH RESPONDENT

*(Being an application for an order that service of the notice of appeal
arising from the judgment and decree of the Environment and Land Court
at Kisumu (S. K. Kibunja,J) dated 13th December, 2019 in ELC Cause NO. 782
of 2015 (need not be effected on parties who did not take part in the proceedings.)*

RULING OF THE COURT

The Applicant's Notice of Motion (Ex Parte) dated 5th February, 2020 brought pursuant to Section 3A and 3B of the Appellate Jurisdiction Act CAP 9 laws of Kenya and Rule 77 (1) of the Court of Appeal Rules, 2010, seeks the following orders:

“

a) THAT the Notice of Appeal filed on the 20th day of December 2019 in respect to the judgment and decree of the Superior Court delivered by the Honourable Justice S. K. Kibunja at Kisumu on the 13th December 2019 need not be served on, Felistus N. Barasa (10th Respondent), Edwin A. Omuyaka (11th Respondent), Wilson Opondo (12th Respondent), Elizabeth Nyabera (14th Respondent), Paul Oduol Onalo (18th Respondent), Ruth Akinyi Ouko (19th Respondent), Elijah Ogoti Osiemo (20th Respondent) And Ephraim Engatia (23rd Respondent), being persons who did not take part in the proceedings of the superior court”.

The Notice of Motion is based on the following grounds:

“

a) That on the 13th of December 2019, the Environment and land Court delivered a judgment and dismissed with costs case number KISUMU ELC NO. 782 OF 2015 and the Applicant herein being aggrieved with this decision preferred an appeal to this Honourable Court and filed a Notice of Appeal in the Environment and Land Court on the 20th December 2019”.

b) That the Applicant as required by Rule 77 (1) Court of Appeal Rules proceeded to serve the Notice of Appeal on the parties affected by the Appeal and now seeks leave of the Honourable Court to dispense with service of the Notice of Appeal on all persons who took no part in the proceedings in the Environment and Land Court as required by the proviso to Rule 77 (1) of the Court of Appeal Rules.

c) That Felistus N. Barasa (10th Respondent), Edwin A. Omuyaka (11th Respondent), Wilson Opondo (12th Respondent), Elizabeth Nyabera (14th Respondent), Paul Oduol Onalo (18th Respondent), Ruth Akinyi Ouko (19th Respondent), Elijah Ogoti Osiemo (20th Respondent) And Ephraim Engatia (23rd Respondent), did not take part in the proceedings of the Environment and Land Court.

d) That the said persons, Felistus N. Barasa (10th Respondent), Edwin A. Omuyaka (11th Respondent), Wilson Opondo (12th Respondent), Elizabeth Nyabera (14th Respondent), Paul Oduol Onalo (18th Respondent), Ruth Akinyi Ouko (19th Respondent), Elijah Ogoti Osiemo (20th Respondent) And Ephraim Engatia (23rd Respondent), have exhibited disinterest in these proceedings by failing to take part in the proceedings of the Environment and Land Court.

e) That this Honourable Court has unfettered discretion to allow this application.

f) It is in the interest of justice that the instant application be allowed to enable the Applicant progress and fast track the Appeal”.

The Notice of Motion is supported by the affidavit of **David Otieno**.

Therein he deposed that; on **13th of December 2019**, the Environment and Land Court delivered a judgment dismissing with costs case number KISUMU ELC No. 782 of 2015. The Applicant being aggrieved preferred the present appeal lodged on **20th December 2019** hereto annexed and marked DO/1. The Applicant further deposed that he proceeded to serve the Notice of Appeal on the parties affected by the appeal and is now seeking the leave of Court to dispense with service of the Notice of Appeal to parties who took no part in the proceedings as required by the provision in Rule 77 (1) of the Court of Appeal Rules; further to that, he swore that **Felistus N. Barasa** (10th Respondent), **Edwin A. Omuyaka** (11th Respondent), **Wilson Opondo** (12th Respondent), **Elizabeth Nyabera** (14th Respondent), **Paul**

Oduol Onalo (18th Respondent), **Ruth Akinyi Ouko** (19th Respondent), **Elijah Ogoti Osiemo** (20th Respondent) and **Ephraim Engatia** (23rd Respondent), exhibited disinterest in these proceedings by failing to take part in the proceedings of the Environment and Land Court; the Applicant concluded his affidavit by swearing that the Honourable Court had unfettered discretion to allow the application, which would be in the interest of justice, enable the Applicant to fast track the Appeal and not prejudice the Respondents.

The Applicant in his submissions dated **25th January, 2021**, made reference to **Rule 77 (1) of the Court of Appeal Rules** and he further drew Court's attention to the case of **Stephen Boro Githia v Family Finance Building Society & 3 others Civil Application No. Nai 263 of 2019**. The gist of the case being that the introduction of the overriding objective in both Civil Procedure Act and CAP 9 require courts to give pride of place to the overriding objective. He concluded his submission by stating that no prejudice will be occasioned to any person by making an order allowing this application and further informed the Court that an Appeal, Civil Appeal No. 33 of 2020 (Kisumu) had been filed against the judgment.

Rule 77 (1) of the Court of Appeal, 2010 Rules states that:

“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”.

In the case of **Daniel Odindo Waga Vs Nabil Hassan [2009] e KLR Civil Appeal No. 159 of 2009** as quoted in **Joseph Kiangoi v Wachira Waruru & 2 others [2010] eKLR** this Court stated as follows:-

“The phrase “directly affected by the appeal “does not have a technical meaning. It is a question of fact whether a party shall or shall not be affected by the outcome of an appeal. The test we think, must be whether if the appeal were to succeed, the result will adversely affect that party”

In the case of **Daniel Nkirimpa Monirei v Sayialel Ole Koilel & 4 others [2016] eKLR** the Court of Appeal sitting at Nairobi stated that:

“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”.

Given the fact that the respondents named in the motion did not participate in the lower court's proceedings, it is only fair to conclude that they will not be “affected” by the appeal. Further, having not participated, there is no need to alert them that the matter is not concluded.

It is in view of the above that I allow the motion dated **5th February, 2020**.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2021.

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR