



Doune Farm Ltd v Borop Multipurpose Co-operative Society & 5 others (Civil Application 128 of 2020) [2021] KECA 240 (KLR) (26 November 2021) (Ruling)

Neutral citation: [2021] KECA 240 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION 128 OF 2020
DK MUSINGA, HM OKWENGU & MSA MAKHANDIA, JJA
NOVEMBER 26, 2021**

BETWEEN

DOUNE FARM LTD APPLICANT

AND

BOROP MULTIPURPOSE CO-OPERATIVE SOCIETY 1ST RESPONDENT

RICHARD SOI 2ND RESPONDENT

JOSEPH RUNYA CHUMA 3RD RESPONDENT

JACKSON MUTAI 4TH RESPONDENT

CHRISTINE LABOSO 5TH RESPONDENT

JACKSON MUTAI 6TH RESPONDENT

(An application seeking to strike out the notice of appeal dated 4th August 2017 and filed on 7th August 2017 from the Ruling of the High Court of Kenya at Nakuru (D. O. Obungo, J.) dated 31st July, 2017 in ELC Case No. 86 of 2002)

RULING

1. The applicant's notice of motion dated 13th March 2020 seeks an order for striking out of the notice of appeal dated 4th August 2017 or to deem the said notice as withdrawn. The application is made on two grounds. The first one is that the notice of appeal was served upon the respondent after fourteen (14) days from the date of filing, contrary to rule 77 of this Court's Rules that requires such service to be effected within seven (7) days after lodging the notice of appeal. See *Daniel Nkirimpa Monirel vs Sayialele ole Koilel & 4 Others* [2016] eKLR.
2. The second ground is that since 7th August 2017 to date, the respondents have not filed the memorandum and record of appeal, contrary to rule 82 of this Court's Rules, which requires that an



appeal be instituted by lodging in the appropriate registry within sixty (60) days of filing the notice of appeal a memorandum of appeal and the record of appeal. See *Mae Properties Limited vs Joseph Kibe & Another* [2017] eKLR.

3. When this application came up for hearing on 23rd November 2021 Mr. Langat appeared for the applicant and Miss Tanui for the respondent. The applicant's learned counsel relied entirely on his written submissions that he filed and served on 8th November 2021.
4. On her part, the respondents' learned counsel told the Court that her firm had not filed a replying affidavit or submissions because they were not served with the applicant's application. She therefore sought an adjournment.
5. Mr. Langat responded that the respondents' advocates were duly served with the application and submissions. He referred the Court to an affidavit of service that clearly shows that the firm of Arusei & Company Advocates were physically served with the application on 16th July 2020 at 13.30 pm and they acknowledged service by stamping and signing a copy of the application.
As regards the submissions, there is evidence that the same were served electronically.
6. The Court declined to grant the adjournment as sought as there was no basis for granting it. The application is therefore unopposed.
7. It is not in dispute that the respondents' notice of appeal was served outside the statutory period of seven days after its filing. It is equally true that the appellant has not filed the memorandum and record of appeal since 7th August 2017 when the notice of appeal was lodged.
8. The ruling that was sought to be appealed against was delivered on 31st July 2017. On 14th August 2017 the respondents' advocates applied for certified copies of the proceedings and ruling. We do not know whether the same have been provided or not. But either way, the respondents have not demonstrated any diligence in pursuing the intended appeal.
9. Rule 83 of this Court's Rules states as follows:

“ 83. If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served”.

10. We are satisfied that the applicant's notice of motion is well founded. Consequently, the respondents' notice of appeal dated 4th August 2017 is hereby deemed to have been withdrawn with costs to the applicant. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF NOVEMBER, 2021.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL



ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

