



Erdemann Property Limited v National Environmental Tribunal; National Environment Management Authority & another (Interested Parties) (Civil Application 199 of 2020) [2021] KECA 256 (KLR) (3 December 2021) (Ruling)

Neutral citation: [2021] KECA 256 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 199 OF 2020
AK MURGOR & PO KIAGE, JJA
DECEMBER 3, 2021**

BETWEEN

ERDEMANN PROPERTY LIMITED APPLICANT

AND

NATIONAL ENVIRONMENTAL TRIBUNAL RESPONDENT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY INTERESTED PARTY

LONDON DISTILLERS (K) LIMITED INTERESTED PARTY

(Being an application to strike out the Notice of appeal and record of appeal from the ruling of the Environment and Land Court at Machakos (Mbogo, J) delivered 23rd April 2020 in ELC JR Appl. No. 75 of 2019)

RULING

RULING OF MURGOR, JA

1. By a notice of motion dated 3rd June, 2020, the 2nd Interested Party, London Distillers (K) Limited (the applicant has sought to strike out the Notice of Appeal dated 23rd April 2020 lodged by the respondent, Erdemann Property Limited in the Environment and Land Court on 29th April 2020, and the Record of Appeal dated 8th May 2020 lodged before this Court. The application was supported by the sworn affidavit of Pushpinder Singh Mann, the applicant’s General Manager Administration on grounds set out on the face of the application as well as its written submissions. It was contended that the Notice of Appeal dated 23rd April 2020 and lodged on 29th April 2020 was served on the applicant’s advocates through electronic means on 8th May 2020, which was out of the time prescribed by the rules of this



Court; that to the applicant's knowledge, the respondent has not sought time to be extended for service of the Notice of appeal on the applicant.

2. Furthermore, it was contended that the Record of Appeal was lodged on 8th May 2020 and served on the applicant's advocates on 20th May 2020 through electronic means, which was outside the timelines stipulated by rule 90 of the *Court of Appeal Rules*; that the delay in service has rendered the record of appeal incompetent, particularly as it is within the knowledge of the respondent that in such circumstances, time for filing of the record of appeal ought to be extended.
3. Another complaint was that the appeal the respondent filed was in the name of Erdemann Properties Limited, who was not at any time a party to the suit in the lower court; that the misdescription of the respondent is equally fatal and renders the record of appeal incompetent as it was lodged against a party who was a stranger to the proceedings.
4. In their replying affidavit sworn by Ruth Hinga, the respondent's legal manager and in written submissions, it was contended that the Notice and record of appeal were lodged in Court at the height of the Covid-19 pandemic and the disruptions resulted in the respondent having to serve the applicant through electronic means; that the Notice and record were filed timeously and endorsed by the Deputy Registrar of the Environment and Land Court; that thereafter a request was made for the proceedings; that the Notice and record were duly served on the applicant within the prescribed time.
5. It was further deposed that contrary to rule 79 (1) (a) of this Court's Rules the applicant has never lodged or served the respondent with a notice of address for service as required by law, despite acknowledging receipt of the Notice of Appeal; that upon serving the Notice of Appeal, the respondent subsequently served the record of appeal electronically through the applicant's advocates, on the applicant and on the other respondents; that though service of the record was effected six days after the prescribed time, but it was noteworthy that the respondents had not complied with rule 79 by providing an address for service. It was averred that in the event this Court were to find that the Notice and record of appeal were served out of time, then, the respondent invokes rule 4 and requests that time be enlarged for service of the appeal.
6. It was further asserted that the difference in the respondent's name was a typographical error for which the respondent ought not to be penalized; and that in the interest of justice the appeal ought to be sustained and determined on its merits, particularly because it raised important issues such as, the propriety of the impugned decision, whether each instance of administrative action or quasi-judicial determination raised a specific cause of action amenable to independent challenge, the applicability of doctrine of *res judicata* to the circumstances of the case, among other issues.
7. I have carefully considered the motion, the affidavit of the parties, and the submissions relied upon. On whether the misdescription of the applicant's name has rendered the appeal incompetent, I do not think so. This is because the word 'property' and "properties' being derived from the same word, bear a resemblance to the respondent and do not contributed a material misdescription. A typographical error of this nature would not therefore of necessity render the appeal incompetent.
8. As pertains to the substantive issue of delay, it is not in dispute that the impugned Ruling was delivered on 23rd April, 2020. The Notice of Appeal dated 23rd April 2020, was filed in this Court on 29th April 2020 which was within the statutory timelines provided by rule 75 of this Court's Rules. The Record of appeal was lodged on 8th May 2020 which was 15 days after the Notice of Appeal was lodged, and well within the prescribed period of 60 days. As such, it is clear that both the Notice and Record of Appeal were filed within time, and therefore up to this point there is no controversy.



9. The applicant's case however is that the Notice was served on it on 8th May 2020, which was 2 days outside of the time prescribed by the rules of this Court, and the record was served 6 days after the period prescribed by the rules, with the result that, both the Notice and Record were served out of time, which has rendered the appeal incompetent; that furthermore, the respondent had not filed any application seeking to have the time for service of the Notice and record on the applicant extended.
10. The provisions as they relate to service of the Notice and Record of appeal are to be found in rules 77, 79 and 90 of this Court's rules.

Beginning with the Notice of appeal, rule 77 provides;

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...
 2. Where a 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 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." (emphasis mine)
11. And in so far as service of the record of appeal is concerned rule 90 (1) specifies that, "...The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies thereof on each respondent who has complied with the requirements of rule 79".
 12. It was not controverted that the notice was served two days after the period prescribed, and the record, six days after the prescribed period. In conceding the delay, within its replying affidavit, the respondent pleaded that I invoke rule 4 and enlarge the time for service of the Notice and record of appeal.
 13. So as to determine whether or not the appeal should be struck out for delayed service of the Notice and Record of Appeal at the outset, judicial notice is taken that the respondent was filing and serving the appeal at the height of the Covid-19 Pandemic, when stringent movement and logistical constraints were imposed within the country. It is not also lost on us that despite this, the respondent was able to timeously file the Notice and record, with the result that, the appeal is ready to be heard and determined, save for the misstep of two days' delay in service of the Notice and six days for the record. Having come this far, the difficult circumstances notwithstanding, what good would be served by striking out the entire appeal? The applicant has readily accepted that it has received the appeal documents. What prejudice would it suffer when it will not have been subjected to any ambush? My view is that, the enactment of Article 159 of the *Constitution* was intended to cure procedural lapses arising from extraordinary and unprecedented circumstances such as those experienced in the county at the height of the Pandemic, and particularly where the delay was not inordinate.
 14. Since the applicant has already acknowledged receipt of the appeal documents, there would be no prejudice to it that cannot be compensated in costs. On the other hand, the interests of justice would be better served by having the appeal heard on its merits, instead of it having to be brashly locked out on account of the unusual environment that was prevalent at the time.
 15. Faced with these circumstances I decline the invitation to strike out the appeal, and instead would exercise my inherent jurisdiction and deem the Notice and Record of Appeal as properly served.
 16. Accordingly, the notice of motion dated 3rd June, 2020 is hereby dismissed. I order the respondent to pay the applicant costs of Kshs. 15,000 before the hearing of the appeal. In default the respondent will be at liberty to execute.



17 The Ruling is signed under Rule 32(3) of the Court of Appeal Rules (CAR), since the Hon. Lady Justice M.K. Koome, JA ceased to hold office of Judge of Appeal upon her appointment into being the Chief Justice and, as Kiage, JA agrees the above are the orders of the Court.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021.

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

CONCURRING RULING OF P.O. KIAGE, JA

I have had the advantage of reading in draft the ruling of **MURGOR, JA**. I am in full agreement with the reasoning and conclusions and, therefore, have nothing useful to add.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021.

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

