



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MURGOR, J.A.

CIVIL APPLICATION NO. 267 OF 2019

BETWEEN

ECOBANK KENYA LIMITED.....APPLICANT

AND

SAMUEL MBURU WAWERU & STEPHEN KOIGI WAWERU (Suing in their capacity as

Administrators of the Estate of the Late PETER WAWERU MUNGURA)...1ST RESPONDENT

DOMINIC KIMANI KAMAU.....2ND RESPONDENT

UNCLE SAMS GITURAI LIMITED.....3RD RESPONDENT

SAMUEL MUREITHI MURIOKI.....4TH RESPONDENT

BEATRICE KOSGEL.....5TH RESPONDENT

(Being an application for leave to waive service of the Notice of Appeal

lodged on the 8th August 2019 on the 2nd respondent arising from the Judgment

and decree of the High Court of Kenya in Nairobi (J.A. Makau, J.)

delivered on 31st July 2019 in HCCC No. 1141 of 2000)

RULING

The Notice of Motion dated 13th August 2019 is made pursuant to *sections 3 A and B* of the *Appellate Jurisdiction Act* and *rule 77 (1)* of the *Court of Appeal rules* and seek for orders that this Court directs that the service of the Notice of appeal lodged by the applicant on 8th August 2019 need not be effected on *the 2nd respondent, Dominic Kimani Kamau* and that the costs of the application be provided for.

The application was brought on the grounds that following delivery of a judgment by the High Court on 31st July 2019 in *Nairobi High Court Civil Case No 1141 of 2000*, the applicant filed a Notice of appeal on 8th August 2019 which it served on the 1st, 3rd, 4th and 5th respondents on the 4th and 5th August 2019; that the 2nd respondent neglected to participate in the proceedings before the High Court and was unrepresented, and further his whereabouts were unknown. As a consequence, the applicant has been unable to serve him with the Notice of appeal, and for the aforesaid reason urged that this Court direct that service on the 2nd respondent need not be effected. The motion was supported by the affidavit of *Jackson Muema Kisinga*, Advocate sworn on the same date.

I have considered the application and the submissions of *Mr. Kisingi*, learned counsel for the applicant. The proviso to *rule 77 (1)* of this Court's rules makes it a requirement for any intended appellant who wishes to dispense with service upon a party who did not participate in the proceedings in the lower court to apply for direction within seven days of lodging the notice of appeal.

The applicant contends that the 2nd respondent neglected to participate in the proceedings before the High Court and indeed in the judgment delivered on 31st July 2019, the learned judge (J.A. Makau, J) recorded that, “...the 2nd defendant did not appear during the hearing and could not be traced to give evidence;...”. Furthermore, the applicant confirmed compliance with the requirement to file the application within 7 days of lodging the Notice of appeal, and it was submitted that the Notice of appeal was lodged on 8th August 2019, and this application was brought on 13th August 2019; that since 12th August 2019 was declared a National holiday, it was excluded from computation of time.

In sum, the application is merited. It is allowed and I direct that service on the 2nd respondent, Dominic Kimani Kamau be and is hereby dispensed with.

I make no orders as to cost.

It is so ordered.

Dated and delivered at Nairobi this 24th day of April, 2020.

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR