



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: NAMBUYE, M'INOTI AND KANTAL, JJA]

CIVIL APPLICATION NO. 51 OF 2019

BETWEEN

THE PARLIAMENTARY SERVICE COMMISSION.....APPLICANT

AND

THE SALARIES AND REMUNERATION COMMISSION .....1<sup>ST</sup> RESPONDENT

ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT

LAW SOCIETY OF KENYA .....3<sup>RD</sup> RESPONDENT

HONOURABLE BENSON MUTURA .....4<sup>TH</sup> RESPONDENT

OKIYA OMTATA OKOITI .....5<sup>TH</sup> RESPONDENT

*(Being an appeal from the Judgment of the High Court at Nairobi (G. V. Odunga, J.) dated 10<sup>th</sup> December 2018*

*in*

*Judicial Review Application No. 686 of 2017)*

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**RULING OF THE COURT**

Before us is a Notice of Motion dated 14<sup>th</sup> February 2019, and filed on 15<sup>th</sup> February 2019. It is premised on Rule 42 and 77 of the Court of Appeal Rules (CAR). It substantively seeks to strike out the Notice of Appeal dated 13<sup>th</sup> December 2018, together with an attendant prayer for provision for costs. It is supported by grounds on its body, a supporting affidavit of **Jeremiah Nyegenye CBS**, and a further affidavit of **Esther Mwikali**, sworn on 16<sup>th</sup> May 2019 and filed on 17<sup>th</sup> May 2019. The application is opposed by a replying affidavit sworn and filed on 13<sup>th</sup> May 2019 by **Anne R. Gitau**, on behalf of the 1<sup>st</sup> respondent.

The application was canvassed by way of oral submission. Learned counsel **Mr. G. S. Miyare** appeared for the applicant, while learned counsel **Mr. Andrew Wandabwa**, appeared for the 1<sup>st</sup> respondent. There was no appearance for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents who were duly served. In support of the application the applicant submitted that on 10<sup>th</sup> December, 2018 the High Court (**G.V. Odunga, J.**) delivered a judgment in Judicial Review Application No. 686 of 2017 and issued an order of certiorari quashing the decision by the 1<sup>st</sup> Respondent contained in **Gazette Notice no. 6517** published on 7<sup>th</sup> July 2017. On 15<sup>th</sup> January 2019 the 1<sup>st</sup> respondent served upon the applicant Civil Application No. 9 of 2019, seeking stay of execution of the orders issued by the High Court, to which was annexed “**a purported notice of appeal**” dated 13<sup>th</sup> December 2018. Since then, counsel argued, the 1<sup>st</sup> respondent had not been served with the said notice or any other notice at all and that it is a mandatory requirement of the law that any notice of appeal filed by an intended appellant must be served personally on all parties directly affected by the intended appeal within seven (7) days of lodging the same.

**Mr. Miyare** therefore urged us to reject the 1<sup>st</sup> respondent’s contention that it effected service on the applicant by registered post since no return of service was exhibited as required by law. The applicant further urged the Court to find that the purported service is not only false and misleading but also improper and unacceptable in law. To buttress the above submission, the applicant relied on the case of **Daniel**

**Nkiringa Monirei v. Sayiale Ole Koilel & 4 Others [2016] eKLR and Justus Aloo Ogeka & 6 Others v. Kenya Union of Commercial Food and Allied Workers & 2 Others [2018] eKLR**, in which the notices and records of appeal were struck out for non-compliance with the mandatory requirements of **Rules 76(1) and 77(1) of the Court of Appeal Rules**.

**Mr. Wandabwa**, in opposing the application, agreed that the orders of the High Court were made on 10<sup>th</sup> December 2018. The 1<sup>st</sup> respondent was aggrieved and desired to appeal. It timeously filed both the notice of appeal and the letter bespeaking proceedings at the High Court registry on 19<sup>th</sup> December 2018. Being aware that advocates offices normally close for Christmas holidays, his firm caused the notice of appeal to be served on all parties directly affected by the intended appeal by registered post and that it was only the applicant who was complaining of lack of service of the notice of appeal through registered post.

It was also **Mr. Wandabwa's** contention that the intended appeal raises issues of general public importance and should therefore be accorded an opportunity to be heard on its merit. In light of the fact that the other parties were not complaining of lack of service, **Mr. Wandabwa** urged us to find that there was service and to dismiss the application especially since the 1st respondent stood to suffer no prejudice if the applicant were accorded an opportunity to pursue the intended appeal. To buttress the above submissions, counsel relied on **Nicholas Kiptoo Arap Salat v. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR**, where an appellant was afforded an opportunity to pursue its appeal in the absence of intentional or contumelious default. He added that any inconvenience caused could be compensated for by way of costs and that the period of delay was not inordinate. It was his further view that it was disproportionate to strike out the appeal for the reason only of non-service of the notice of appeal. He also cited **Joseph Kiangoi v. Wachira Waruru & 2 Others [2010] eKLR**, **Ayub Murumba Kakai v. John Clerk of Webuye County Council [2010] eKLR**, **Abok James Odera t/a A.J. Odera Associates v. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**, and **Gichuki King'ara & Company Advocates v. Emperium Enterprises Limited and 2 Others Civil Application No. NAI 1211 of 2012 (UR 156/2012)** and urged us to take a broad view of justice as mandated by the overriding objective.

In reply, **Mr. Miyare** submitted that the intended appeal is primarily against the applicant and not the other parties and maintained that the intended appeal does not lie because **Rule 17(1) of the Court of Appeal Rules** is mandatory that leave of the court must be obtained before adopting other modes of service.

We have considered the rival pleadings, submission and principles of case law relied upon by the applicant and the 1<sup>st</sup> respondent in support of their opposing positions. **Rule 77(1)** on which this application is primarily founded provides as follows:

**“An intended appellant shall, before or within seven days after lodging notice of appeal send copies thereof on all persons directly affected by the appeal.”**

The order that aggrieved the 1st respondent was issued on 10<sup>th</sup> December 2018. **Rule 75(1) and (2)** obliged the 1<sup>st</sup> respondent to lodge the Notice of Appeal within fourteen days. It provides as follows: -

**“(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 rule 84 and 97 be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”**

The 1<sup>st</sup> respondent submits that it complied with the prerequisite in **Rule 75(1) and (2)** because it lodged a notice of appeal dated 13<sup>th</sup> December 2018 in the High Court Judicial Review Division on 19<sup>th</sup> December 2018 in compliance with **Rule 77(1)** and because of the impending Christmas holidays, caused the said notice to be served on all parties directly affected by the intended appeal by registered post within seven (7) days of such lodging. Such service, it was contended, is allowed by the Rules. The applicant on the other hand, countered that it came to learn of the existence of the impugned notice on 15<sup>th</sup> January 2019, when it was served with an application for stay of execution. It disputed service by registered post in the absence of an affidavit of service and also on the basis that the Court had not sanctioned such service.

It is not in doubt that the 1<sup>st</sup> respondent has not provided an affidavit of service to prove service by registers post. It has however exhibited Postal Corporation of Kenya receipts, five (5) in number, one of which bears the name of **Miyare and Company Advocates**, all rubber stamped 19<sup>th</sup> December 2018 by the Postal Corporation of Kenya. The 1<sup>st</sup> respondent contends that none of the posted notices was returned to them unclaimed. The applicant however urges us to ignore the receipts because postal service was not sanctioned by the Court.

**Rule 17 (1) and (4)** of the Court of Appeal Rules provide as follows:

**“17(1) Where by in these Rules any document is required to be served on any person, service may be effected in such way as the Court may in any case direct, and in the absence of any special direction shall be made personally on the person to be served or any person entitled under rule 22 to appear on his behalf or by any other recognized mode of service as provided under Order 5 of the Civil Procedure Rules, 2010**

...

**(4) Proof of service may be given where necessary by affidavit, unless in any case the Court shall require proof by oral evidence.”**

In our view personal service is one of the modes of service of documents approved by the rules. That said, the Court may allow any other mode of service. There is however no mandatory requirement that the Court must sanction all other modes of service other than personal service. This is borne out by the use of the words “**or by any other recognized mode of service as provided under Order 5 of the Civil Procedure Rules, 2010**”. **Order 5 Rule 3** of the **Civil Procedure Rules** (CPR) provides for service on corporations by way of registered post among others modes of service as specified therein. We find nothing either in **Rules 17(1) and (4)** or **Order 5 Rule (3)** of the **Civil Procedure Rules** requiring that service by registered post must receive prior sanction of the Court.

As for proof of service, even though there was no affidavit of service, this was not fatal. An affidavit of service is one mode of proving service. In this case the 1st respondent has exhibited Postal Corporation receipts bearing the dates and names of the firms of advocates for the parties in the intended appeal. It would not be acting constantly with the overriding objective to ignore this evidence of service. See **Owino Ger v Marmanet Forest Co-operative Credit Society Ltd [1987] eKLR**; **CFC Stanbic Limited v. John Maina Githaiga & Another [2013] eKLR**, and **Catherine Njuguini Kanya & 2 Others v. Commercial Bank of Africa Ltd Civil Application No. Nai 366 of 2019. Rule 84** of the Court of Appeal Rules obliged the applicant to apply to strike out the notice of appeal within 30 days from the date of service of the notice upon it. In this case the applicant acknowledges that it became aware of the notice of appeal when it was served with the application for stay of execution on 15th January 2019. As we have noted, the Postal Corporation receipts show that service was effected on 19th December 2018. Whichever date one considers the application to strike out the notice of appeal was filed out of time.

For the foregoing reasons, we are inclined to sustain the notice of appeal for reason that rules of procedure are handmaidens of justice. See **Nicholas Kiptoo Arap Salat v. Independent Electoral and Boundaries Commission and 6 Others [supra]**. That too is the course of action, in the circumstances of this application, which is more consistent with the letter and spirit of the overriding objective, which we are obliged to promote.

Accordingly, this application is dismissed with costs to the 1<sup>st</sup> respondent. It is so ordered.

**Dated and Delivered at Nairobi this 24<sup>th</sup> day of April, 2020.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**K. M’INOTI**

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**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**