



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: MURGOR, J. MOHAMMED & KANTAI J.J.A.)**

**CIVIL APPLICATION NO. 92 OF 2019**

**BETWEEN**

**CHRISTINA MARGIT SCHEIBER**

**BERNARD SCHEIBER**

**TRUSTEES FOR WOMEN FOR WOMEN**

**COMMUNITY BASED ORGANIZATION.....APPLICANT**

**AND**

**WILLIAM NYONGESA FESTO LUNYELEKWE.....1<sup>ST</sup> RESPONDENT**

**KENNEDY WANJALA MABONGA.....2<sup>ND</sup> RESPONDENT**

***(An application to strike out the 1<sup>st</sup> respondent's Notice of Appeal lodged on 21<sup>st</sup> June 2019***

***in an intended appeal arising from the ruling of the High Court at Kitale***

***(Chemetei, J) dated on 17<sup>th</sup> March 2009 in***

***HC SUCC NO. 14 of 2015)***

**\*\*\*\*\***

**RULING OF THE COURT**

This matter before us concerns an application to strike out the 1<sup>st</sup> respondent, *William Nyongesa Festo Lunyelekwe's* Notice of Appeal lodged on 25<sup>th</sup> June 2019. The application was premised under *rules 75 and 84* of the *Court of Appeal rules* and was brought on the grounds that the Notice of Appeal lodged on 25<sup>th</sup> June 2019, contravenes the provisions of *rule 75 (3)* of the rules of this court, as it does not accord with the format of Form D in the First Schedule and does not disclose the part of the judgment that the respondents are dissatisfied with, which has caused undue prejudice to the applicant and goes to the substance of the intended appeal thereby rendering it a nullity.

Though served with a Notice of hearing on 24<sup>th</sup> May 2020 no replying affidavit or submissions were filed by the 1<sup>st</sup> respondent, and by way of an email dated 17<sup>th</sup> June 2020, B.N.Munialo Advocate for *the 2<sup>nd</sup> respondent, Kennedy Wanjala Mabonga* stated that the 2<sup>nd</sup> respondent supported the application to strike out the Notice of Appeal.

We have considered the impugned Notice of Appeal lodged on 25<sup>th</sup> June 2019 wherein it is indicated that;

***“TAKE NOTICE that WILLIAM NYONGESA FESTO LUNYELEKWE being dissatisfied with the decision of HONOURABLE JUSTICE H.K. CHEMETEI given at Kitale on 26<sup>th</sup> day of June 2019 intends to appeal to the court of appeal against part of the said Decision.”***

And in so far as the contents of the Notice of appeal are concerned, **rule 75 (3)** of this Court’s rules is clear. It provides in part that;

**“Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal only against a part of the decision, shall specify the part complained of...”**

In effect, it is a requirement that where it is intended that a part of a judgment or ruling is to be appealed against, then, that part of the judgment or ruling must be specifically particularized. It is also worthy of note that the requirement is spelt out in mandatory terms.

The rationale behind the requirement was explained in the case of Kenya Revenue Authority vs Doshi Iron Mongers and another [2016] eKLR, thus;

**“This provision is not restrictive at all and allows a party to appeal against an entire judgment/decree. A party aggrieved by an entire judgment of the court must nonetheless state so.**

**Likewise, a party who is aggrieved only by a part of a judgment is at liberty to pinpoint that part of the judgment that aggrieves him/her. When a party specifies the part of the judgment it wishes to appeal against, and files a notice of appeal to that effect, then it cannot thereafter be allowed to ambush the other parties by including aspects of the judgment which were hitherto deemed to have caused no grievance to the party.**

**This is because principles of justice and fairness demand that no party should ambush the other at the hearing”.**

Conversely, where a party indicates that they intend to appeal against a part of the judgment or ruling, and fails to specify the part against which they intend to appeal, were the appeal to proceed to hearing without that part of the decision being specified, that appeal would give rise to an ambush on the other party, and go against the rules of fair hearing.

Indeed, in this case, though the 1<sup>st</sup> respondent has indicated that he intends to appeal against a part of the ruling, there is no mention of the part intended to be appealed against with the result that, the 1<sup>st</sup> respondent has failed to comply with the requirements of **rule 75 (3)** of the rules of this Court which has rendered the Notice of appeal to be incompetent, and incapable of sustaining the appeal.

In view of the foregoing, the application is merited, and is allowed. The Notice of Appeal lodged on 25<sup>th</sup> June 2019 is struck out with costs to the applicant.

***It is so ordered***

**DATED and delivered at Nairobi this 7<sup>th</sup> day of August, 2020**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**