



IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPLICATION NO.36 OF 2019

BETWEEN

EQUATORIAL LAND HOLDINGS LIMITED...1st APPLICANT

KAREBE GOLD MINING LIMITED.....2nd APPLICANT

AND

CHESERET ARAP KORIR.....RESPONDENT

(Being an application to strike out the Notice of Appeal dated 24th

July, 2019 against the ruling of the Environment and Land Court at

Eldoret (Ombwayo, J.) delivered on 23rd July, 2019 in E.L.C. Case No. 127 of 2019)

RULING OF THE COURT

1) The notice of motion dated 22nd August, 2019 is brought under **Sections 3A & 3B** of the **Appellate Jurisdiction Act** and **Rules 42, 77(1) and 84** of the **Court of Appeal Rules** (this Court's Rules).

2) The application seeks the following orders:

a) That this Honourable Court be pleased to strike out the Notice of Appeal Dated 24th July, 2019 and filed on 24th July, 2019 against the whole ruling of the Environment and Land Court at Eldoret case No. 127 of 2018 dated 23rd July, 2019;

b) That costs of and incidental to this application and the appeal be awarded to the applicants.

3) The application is based on the following grounds:

a) The notice of appeal dated 24th July, 2019 was filed on even date;

b) The decision against which the applicants seek to appeal was dated, signed and delivered on 23rd July, 2019;

c) The Notice of Appeal was served on the respondent on 2nd August, 2019 which was 10 days after the Notice of Appeal was lodged;

d) The Notice of Appeal was required to be served on the respondent within seven (7) days from 24th July, 2019;

e) The Notice of Appeal was served on the respondent outside the seven (7) day period provided by this Court's Rules;

f) The Notice of Appeal dated 24th July, 2019 should be struck out with costs.

4) The application was supported by the affidavit of **Mitchell Menezes**, learned counsel for the applicants who deponed that the respondent filed the Notice of Appeal timeously on 24th July, 2019 in compliance with **Rule 75(2)** of this Court's Rules; that the Notice of Appeal was served on counsel for the applicants outside the seven (7) days required under **Rule 77(1)** of this Court's Rules; that in the circumstances, the Notice of Appeal is fatally defective, incompetent, a gross abuse of the court process and of no legal effect; that the delay in serving the Notice of Appeal has not been satisfactorily explained; that no application for leave to validate service of the Notice of Appeal has been made by the respondent to-date; and that in the circumstances, the Notice of Appeal should be struck out with costs.

5) The application was opposed by the respondent who filed a replying affidavit sworn by **Joseph M. Kimani**, counsel for the respondent who deponed that he filed a Notice of Appeal on 24th July, 2019; that the Notice of Appeal was however not signed by the Deputy Registrar until 2nd August, 2019 when he caused it to be served on counsel for the applicants on the same day; that counsel for the applicants refused to acknowledge receipt of the Notice of Appeal, contending that it was served out of time; that the Notice of Appeal was not served out of time as it was served on the same day that it was signed by the Deputy Registrar; that the Deputy Registrar did not sign at the designated place or indicate the date when she signed the Notice of Appeal which oversight should not be visited on the innocent litigant; that the notice of appeal was filed and served within 14 days which is a clear sign of good faith; that no prejudice will be occasioned to the applicants if the Notice of Appeal is deemed as duly served; that the subject of the intended appeal being a land matter, it is only fair and just that the respondent is given an opportunity to ventilate the intended appeal on merit; and that it is only fair and just that the Notice of Appeal be deemed to have been served within time.

6) We have considered the impugned Notice of Appeal dated and filed on 24th July, 2019. The notice of appeal was served on counsel for the respondent on 2nd August, 2019 which was outside the 7 days stipulated by **Rule 77(1) of this Court's Rules** which is couched in mandatory terms and provides in part as follows:

“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.”

[Emphasis supplied].

7. In ***Daniel Nkirimpa Monirei v Savialele ole Koilel & 4 others*** [2016] eKLR, this Court stated that:

“Whichever way, one looks at it, there was no service of the Notice of Appeal on the applicant. The purpose of service of a Notice of Appeal is to alert the parties being served that the case in question has not been concluded yet as the same has been escalated to another level. This enables the party to prepare and get ready for another fight, be it by way of gathering resources or just getting mentally prepared for defending the intended appeal. Failure to serve a party with a Notice of Appeal within the time prescribed by law gives a party false belief that the matter has been concluded, only to be ambushed later with the record of appeal in which the said notice is tucked away somewhere in the record. That occasions prejudice to the ambushed party, and it is in our view a habit that should not be countenanced in any fair and just process. That would explain why Rule 77 (1) of the Court of Appeal Rules is couched in mandatory terms.”

8. By parity of reasoning, the impugned Notice of Appeal in the instant application was served outside time and did not comply with the mandatory provisions of **Rule 77(1) of this Court's Rules**. There is therefore no valid Notice of Appeal on record.

9. The upshot is that this application has merit and is allowed with the effect that the Notice of Appeal dated and filed on 24th July, 2019 is struck out with costs to the applicants.

It is so ordered.

Dated and delivered at Nairobi this 7th day of August, 2020.

A. K. MURGOR

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JUDGE OF APPEAL

J. MOHAMMED

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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