



**IN THE COURT OF APPEAL**

**AT ELDORET**

**[CORAM: MURGOR, SICHALE & KANTAL, JJ.A]**

**CIVIL APPLICATION NO. 87 OF 2018**

**BETWEEN**

**LINA CHEROP WANGAMATI.....APPLICANT**

**AND**

**PHILIP KISANG.....1<sup>ST</sup> RESPONDENT**

**KABON KISANG.....2<sup>ND</sup> RESPONDENT**

(Being an Application to strike out the Notice of Appeal against the judgment

of the High Court of Kenya at Kitale (H.K Chemitei, J.) dated 14<sup>th</sup> May, 2018

**In**

**Succession Cause. No. 61 of 2014)**

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**RULING OF THE COURT**

The applicant, **Lina Cherop Wangamati** has filed a Notice of Motion dated **14<sup>th</sup> September 2018**, under **Rules 83** and **84** of this Court's Rules seeking to strike out the respondents' notice of appeal dated and filed on **25<sup>th</sup> May 2018** against the Judgment of **Chemitei, J.** delivered on **18<sup>th</sup> May 2018**.

The grounds on the face of the application which are reiterated in the supporting affidavit of **Peter Kiarie Ndarwa**, the applicant's advocate are that:

**“ i. A notice of appeal was filed on 25<sup>th</sup> May 2018 and served upon the respondent on 17<sup>th</sup> August 2018, which is outside the time stipulated by Rule 90(1) of the Court of Appeal Rules, 2010**

**ii. The respondents failed to institute an appeal within 60 days from the date of filing the Notice of Appeal and the same should be deemed as withdrawn**

**iii. The Respondents did not make a written request to the court for typed proceedings as a copy was never served on the applicant**

**iv. A record of appeal has never been served on the applicant”.**

The Respondents, **Philip Kisang** and **Kabon Kisang**, did not file any affidavit in response to the instant application.

On **4<sup>th</sup> June, 2020**, the motion came up before us for consideration **“on written submissions, no appearance of counsel”**. We have considered the application in its entirety. The applicant seeks to strike out the respondents' notice of appeal under **Rule 84** on the basis that an essential step within the proceedings was not taken in time, to wit: **Rule 77(1)** of this Court's Rules has not been complied with. The Rule

stipulates:

77(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”.**

It is not in dispute that the respondents’ notice of appeal was filed timeously on 25<sup>th</sup> May 2018. However, the face of the notice clearly indicates that the notice of appeal was served upon the applicant on 17<sup>th</sup> August 2018, which is 77 days outside the stipulated time.

It is well settled that **Rule 77 (1)** is couched in mandatory terms and that service of the Notice of Appeal must always be effected upon the respondent within 7 days of filing it. (See **Stephen Kinoro Kamau vs. Wanjiku Kinuthia & another [2005] eKLR** and **Daniel Nkirimpa Monirei vs. Sayialel ole Koilel & 4 others [2016] eKLR**). The rationale behind this requirement was aptly set out by this Court in **Daniel Nkirimpa Monirei** (supra) where it was held:

**“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...”**

Indeed, failure to serve the notice of appeal on time may be excused for good reason, if the respondent satisfies the Court that the delay was excusable in the circumstances (See **Njeri Njoroge vs. Joseph Maina Gichuhi & another [2018] eKLR** and **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 others [2013] eKLR**). Unfortunately this is not the case in this instance. There is no application on record seeking to enlarge the time to serve the notice of appeal outside the seven (7) days stipulated in the rules.

It is evident that there is an outright non-compliance of an essential step of this Court’s Rules.

In the end the inevitable outcome of this application is that it succeeds.

Consequently, the notice of appeal dated 25<sup>th</sup> May, 2018 is hereby struck out. The respondents shall bear the costs of the application.

**Dated and Delivered at Nairobi this 23<sup>rd</sup> Day of October, 2020.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**F. SICHALE**

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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**