



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: VISRAM, KARANJA & SICHALE JJ.A)**

**CIVIL APPLICATION NO. 82 OF 2018 (UR 83/2018)**

**BETWEEN**

**1. SWAFIYA ABDALLA.....1<sup>ST</sup> APPLICANT**

**2. FATUMA SWALEH.....2<sup>ND</sup> APPLICANT**

**AND**

**BAHATI TEMO & 6 OTHERS.....RESPONDENTS**

**AND**

**CIVIL APPLICATION NO. 55 OF 2018 (UR 43 OF 2018)**

**BETWEEN**

**BAHATI TEMO & 6 OTHERS.....APPLICANTS**

**AND**

**1. SWAFIYA ABDALLA.....1<sup>ST</sup> RESPONDENT**

**2. FATUMA SWALEH.....2<sup>ND</sup> RESPONDENT**

(Being an application for stay of execution and any other proceedings on the ruling and order of the Environment and Land Court of Kenya at Mombasa (Yano, J.) dated 11<sup>th</sup> April, 2018 in ELC Cause No. 155 of 1993 (UR 83 of 2018)

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**RULING OF THE COURT**

The applicants *Swafiya Abdalla* and *Fatuma Swaleh* filed a Notice of Motion dated 4<sup>th</sup> July 2018 in Civil Application No. 82 of 2018. *Bahati Temo, William Mjape, Stephen Kahindi Mwadzani, Charles Charo, Johnson Koya, Kesi Mjape and Robert Lugo* were named as the respondents. In the motion the applicants sought the following orders:-

**“(i) That notice of appeal dated 23<sup>rd</sup> April, 2018 is struck out as it was never served on the applicants or their advocate on record in the matter, or upon any other party likely to be affected by the intended appeal.**

**ii. The notice of motion application dated 30.4.2018 is struck out as it is grounded on an incompetent and unserved notice of appeal, and consequently the court’s jurisdiction is not properly invoked;”**

The motion was supported by an affidavit sworn on 4<sup>th</sup> July 2018 by the two applicants in which they deponed that whereas the respondents filed a notice of appeal dated 23<sup>rd</sup> April 2018 they have never been served with the said notice of appeal.

The respondents opposed the motion vide an affidavit sworn on 6<sup>th</sup> November 2018 by *Robert Njape Lugo*, the 7<sup>th</sup> respondent herein in

which he admitted that whereas a notice of appeal was filed on 23<sup>rd</sup> April 2018, he entrusted service thereof on one **Maita Gitu Mwangombe**; that he did not know that the service of the notice of appeal was not effected until he was served with the instant application; that failure of service of the notice “...was not out of either indolence or inertia”.

On 8<sup>th</sup> November 2018 the motion came before us for plenary hearing. Learned counsel, **Mr. Kimani** for the applicants urged the motion reiterating the grounds on the face of the motion and in the supporting affidavit. Learned counsel **Mr. Mwanyale** holding brief for **Mr. Lewa** for the respondents opposed the motion on the basis that the reason for the delay of the service of notice of appeal was explained. Further, counsel on behalf of the respondents placed reliance on **Article 159** of the Constitution for the proposition that justice is not to be encumbered by procedural technicalities.

We have considered the motion, the rival arguments, the applicant’s written submissions dated 26<sup>th</sup> September 2018, the authorities cited and the law. **Rule 77(1)** of the Court of Appeal Rules provides that:

**“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 Provided that the Court may on application, which may be made ex parte, within seven days after lodging the notice of appeal, direct that service need not be effected on any person who took no part in the proceedings in the superior court.**

**2. Where any person required to be served with a copy of a notice of appeal gave any address for service in or in connection with the proceedings in the superior court, and has not subsequently given any other address for service, the copy of the notice of appeal may be served on him at that address, notwithstanding that it may be that of an advocate who has not been retained for the purpose of an appeal”.**

The respondents admit having filed a notice of appeal dated 23<sup>rd</sup> April 2018 on 28<sup>th</sup> April 2018 at the Environment and Land Court at Mombasa. They also admit that service of the notice of appeal was not effected within 7 days as provided in **Section 77(1)** of this Court’s Rules. It is also not denied that the applicants got to know of the said notice when they learnt of the existence of an application dated 30<sup>th</sup> April 2018 seeking an order of stay of the judgment of 11<sup>th</sup> April 2018 in HCC No. 155 of 1993 (O.S.) in Civil Application No. 55 of 2018. The notice of appeal dated 23<sup>rd</sup> April 2018 was annexed to the application seeking stay of execution. In our view the respondents cannot hide under the cover that they were let down by a process server. We cannot shut our eyes to the blatant non observance of the rules given the fact that the notice of appeal was not served within 7 days of filing and neither was the notice of motion application made under **Rule 5(2)(b)** of this Court’s rules served upon the applicants. The applicants got to know of the said notice of motion on seeing it cause listed for hearing on 4<sup>th</sup> June 2018.

As regards reliance on **Article 159** of the Constitution, it is our view that this cannot avail them the respondents. The non-observance of the rules of procedure cannot be cured by the provisions of **Article 159** of the Constitution as the rules of procedure facilitate the due administration of disputes. In **RAILA ODINGA & 5 OTHERS VS. INDEPENDENT ELECTORAL AND BOUNDARIES**

**COMMISSION & 3 OTHERS** [2013] eKLR the Supreme Court stated:

**“Article 159(2) of the Constitution simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court.”**

The upshot of the above is that the notice of appeal dated 4<sup>th</sup> July 2018 is hereby struck out with costs to the applicants.

Apart from the above motion Civil Application No. 82 of 2018 **Bahati Temo, William Mjape, Stephen Kahindi Mwadzani, Charles Charo, Johnson Koya, Kesi Mjape** and **Robert Lugo** as respondents filed a notice of motion dated 30<sup>th</sup> April 2018 in Civil Application No. 55 of 2018. **Swafiya Abdalla** and **Fatuma Swaleh** were named as the respondents. In the main, the applicants in Civil Application No. 55 of 2018 sought the following orders:

**“1. Spent**

**2. That there be a stay of execution of the ruling and orders arising from the ruling of C. Yano delivered on 11<sup>th</sup> day of April, 2018 in Mombasa. HCC No. 155 of 1993 between Bahati Temo and 6 others vs Swafiya Abdalla and another, pending hearing and determination of this application.**

**3. That there be a stay of execution of the ruling and orders arising from the ruling of Hon. Mr. Justice C. Yano delivered on 11<sup>th</sup> day of April, 2018 in HCC No. 155 of 1993 between Bahati Temo and 6 others vs. Swaffiya Abdalla & Fatuma Swaleh.**

**4. That costs of this application be provided for”.**

The motion came before us for hearing on same date the motion in Civil Application No. 82 of 2018 was heard (8<sup>th</sup> November 2018). **Mr. Mwanyale** for the applicants urged the motion. He urged us to find that the applicants have an arguable appeal. On the nugatory aspect, counsel for the applicants contended that the applicants who stay on the land, stand to be evicted, absent stay, thus rendering the appeal nugatory.

**Mr. Kimani** for the respondents (in Civil Application No. 55 of 2018) opposed the motion. He contended that the notice of appeal which originates jurisdiction in a **5(2)(b)** application has never been served upon them. It is this same notice of appeal that we struck out in Civil Application No. 82 of 2018.

Following the striking out of the notice of appeal dated 23<sup>rd</sup> April, 2018, it is our view the motion herein has no legs to stand on. In **NICHOLAS KIPTOO ARAP KORIR SALAT VS INDEPENDENT AND BOUNDARIES COMMISSION & 7 OTHERS [2014] eKLR**, the Supreme Court re-emphasized that a notice of appeal “... **is a jurisdictional pre-requisite.**” Having struck out the applicant’s notice of appeal in Civil Application No. 82 of 2018, it therefore follows that we have no jurisdiction to entertain the motion in Civil Application No. 55 of 2018, Accordingly Civil Application No. 55 of 2018 is hereby dismissed with costs to the respondents.

**Dated and delivered at Mombasa this 14<sup>th</sup> day of February, 2019**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**