IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, OKWENGU & AZANGALALA, JJ.A

CIVIL APPEAL (APPLICATION) NO. 140 OF 2015

BETWEEN

DANIEL NKIRIMPA MONIREI.....APPLICANT/INTERESTED PARTY

VERSUS

SAYIALEL OLE KOILEL.....RESPONDENT

AND

LAND REGISTRAR, KAJIADO.....1ST RESPONDENT

THE SENIOR RESIDENT MAGISTRATE, KAJIADO.....2ND RESPONDENT

THE CHAIRMAN, LAND DISPUTE TRIBUNAL, KAJIADO.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

(An application to strike out the Notice of Appeal dated 30th October, 2014

and the Record of Appeal filed in Court on 5th June 2015 from the Ruling

and Order of the High Court of Kenya at Machakos (Mutende, J)

delivered on 23rd day of October, 2014

in

Petition No. 357 of 2012)

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RULING OF THE COURT

1. By a Ruling rendered at the High Court in Machakos on 23rd October, 2014, L. N. Mutende, J struck out with costs, the appellant's petition dated 24th September, 2012. This was consequent upon the court upholding a preliminary objection raised by Daniel Monirei, the applicant herein, to the effect that the

issues raised in the petition were *res judicata*.

2. The petitioner, Sayialel ole Koilel, being dissatisfied with the said ruling decided to file an appeal against the entire ruling. The Notice of Appeal, now impugned, is dated 30th October, 2014. It is part of the Record of Appeal, and is also annexed to the affidavit of Philip Ocharo in support of the chamber summons. The said notice does not bear any stamp of the court in which it was filed, to confirm receipt and filing of the same. We shall advert to that issue later.

3. The appellant subsequently filed the record of appeal on 5th June 2015, as can be deciphered from the record of appeal. The record was then served on the applicant herein (the interested party in the petition) on 13th July, 2015. This was received under protest as minuted on the copy of the Notice of Appeal on which the applicant's advocates wrote:-

> *"received under protest. We were not served with the notice of appeal and the letter requesting for copies of proceedings and Ruling/Judgment."*

4. These are the circumstances that led the applicant to file the Notice of Motion dated 6thAugust, 2015. The same is predicated on **Rules 42, 76, 80, 81** and **85 of the Rules of this Court**. The applicant seeks, *inter alia*, orders that the Notice of Appeal dated 30th October, 2014 be struck out; and that the Record of Appeal dated 2nd June, 2015, but filed on 5th June, 2015 be struck out too. The applicant cites two grounds on the face of the application. These grounds are to the effect that the notice of appeal was not served on the applicant as by law provided; and secondly, that the record of appeal was also not served within the time prescribed by the Rules of this Court.

5. In support of the application, Philip Ocharo, learned counsel for the applicant, has sworn an affidavit which essentially challenges the authenticity of the said Notice of Appeal, because it bears no court stamp to show that it was indeed lodged in the High court registry as required by the Rules. Learned counsel also deposes that the letter bespeaking the proceedings was neither copied to the applicant nor served on him. Further, that even the certificate of delay in the record of appeal is not signed by the Deputy Registrar of the Court and its authenticity is also called into question. He entreats the Court to strike out both the Notice of Appeal and the Record of Appeal.

6. In reply, learned counsel, Mr. Malinzi Lucey Kwisega learned counsel for the appellant/respondent in this application, depones that the impugned Notice of Appeal was filed in the High Court registry at Machakos and served accordingly. On the other hand, says counsel, if the Notice of Appeal was not served, then the non-service was an oversight, and a genuine mistake which should not be visited on the appellant. He depones that the certificate of delay was duly *"sealed and signed"*.

A cursory look at the said annexure will however show that the same is not "*sealed"* as it bears neither the seal, nor the rubber stamp of the court, which is necessary to authenticate the signature said to belong to the Deputy Registrar, High Court Machakos. Learned counsel further deposes that any errors committed in the process of filing the appeal are regretted and that the Court should be minded to sustain rather than terminate suits. He urged that the application be dismissed with costs.

7. Urging the motion before us, Ms. Mogoa, learned counsel for the applicant, reiterated the contents of the supporting affidavit outlined above. She summed up by saying that the jurisdiction of this Court has not been properly invoked, there being no valid Notice of Appeal, and the application should therefore be allowed. She emphasised that no good reasons have been advanced for the said breaches of the law, and the same should not therefore be countenanced.

8. While reiterating the contents of the replying affidavit, Mr. Malinzi, admitted that the letter bespeaking the proceedings was never served on the applicant. He nonetheless maintained that service of the Notice of Appeal with the Record of Appeal was proper.

9. On his part, Mr. Onyiso, learned counsel, appearing for the respondents in the appeal, made no

submissions, and left the matter in the good hands of the Court.

10. We have considered the application, the rival affidavits, submissions of both counsel, and the relevant annexures. The issue here is in our view quite simple and straightforward. Do we have a valid Notice of Appeal on record that can give life to the appeal herein? The format of the Notice of Appeal is provided for in **Rule 75 of this Court's Rules**. **Rule 75(1)** which explicitly states that the Notice of Appeal shall be lodged with the Registrar of the Superior Court (in this case the High Court) in duplicate.

After the Notice of Appeal is duly lodged, the Registrar of the said court transmits the notice to the relevant court registry. The Notice of Appeal is endorsed by the Registrar before being transmitted to the appropriate appeal registry. After that is done, **Rule 77(1)** comes in to play. This Rule is couched in mandatory terms and compliance with the same is not optional. The Rule provides as follows:-

> **77(1)** ***"An intended appellant shall, before or within seven days after lodging the notice of appeal, serve copies thereof on all persons directly affected by the appeal."***

11. In this case, the applicant was the interested party before the High Court. He had fully participated in the Judicial Review proceedings before that court, and even more importantly, he is the registered proprietor of the land which is the subject of the said pleadings. There was no exemption granted by the court pursuant to the proviso to **Rule 77(1)** for him not to be served.

It is imperative to note also that the said service must be within seven (7) days of filing of the Notice of Appeal. In the matter before us, the annexed Notice of Appeal bears no rubberstamp of the High Court, nor does it have any other endorsement by the Registrar of the High Court. This glaring authentification deficiency has not been explained by learned counsel for the applicant. In our view, this document does not pass muster. The Notice of Appeal therefore, fails the first test.

12. Then comes the issue of service. From the replying affidavit, the deponent is not sure whether the notice was served within the prescribed time. This comes out clearly in paragraphs four and five of the replying affidavit. According to the learned counsel *"if at all the notice was not served upon the applicant, then this was a honest mistake…."*

The mistake is therefore, partially admitted. That notwithstanding however, learned counsel in his submission in Court insisted that there was service, saying that the said service was done on 13th July, 2015, along with the record of Appeal. We note however, that the said "*service"* was service of the Record of Appeal, in which there was a copy of the Notice of Appeal.

13. With due respect to learned counsel for the respondent, that cannot amount to proper service of the Notice of Appeal as contemplated by **Rule 77(1) of the Court of Appeal Rules**. In any event, even if, *arguendo*, such service was found to be acceptable, the same was done almost nine (9) months after the "filing" of the contested notice of appeal. There was no application for enlargement of time to serve the Notice of Appeal outside the seven (7) days provided for by the Rules.

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.

14. From the above analysis, it is clear that there is no valid Notice of Appeal on record, to clothe us with the requisite jurisdiction to entertain the appeal herein. We have no hesitation in striking out the Notice of

Appeal dated 30th October, 2014. That would have taken care of the Record of Appeal. It would nonetheless be remiss of us not to deal with the prayer for striking out the Record of Appeal itself.

The filing of the record of appeal is provided for under **Rule 82 of the Court of Appeal Rules** as follows:-

> ***"82 (1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry <u>within sixty days</u> of the date when the notice of appeal was lodged –***
>
> *a.* ***a memorandum of appeal, in quadruplicate;***
>
> *b.* ***the record of appeal in quadruplicate;***
>
> *c.* **……..**
>
> *d.* **…….**
>
> ***Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule***
>
> *2.* ***within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy."(Underlining ours)*** **Sub rule (2) of Rule 82** goes on to provide as hereunder;
>
> ***"An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent''***

These provisions are self-explanatory and require no embellishing or expounding.

15. Learned counsel for the respondent admitted that the letter bespeaking the proceedings was never served on the applicant. That being so, then the Record of Appeal was definitely filed outside the sixty (60) days provided for under **Rule 82 (1)** above.

We have already found that the Notice of Appeal was not lodged as required. Be that as it may, the Record of Appeal ought to have been filed by 30th December or early February 2015, if the Court was to take into account the December Court Vacation. The record herein was lodged in June 2015. There was no leave granted by the Court to file it out of time. Could the appellant take refuge in the proviso to **Rule 82(1)** above?

In view of the concession of the noncompliance with **sub rule (2)** above, certainly not. This would therefore inevitably mean that the Record of Appeal is not properly on record, and it too ought to be struck out. There were too many errors made when lodging this appeal, which in our view cannot be brushed aside under the guise of inadvertence. Interestingly, the appellant has not even tried to invoke the provisions of **Article 159 (2) (d) of the Constitution** or **Section 3A** and **3B of the Appellant Jurisdiction Act.**

16. However, even if he had done so, jurisprudence emanating from this Court on these provisions is clear, and it could not have accorded the respondent any solace.

In the case of **<u>Ramji Davji Vekaria vs Joseph Oyula</u>, [2011] eKLR,** this Court held that lodging an appeal out of time is not a procedural technicality which can be cured by the Court invoking the overriding principle. The issue is a substantive one that goes to the core of ensuring that an intended respondent or interested/ affected party is accorded reasonable time to prepare for an appeal.

17. This Court invokes the overriding principle only in well deserving cases, and each case must be considered on its own peculiar circumstances. As poignantly pronounced in **Murandula Suresh Kantaria vs Suresh Nanalal Kantaria, Civil Appeal No. 277** of **2005** (unreported), the overriding principle is not a panacea for all ills and in every situation, and that proper basis must be laid before the Court can invoke the same in favour of a party. In exercising the power to give effect to the principle, the Court must do so judicially and with proper and explicable foundation.

We may add here that the principle must be used sparingly and definitely not be called in to aid a party who is seeking to avoid what he/she may find to be tedious compliance with laid down procedures, or to subvert due process.

18. In the case before us, learned counsel for the applicant did not even endeavor to explain why the Notice of Appeal was not served on such a principal party as the applicant was in the suit. Nor did counsel proffer any explanation as to why the letter bespeaking the proceedings was not copied or served on the applicant.

From the foregoing, it is evident that the application dated 6th, August 2015, has merit. The Notice of Appeal dated 30th, October 2014, and the Record of Appeal filed on 5th, June 2015, are hereby struck out with costs to the applicant.

Dated and delivered at Nairobi this 4th day of November, 2016.

W. KARANJA

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR