



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, MURGOR & J. MOHAMMED, JJ.A.)

CIVIL APPLICATION NAI. 107 OF 2013

BETWEEN

ROTAM AGROCHEMICAL CO. LTD..... APPLICANT

VERSUS

TWIGA CHEMICAL INDUSTRIES LTD RESPONDENT

(Being an application to strike out the notice of appeal filed to challenge the Ruling of the High Court of Kenya delivered at Nairobi (Mabeya, J.) delivered on 25th March, 2013

in

HCCC No. 553 of 2011)

RULING OF THE COURT

1. The applicant's notice of motion dated 16th May, 2013 seeks to strike out the notice of appeal dated 8th April, 2013 filed by the respondent in Milimani HCCC No. 553 of 2011 for the reason that the notice was served outside the period of seven days after filing, contrary to the provisions of **rule 77** of the **Court of Appeal Rules**.
2. In an affidavit sworn by **John Wananda**, an advocate practising as a partner in the law firm of M/S Shapley Barret & Co. Advocates for and on behalf of the applicant, it was deposed that the ruling that gave rise to the intended appeal was delivered on 25th March, 2013. The trial court struck out the respondent's statement of defence and entered partial judgment in favour of the applicant in the sum of **US\$597,600.41** plus costs and interest.
3. Mr. Wananda stated that the respondent filed a notice of appeal against the said ruling on 8th April, 2013 but the same was served upon the applicant's advocates on 24th April, 2013. A further/second copy was served on 26th April, 2013.
4. The respondent's advocate, **Peter Gichuki King'ara**, filed a replying affidavit and stated that the notice of appeal was filed on 8th April, 2013 but when his clerk went to serve the same upon the applicant's advocates' office they refused to accept service, saying that the notice did not bear the deputy registrar's signature. All the same the clerk left the notice with the applicant's advocates.

5. The clerk returned to the applicant's advocates' office on 24th April, 2013 and served another notice which was duly accepted.
6. The averments by Mr. King'ara were supported by an affidavit of service sworn by one Daniel Gatutha, a court process server. This is what the process server stated:

“2. That on the 8th day of April 2013 I received copies of a notice of appeal for HCCC 533 of 2011. I proceeded to file the same in the High Court Commercial Registry on the same date; however the copies were stamped at the Registry but I was informed that they would be taken to the Deputy Registrar for execution. I was therefore given two copies whilst the other copies remained at the registry.

3. *That on the same day I proceeded to Prudential Assurance Building 2nd Floor where the advocates for the applicant are situate and upon arrival I met the secretary to whom I explained the purpose of my visit and served him with the above mentioned document which she declined to accept service as the documents did not bear the Deputy Registrar's signature.*
4. *That I went back to the High Court to follow up on whether the copies I had left had been stamped. The Notice of Appeal were eventually stamped and signed by the Deputy Registrar on the 24th day of April 2013.*
5. *That on the said date I proceeded (sic) the Applicant's*

*Advocates offices at Prudential Assurance Building 2nd
Floor. This time they accepted service.”*

7. We have considered the application before us. **Rule 75 of the Court of Appeal Rules** requires any person who desires to appeal to this Court to give a notice in writing, which should be lodged in duplicate with the registrar of the High Court. The registrar is required to sign the notice. The notice should be lodged within fourteen days of the date of the decision against which it is desired to appeal.
8. Under **rule 77(1)**, the notice should be served within seven days after lodging it. The applicant contends that service was effected outside the stipulated period but the respondent asserts that the notice, though not signed by the registrar as required, was duly served within time but service was declined, simply because the notice did not bear the registrar's stamp. That allegation was verbally denied by Wananda. We think the applicant's advocates' secretary who was alleged to have declined service ought to have sworn an affidavit to refute the deposition by the process server, if indeed there was no element of truth in the process server's affidavit.

9. In the absence of an affidavit by the secretary who was allegedly served on 8th April, 2013, we are inclined to believe that the respondent's advocates served the applicant's advocates' secretary with a defective notice of appeal on 8th April, 2013, as the same did not bear the registrar's signature. If that be the case, the applicant's advocates' secretary ought to have accepted service and thereafter the applicant would have filed an application to strike out the notice of appeal.

10. But even if we are not right in believing the process server's averments, we do not think that in the specific circumstances of this matter it would be in the interest of justice to punish the respondent by striking out the notice of appeal due to the registrar's delay in signing the same. In such instances, the provisions of **Article 159(2) (d) of the Constitution of Kenya, 2010** which require that “justice shall be administered without undue regard to procedural technicalities” must be called to aid.

4The respondent intends to contest a judgment of **US\$597,600.14**

(about Kshs.53,000,000/=) that was entered after its statement of defence was struck out and it filed a notice of appeal within fourteen days of delivery of the High Court ruling. We think it ought to be afforded an opportunity to pursue its appeal.

12. For these reasons, we are not inclined to grant the application dated 16th May, 2013. The same is hereby dismissed. The costs of the application shall be in the appeal.

Dated and Delivered at Nairobi this 24th day of April, 2015.

D.K. MUSINGA

JUDGE OF APPEAL

A.K. MURGOR

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR