



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, MWILU & KIAGE, JJ.A)

CIVIL APPEAL (APPLICATION) NO.120 OF 2013

Consolidated with

CIVIL APPLICATION NO.105 OF 2013

AND

CIVIL APPLICATION NO.168 "A" OF 2013

BETWEEN

KAMLESH MANSUKHALAL DAMJI PATTNIAPPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS1ST RESPONDENT

THE ATTORNEY GENERAL2ND RESPONDENT

ELIJAH KIPNG'ENO ARAP BII3RD RESPONDENT

INTERNATIONAL CENTRE FOR POLICY AND CONFLICT4TH RESPONDENT

(Application No.120/2013 being for striking out the 1st respondent's Civil Appeal No.120 of 2013 and application No.105 of 2013 being for striking out the notice of appeal dated 8th April 2013 and application No.168 "A"/2013 being for striking out the 1st respondent's record of appeal in Civil Appeal No.120 of 2013 all arising from the judgment and decree of the High Court of Kenya (Mutava, J.) dated 20th December 2013 in Judicial Review Miscellaneous Civil Application

No.305 of 2012)

In

H.C. JUDICIAL REVIEW MISC CIVIL APPLICATION NO.305 OF 2012

RULING OF THE COURT

1. The applications before us show that, Kamlesh Mansukhlal Damji Pattni, the applicant, seeks to strike out the notice of appeal and the record of appeal in Civil Appeal No.120 of 2013 in which he is named as the first respondent. The background to the applications is not complicated. The applications show that the applicant was charged with criminal offences over the Goldenberg Affair in 1993 and was thereafter in and out of court in criminal and civil litigation. The applications further show that the applicant initially had a multiplicity of criminal cases against him which gave way to the Bosire Commission of Inquiry into the Goldenberg affair. After issuance of the report known as the Bosire Report, the applicant was charged in Criminal Case No.518 of 2006 with three others ostensibly pursuant to the said Report with offences relating to conspiracy to steal billions of shillings contrary to Section 393 of the Penal Code, conspiracy to defraud the government of Kenya of billions of shillings and conspiracy to steal billions of shillings (totaling to Shs.5,782,655,311.00), the property of the Government of Kenya. Other criminal charges were preferred against the applicant's co-accused, Wilfred Karuga Koinange, now deceased, and Elijah Kipngeno Arap Bii, both public servants, which related to abuse of office contrary to Section 101(1) of the **Penal Code** and breach of trust against the public contrary to Section 127 of the **Penal Code**.

2. The applicant embarked on plea bargaining but the Director of Public Prosecutions in his letter dated 27th January 2012 to the applicant's advocates, Messrs Kalove & Company, declined the offer for plea bargaining, whereupon the applicant moved to the High Court in Judicial Review Miscellaneous Application No.305 of 2012 seeking an order of certiorari to have quashed the DPP's decision to prosecute him (contained in the DPP's said letter of 27th January 2012) and for orders of prohibition to prevent the Attorney General, the DPP, and the Commissioner of Police, from prosecuting or arresting him or continuing with Criminal Case No.518 of 2006 against him.

3. The judicial review application was heard by Mutava, J. It was determined on the basis of affidavit evidence. In his judgment dated 20th March 2013 delivered on 25th March 2013 by the Hon. Mr. Justice Majanja on his behalf, Justice Mutava, issued an order of prohibition against the Attorney General, the DPP and the Commissioner of Police prohibiting them **firstly** from prosecuting or continuing to prosecute the applicant and companies associated with him including Goldenberg International Limited in Criminal Case No.518 of 2006 or in any other matter relating to the Goldenberg International Ltd and **secondly** from continuing with Criminal Case No.518 of 2006.

4. The DPP was aggrieved by the decision. Consequently, he sought to appeal against it and on 8th April 2013 gave a notice of appeal manifesting his intention to challenge the whole judgment. The notice of appeal attracted four applications from the applicant. These were Nos.105/2013, 106/2013, 168 "A"/2013 and 120/2013. Curiously, application 120/2013 which was dated and filed in court on 18th July 2014 bore the year 2013. But this appears to have been due to the fact that it was made in the Appeal No.120 of 2013 which the DPP filed in August 2013 against the applicant as the 1st respondent, and Elijah Arap Bii as the 2nd respondent, and International Centre for Policy and Conflict as the 3rd Respondent.

5. The application No.120 of 2013 shows that the DPP filed the record of appeal in this Court in Civil Appeal No.120 of 2013 on 12th June 2013 pursuant to the notice of appeal dated and filed on 8th April 2013. In the said appeal, the DPP faulted the judgment of Mutava J. and contended, inter alia, in grounds 8, 12, 13, 14, 15, 17 and 18 of his memorandum of appeal containing 18 grounds that –

The learned Judge of the High Court erred in law and in fact in holding that the appellant commenced Chief Magistrate's Court Criminal Case No.518 of 2006 against the 1st respondent on the basis of the recommendations of the report of the Judicial Commission of Inquiry into the Goldenberg Affair and that no further investigations were conducted as recommended in the said Report.

12.the learned Judge of the High Court erred in law and in fact in holding that the Central Bank of Kenya (CBK) was the complainant in Chief Magistrate's Court Criminal Case No.518 of 2006 and that since CBK had allegedly reached a settlement with the 1st respondent, the rationale of pursuing criminal proceedings with no apparent complainant is questionable.

13. *The learned Judge of the High Court erred in law in failing to find that if the alleged settlement between the CBK and the 1st respondent purported to offer immunity from criminal accountability, which it did not, then such immunity was illegal, contrary to public policy, offensive to law and therefore null and void.*
14. *The Learned Judge of the High Court erred in law in holding that to lay fresh charges against the 1st respondent and others fourteen years after the events giving rise to the charges occurred in inordinate delay.*
15. *The learned Judge of the High Court erred in law and in fact in holding that the appellant had not offered any reasonable explanation to the delay in concluding Chief Magistrate's Court Criminal Case 518 of 2006 or any other case against the 1st respondent and that the 1st respondent could therefore not have a fair trial.*
17. *The learned Judge of the High Court erred in law in issuing prohibitory orders barring the appellant from preferring future criminal proceedings against the 1st and the 2nd respondents arising from or in any way connected to the Goldenberg Affair and the Report of the Judicial Commission of Inquiry into the Goldenberg Affair.*
18. *The Learned Judge of the High Court erred in law in relying upon the decisions in Misc. Civil Application No.102 of 2006, Republic Vs The Judicial Commission of Inquiry into the Goldenberg Affair & Others, Ex-parte Hon. Professor George Saitoti and Misc. Civil Application No.416 of 2006, Republic vs – The Judicial Service Commission of Inquiry into the Goldenburg Affair & Others, Ex-parte Eric Cheruiyot Kotut as precedents and justification for his decision, notwithstanding the fact that the said decisions were arrived at based on different sets of facts and were not binding on him.*

6. On 25th September 2014, application No.120 of 2013 came up for hearing before us along with applications numbers 105/2013, 106/2013 and 168 "A"/2013. All of them, as we have stated above, were filed by **Kamlesh Mansukhal Pattni** (the applicant). Learned counsel **Mr. Mungai Warui** who appeared for the Director of Public Prosecutions (DPP), the 2nd respondent in all the 4 applications, drew our attention to the fact that applications Nos.105/2013, 106/2013 and 168 "A"/2013 were filed prior to Civil Application No. 120/2013. We verified the fact that while application No.120/2013 was filed on 18th July 2014, applications Nos.105/2013 and 106/2013 were both filed on 15th May 2013 and application No.168 "A"/2013 was filed on 15th July 2013.

7. **Mr. Steve Mwenesi**, learned counsel appearing with learned counsel **Mr. Kalove** for the applicant in all the four applications was in agreement as were learned counsel **Mr. Kaumba** for the Attorney General (2nd respondent) and Mr. Elijah arap Bii , who is named as an interested party in both applications Nos.105/2013 and 106/2013 and as the 2nd respondent in both Civil Applications Nos.120/2013 and 168 "A"/2013. Mr. Arap Bii appeared in person, his counsel, **Mr. Peter Simani of Simani & Associates Advocates** having been killed in the tragic Westgate terrorist attack in 2014. The International Centre for Policy and Conflict, which was named as the 3rd respondent in both applications Nos.120/2013 and 168 "A"/2013 and as the 1st respondent in application No. 105/2013 was not represented and **Mr. Mungai Warui** indicated to us that while the International Centre for Policy and Conflict had abandoned the proceedings, the Attorney General on his part was not interested in the proceedings because the mandate for prosecution of crime had after the promulgation of the Constitution on 27th August 2010 moved from the office of the Attorney General to the office of the Director of Public Prosecutions (DPP) by dint of Article 157 of the Constitution. Consequently, Mr. Kaumba who appeared for the Attorney General, proceeded to apply orally to withdraw the notice of appeal given by the Attorney General dated and filed in court on 10th April 2013 which the applicant had sought in application No.106/2013 to have struck out.

8. Learned Counsel **Mr. Mwenesi** for the applicant indicated that he was glad to have the said notice of appeal withdrawn while learned counsel Mr. Warui for the DPP and Mr. Arap Bii did not object to the withdrawal. We accordingly marked the notice of appeal as withdrawn under Rule 81 of the Rules of this

Court and excused Mr. Kaumba from further participation in the proceedings. In effect, the application No.106/2013 became spent upon the withdrawal of the notice of appeal.

9. As Mr. Mwenesi and Mr. Warui and Mr. Arap Bii all consented to have the remaining applications Nos.168 “A”/2013 and 105/2013 consolidated with application No.120/2013 and heard together and a composite ruling issued, we proceeded to consolidate the applications as agreed by the parties through their counsel and heard them together. The record of the proceedings was made in application No.120/2013.

10. The application No.120/2013 was a notice of motion dated and filed on 18th July 2014. It sought 4 orders as follows –

1. ***A declaration that the appeal is futile and is an abuse of the court process.***
2. ***An order that the appeal be struck out.***
3. ***The costs of and incidental to this application be provided for***
4. ***Any other relief of this Court may deem just and fit to grant.***

11. The application was made mainly on the ground that the appeal by the DPP was an abuse of the court process and that it had no chances of success as the prosecution of the applicant had allegedly been compromised and that the criminal charges were unfairly preferred against him.

12. The application No.105/2013 was by notice of motion dated 14th May 2013 and was filed on 15th May 2013. It sought the following 3 orders –

1. ***The 3rd respondent’s notice of appeal dated and filed on the 8th April 2013 against the judgment of the Honourable Justice Mutava dated 20th March 2013 and given at the High Court at Nairobi on 25th March 2013 be struck out.***
2. ***The costs of and incidental to this application be paid by the 3rd respondent.***
3. ***Any other relief this honourable Court may deem just and fit to grant.***

13. The application was supported by an affidavit of the applicant and was made on the ground that the 3rd respondent’s (DPP’s) Notice of Appeal filed on 8th April 2013 is incompetent for offending Rule 77(1) of the Court of Appeal Rules 2010 in that the said Notice was not served on the Applicant or his advocate within time as provided by the said Rule but was served on the applicant’s advocates on record Messrs Kalove & Company on 16th April 2013. Consequently the applicant alleges that the said Notice of Appeal is incompetent and of no legal effect and ought to be struck out.

14. The application No.168 “A”/2013 was by notice of motion dated and lodged in Court on 15th July 2013. It prayed for the following 3 orders –

1. ***The 1st respondent’s Civil Appeal No.120 of 2013 and record of appeal filed on 12th June 2013 and served on the applicant out of time on 21st June 2013 against the judgment of the High Court (Hon. Mr. Justice Mutava) dated 20th March 2013 in Judicial Review Miscellaneous Civil Application No.305 of 2012 be struck out.***
2. ***The costs of and incidental to this application be said by the 1st respondent.***
3. ***Any other relief this honourable may deem just and fit to grant.***

The application was made on the grounds that –

- a. ***The 1st respondent’s (DPP’s) Civil Appeal No.120 of 2013 and Record of Appeal filed on 12th June 2013 and served on the applicant on 21st June 2013 is incompetent, of no legal effect and is frivolous, vexatious and an abuse of the court process in that the said Record of Appeal is grounded upon the 1st respondent’s Notice of Appeal filed on 8th April 2013 but served on the***

Applicant's advocates on record out of time on 16th April 2013.

- b. ***The 1st respondent's (DPP's) Civil Appeal No.120 of 2013 and Record of Appeal filed on 12th June 2013 was served on the applicant on 21st June 2013 and is incompetent, frivolous, vexatious and an abuse of the court process in that the said record of appeal was served on the applicant's advocates on record out of time in violation of Rule 90 (1) of the Court of Appeal Rules 2010 and merits being struck out.***

15. The notice of appeal in the three applications was lodged by the DPP against the judgment of the Hon. Mr. Justice Mutava in Judicial Review Miscellaneous Civil Application No.305 of 2012 in which the applicant sought and obtained orders of prohibition as aforesaid.

16. Submitting on the three applications (numbers 120/2013, 105/2013 and 168 "A"/2013), learned counsel Mr. Mwenesi stressed that the Court of Appeal Rules require to be adhered to as they regulate the filing and service of both the notice of appeal and the record of appeal and are designed to facilitate proper dispensation of justice.

17. Mr. Mwenesi submitted that Appeal No.120/2013 is founded on the notice of appeal dated and filed in court on 8th April 2013 which was served late in contravention of Rule 77(1) of the Rules of this Court. He pointed out that the rule required the notice of appeal to be served within 7 days of filing and therefore it should have been served not later than 15th April 2013 as it was filed on 8th April 2013. It was Mr. Mwenesi's submission that the notice became invalid because it was served out of time. That is why, he said, the applicant made the application No.105/2013 on 15th May 2013 to strike it out. It was Mr. Mwenesi's further submission that no replying affidavit was filed in response to the application and, he contended, the facts pleaded in the application were therefore not controverted and should therefore be treated as admitted. He urged the Court to strike out the notice of appeal.

18. With regard to the Civil Appeal No.120/2013, Mr. Mwenesi contended that it should be struck out as the record was not served in compliance with the rules. He submitted that the applicant applied on 15th July 2013 in application No.168 "A"/2013 to strike out the record of appeal because it was served late on 21st June 2013. The appeal having been lodged on 12th June 2013, he submitted, the service on 21st June 2013 was clearly out of time as Rule 90(1) required the service to be before or within seven days after lodgment of the record in the court registry. It was counsel's submission that the late service rendered the appeal fatally defective and therefore incompetent.

19. Relying on the affidavit of the applicant sworn on 18th July 2014 in support of the application No.120/2013 and on the grounds for making the application, Mr. Mwenesi submitted that the Civil Appeal (No.120/2013) was an abuse of the process of the Court and urged us to invoke the inherent power of the Court to strike it out having regard to the fundamental rights of the applicant and the evolving jurisprudence and constitutional principle of proportionality with regard to enforcement of the fundamental rights. He pointed out that the office of the DPP was created six months before the record of appeal was lodged. He alluded to what he considered to be important points that emerged from the impugned judgment of Mutava J. but these have no bearing on the determination of the applications before us and we need not therefore consider or delve into them save to point out that it was counsel's submission that the superior court below was right in holding in the judgment of Mutava J. that the applicant could not get a fair hearing in the Criminal Case No.518 of 2012 as the Attorney General did not conduct fresh investigations after the Bosire Report and as there was, according to counsel, no credible evidence to sustain the charges. Moreover, it was contended by Mr. Mwenesi that although the principal complainant in the Criminal Case No.518 of 2012 was the Central Bank of Kenya as the High Court found, the Central Bank of Kenya had stated that it had no further complaint against the applicant. In addition, counsel submitted that there could be no proper basis for prosecuting the applicant as the Bosire Report had been trashed. Counsel also drew the attention of the Court to the DPP Act 2013 and alluded to the principles including constitutionalism that engender fair trial, and contended that the appeal (No.120/2013) ought to be struck out to prevent abuse of the process of the court and thus enhance compliance with the Constitution.

20. Finally, Mr. Mwenesi drew our attention to Article 24 of the Constitution and contended that the applicant was being prosecuted in clear abuse of the process of the Court and, adding a melancholy touch to his conclusion, stated that the complainant's co-accused in Criminal Case No.518 of 2012, save for Kipngetich Arap Bii, have all died, as have also many witnesses.

21. Mr. Mungai Warui, the learned counsel for the DPP urged us to disallow the application No.105 of 2013 on the ground that the notice of appeal was duly filed and served. It was his submission that the notice was duly lodged on 8th April 2013 but he conceded that service was late by a day. He admitted that it was served on 16th April 2013, although it should have been served not later than 15th April 2013. Mr. Warui told the Court that as 16th April 2013 was a Monday, this in his view, effectively reduced the period of delay to one day after discounting the weekend. But he did not give the legal basis or authority for that proposition! In Mr. Warui's submission, the interest of justice was overriding and the appeal which was in place should be sustained and determined on merit.

22. With regard to application No.168 "A"/2013, Mr. Warui contended that the service of the appeal was not out of time. The record was filed on 12th June 2013, he said, against all the three respondents who did not raise any objection save for the applicant.

23. It was Mr. Warui's submission that the applicant's counsel on record refused to accept service of record of appeal. If Mr. Mwenesi was correct in his calculation of the period of lateness in serving the record of appeal, contended Mr. Warui, the period of delay would not exceed a maximum of 2 days and this, contended Mr. Warui, did not occasion any prejudice to the applicant. Mr. Warui urged us to allow merit to determine the outcome of the appeal rather than technicalities of procedure. He cited Section 3A and 3B of the Appellate Jurisdiction Act to buttress his argument that justice to the parties was an overriding criterion over rules governing procedure.

24. As regards application No.120 of 2013, Mr. Warui urged us to strike it out or dismiss it because it offended the proviso to Rule 84 of the Rules of this Court which requires that an application to strike out notice of appeal or the appeal shall not be brought after the expiry of thirty (30) days from the date of service of the notice of appeal or record of appeal as the case may be. The proviso to Rule 84 of this Court's Rules states –

“an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record as the case may be.”

25. It was Mr. Warui's submission that the allegation that no investigations were conducted was incorrect and further that the stance taken by the Central Bank of Kenya should be addressed in the appeal itself. It was desirable, contended Mr. Warui, that the parties be afforded opportunity to ventilate their respective cases during the hearing of the appeal. Alluding to the consent involving International Centre for Policy and Conflict (ICPC) record in the Supreme Court, Mr. Warui submitted that ICPC consented to their appeal being struck out. He added for good measure that it was because the appeal was academic that it was struck out by consent. Mr. Warui urged us to dismiss the three applications to pave way for the hearing and determination of the appeal on merit.

26. Mr. Kipngeny Arap Bii, the interested party, associated himself with the submissions of Mr. Mwenesi and stated that he had nothing to add.

27. Before embarking on the analysis of the applications, perhaps we should mention that Mr. Mwenesi did urge us to disregard the DPP's supplementary record of appeal on the ground that the notice of appeal was served out of time. In his submission in this regard, Mr. Mwenesi contended that the defects in serving the notice of appeal and the record of appeal out of time were fatal and rendered the appeal incompetent. Mr. Mwenesi also alluded to the replying affidavit sworn by Mr. Martin Kiogora Muriungi, a process server, and pointed out that the averments in it showed that the service was out of time. He did not comment or develop or amplify his submission further, nor did he comment on the annexures to the affidavit which have direct bearing on the service of the record of appeal which Mr. Mwenesi alleges was

served out of time. But no matter. The averments in the replying affidavit and in the affidavit of service sworn by Mr. Martin Kiogora Muriungi which was annexed to the replying affidavit were not controverted, and are thus not denied.

28. We have anxiously considered the three applications numbers 120/2013, 105/2013 and 168 “A”/2013 which seek to strike out the notice of appeal and the record of appeal in Civil Appeal No.120 of 2013, now pending in this Court.

29. We observe that application No.105 of 2013 was filed one day shy of the thirty days limit set by the proviso to Rule 84 (supra) as was also application No.168 “A”/2013 which was filed on 15th July 2013 after service of the record on 17th June 2013. Application NO.120 of 2013 was brought after the expiry of thirty days from the date of service of the record of appeal on 17th June 2013 (as we show later) and from that stand point was not in compliance with the proviso to Rule 84 and cannot stand.

30. In application No.105 of 2013, the applicant contends that the notice of appeal dated and filed on 8th April 2013 is incompetent for offending Rule 77(1) of the Court of Appeal Rules 2010 which requires service to be effected within seven (7) days of the date of filing. It was served on 16th April 2013. It should have been served on or before 15th April 2013.

31. In application No.168 “A”/2013, the applicant seeks an order to strike out Civil Appeal No.120 of 2013 because the Notice of Appeal was served out of time on 16th April 2013.

32. We observe that the applicant’s affidavit sworn on 18th July 2014 in support of application No.120/2013 did not focus on the issue of competence of the notice of appeal. Rather, it addressed the issue of alleged abuse of the process of the Court. However, the applicant’s affidavit in support of application No.168 “A” of 2013 averred that the record of appeal in Civil Appeal No.120 of 2013 was not served within 7 days of filing as required by Rule 90 (1) of this Court’s Rules.

33. We have carefully perused the three applications and the 1st respondent’s replying affidavit filed in application No.120 of 2013.

34. There are two clear issues for our determination. First, whether the notice of appeal and the record of appeal were filed and/or served late and (2) whether we should strike out the notice of appeal and the record of appeal if filed and/or served late (and effectively forestall the DPP’s challenge on the judgment of Mutava J. which gave the applicant a lifeline to eschew prosecution in Criminal Case No.518 of 2012) or whether the notice of appeal and/or the record of appeal, if filed and/or served out of time as contended by the applicant’s counsel, there are circumstances disclosed by the applications that justify invocation of Rule 4 of this Court’s Rules so as to deny the applicant the relief he seeks.

35. The decision of the High Court having been delivered on 25th March 2013, the notice of appeal was timeously filed on 8th April 2013 in compliance with Rule 75 (2) of this Court’s Rules which required it to be filed within 14 days of the date of the decision appealed against.

The notice of appeal should have been served on all persons directly affected by the appeal before or within 7 days after its lodgment in compliance with Rule 77(1) of this Court’s Rules. Was it? What happened? We shall revert to this a little later after dealing with the issue of service of the record of appeal whose filing was in compliance with Rule 82 (1) of this Court’s Rules.

36. In the replying affidavit sworn on 18th September 2013 by the process server, Mr. Martin Kiogora Mwirigi, which was referred to by the applicant’s counsel, Mr. Mwenesi who did not dwell on it, the process server explains the efforts he made to serve the record of appeal within the time stipulated by the Rules. After filing the record of appeal on 12th June 2013, he proceeded on the same day to serve Messrs Havi & Company, who were the advocates on record for the 3rd respondent, International Centre for Policy and Conflict. At 12.01 p.m., he proceeded to Austen Place at Westlands where the offices of

Messrs Kalove & Company, the applicant's advocates, are located and tried to effect service of them. He did not succeed. After being allowed into the compound by a guard manning the gate to the premises and after handing over the records of appeal to one Francis Muia, a clerk in the offices of Kalove & Company who introduced himself as such, the latter took the documents and went to the offices of Kalove & Co. Advocates located 20 metres from the gate while the process server was left behind waiting. After 40 minutes, Francis Muia returned with the documents and informed the process server not only that Mr. Kalove was not in but also that Mr. Kalove had carried away with him the "*office documents receiving stamp*" and ostensibly as there was no stamp with which the documents could be stamped as having been received, they could not be accepted. Consequently, the process server was requested to return the following day.

37. The process server proceeded in the afternoon of that day, 12th June 2013, to the offices of Simani & Associates Advocates who represented Elijah Kipngetchi Arap Bii. Without any difficulty whatsoever, he served the record on the said advocates.

38. On 13th June 2013, the process server returned to Austen Place with a view to serve the applicant's advocates with the record of appeal. He found a guard at the gate who called the offices of Kalove & Co. as a result of which a man came to the gate where the process server was waiting and identified himself as Abdul. Abdul took the record of appeal from the process server and headed to Mr. Kalove's office 20 metres away while the process server was left waiting at the gate. Forty minutes later, Abdul returned and declined to accept service of the record on the ground that Mr. Kalove was not in the office at the time. The process server was again requested to return the following day which was a Friday. There was no mention of the stamp. For reasons that the process server did not give, he did not return the following day. Instead, he returned on Monday the 17th June 2013 and served the record on Francis Muia who accepted service but declined to sign receipt or to stamp on the copy returned to the process server. The applicant has not controverted these averments which speak for themselves. It is quite clear that the process server tried to serve the record of appeal on the applicant's advocates on record immediately after filing it but the latter frustrated his efforts to do so. When the process server eventually succeeded to do so on 17th June 2013, time had not run out. But even if time had run out, can the applicant be had to claim that the respondent/appellant did not comply with Rule 90(1) of these court's rules? For starters, although the applicant contended that service of the record of appeal was on 21st June 2013, the applicant did not counter on oath the averments of the process server that service after several attempts was eventually effected on Monday, 17th 2013. It is our finding in this regard that the record of appeal was filed in time on 12th June 2013 and was duly served on Monday, the 17th day of June 2013 as averred by the process server. At any rate, even if we were wrong in holding that service was effected on 17th June 2013, it is clear to us that the applicant's advocates attempted to frustrate the efforts of the process server to effect the service of the record of appeal. A party who frustrates another from complying with timelines set in the Rules or in any decision of the Court cannot be heard to complain that the timelines have not been met. Such party cannot be allowed to capitalize on non-compliance with timelines if he has frustrated timely service and/or caused the delay or failure to serve in compliance with timelines. In such circumstances this Court will be inclined to extend time under Rule 4 of the Rules of this Court where it is shown to its satisfaction that efforts to effect service of court documents in compliance with the Rules or decisions of the Court were frustrated by the party required to be served. Such policy is necessary to ensure that justice is not subverted.

39. We are alive to the fact that in dispensing justice, rules of procedure are intended to serve as the handmaidens of justice, not to defeat it ... (see **Iron & Steelwares Ltd v. C.W. Matyr & Co.** [1956] 23 EACA 175 (CA- ...) at pg 177). Moreover, this Court is enjoined to uphold the overriding objective of the **Appellate Jurisdiction Act, Cap 9**. The Act is echoed by Article 164 (3) of the Constitution which confers on this court jurisdiction to hear appeals from the High Court. The overriding objective of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act. In exercising its judicial power under the Act, this Court is required to give effect to the overriding objective and to handle all matters presented before it for the purpose of attaining the just determination of the proceedings. This Court is guided by the principles enshrined in **Article 159** of the Constitution which include the principle that justice shall be administered without undue regard to procedural

technicalities. The policy of the Court is to hear and determine appeals on their merits and to eschew very rigid application of rules of procedure where such application will result in miscarriage or subversion of justice. The philosophy informing this policy is that rules of procedure, as hand-maidens of justice, are designed to help secure justice not to override it. Technical lapses therefore will in appropriate circumstances be excused to obviate injustice that may ensue therefrom. It has been rightly said that “*courts are not slaves or robots of technical rules shorn of judicial discretion.*” In rendering justice, courts have always been, as they ought to be, conscientiously guided by the norm that on balance, technicalities take a backseat against substantive rights, and not the other way round, (**see in Bank of Phillipine Islands case (The Supreme Court of Manilla, Third Division, G.R. No.168313** also emphasized that the application of the rules must be upheld and that the relaxation of their application is the exception)). In short, rules of procedure help in proper dispensation of justice and in promotion and enhancement of fairness and proper dispatch of judicial work. They also help in toning down or in diminution of costs of proceedings.

40. It must be realized that courts exist for the purpose of dispensing justice. Judicial Officers derive their judicial power from the people or, as we are wont to say in Kenya, from *Wanjiku*, by dint of Article 159 (1) of the Constitution which succinctly states that “*judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.*” Judicial Officers are also State officers, and consequently are enjoined by Article 10 of the Constitution to adhere to national values and principles of governance which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity are upheld. For these reasons, decisions of the Courts must be redolent of fairness and reflect the best interest of the people whom the law is intended to serve. Such decisions may involve only the rights and obligations of the parties to the litigation inter se (and hence only the parties’ interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the Court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.

41. We now turn to the alleged lateness in serving the notice of appeal. The notice of appeal was filed timeously. It should have been served within 7 days of filing in compliance with Rule 77 (1) of the Rules of this Court. The 1st respondent does not deny service on 16th April 2013 was one day late because having been filed on 8th April 2013, it should have been served on or before 15th August 2013. Mr. Mwenesi was quite correct in pointing out that the 1st respondent should have taken advantage of Rule 4 of the Rules of this Court to seek extension of time and in all probability the Court is unlikely to have declined to extend time by one day in the face of the clear efforts by the 1st respondent to serve.

42. The appeal is founded on this notice of appeal which, though filed timeously, was served one day late and thus was not in compliance with Rule 77 (1) (supra). The applications before us and the replying affidavit show that the 1st respondent did not ignore or disdain compliance with the Rules. On the contrary, there is clear evidence of intention to comply. We are mindful that there is an appeal in place. Should delay of one day in service of the notice of appeal upon the applicant spell doom to the appeal? This appeal involves issues of public interest as crimes are alleged against the applicant in relation to huge resources of the Government, and hence the people of Kenya have a stake in it. The nature of the matter and whether the impugned decision by Mutava J. was correct make it imperative that the appeal be determined on merit rather than on procedural technicalities.

43. In **Kensilver Express Ltd & 137 Others v. The Commissioner of Insurance & 3 Others**, Civil Appeal No. Nai 39 of 2009 this Court referred to the decision in **Henry Njai v. Taita Ranching Co. Ltd**, MSA Civil Application No.255 of 2010 (UR), in which the Court stated –

“...in the Board of Trustees of National Social Security Fund and Six Others versus Meshack Owino Onyango (suing as legal representative of the Estate of Silas Ochieng Onyango (deceased)) Nairobi CA (Application) No.87 of 2007 (UR) this court observed, inter alia, thus –

“By Article 159 (2) of the new Constitution of Kenya, the Courts are now required to administer justice without undue regard to procedural technicalities. In addition, this Court is required to give effect to the overriding objective of civil litigation enshrined in the Appellate Jurisdiction Act (Cap 9 of Law of Kenya) which is among other things to facilitate the just and expeditious resolution of appeals (see Section 3A (1) and (2) of the Act.”

“Thus it would be against the policy of the law to strike out the appeal on mere technicality raised in support of the application.”

In Deepak Chamanla Kamani and Another versus Kenya Anti-Corruption Commission and 3 Others Nairobi CA (Application) 152 of 2009 – drawing inspiration from the decision of Lord Woolf in the decision in the case of BIGUZZI 221 versus Rank Leisure PLC [1999] 1. WLK this Court had this to say –

“...the initial approach of the Courts now must not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objective set out in the legislation. If a way or ways alternative to a striking out are available, the Courts must consider those alternatives and see if they are more consonant with the overriding objectives than a striking out.”

“(2) Also while drawing inspiration from its own decision in City Chemist (NRB) and Others versus Oriental Commercial Bank Limited Civil Application No. Nai (Application) 302 of 2008 (UR 199/2008) the following observations were made –

“...the new thinking totally uproots well established principles or precedent on the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary the amendment enriches those principles and emboldens the Court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assist litigants and legal practitioners alike in determining with some measures of certainty the validity of the claims long before they are instituted in court. It also guides the lower courts and maintains stability on the law and its application.”

“see also Housing Finance Company of Kenya versus Rose Wangari Ndegwa R. Mombasa CA (Application) 83 of 2008 (UR) where this Court noted special circumstances of the case and declined to strike out the record of appeal on account of minor procedural lapses capable of being rectified and were sufficiently cured by the provisions of the Appellate Jurisdiction Act.”

44. On the facts and evidence presented in the applications before us, it would be remiss of us to strike out the appeal No.120 of 2013 on account of lateness of one day in serving the notice of appeal or on account of one or two days lateness in serving the notice of appeal or on account of one or two days lateness in serving the record of appeal, if that were the case, which it is not. Of our own volition and so as to do justice, and in line with the principles aforesaid, we decline the invitation by the applicant to strike out the appeal on account of one day lateness in serving the notice of appeal. In the exercise of our discretionary power under Rule 4 of this Court’s Rules we deem the notice of appeal to have been duly served on 16th April 2013 and thus effectively enlarge time for service by one day.

45. We dismiss the applications Nos. 120/2013, 105/2013 and 168 “A”/2013. We order that each party shall bear its own costs in application No.120/2013 but costs in applications Nos.105/2013 and 168 “A”/2013 shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 22nd day of May 2015.

G. B. M. KARIUKI SC

JUDGE OF APPEAL

P. M. MWILU

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR