



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KISUMU**

**Civil Application 219 of 2011**

**CICILIA KERUBO SAMWEL ..... APPLICANT**

**VERSUS**

**HELLEN NYABOKE OTOCHI ..... RESPONDENT**

***(Application to strike out notice of appeal from the judgment and decree of High Court at Kisii  
(Makhandia, J.) dated 15<sup>th</sup> July, 2001***

***in***

***H.C.C.A. NO. 221 OF 2009)***

***\*\*\*\*\****

**RULING OF THE COURT**

This is an application to strike out the respondent's Notice of Appeal dated 27<sup>th</sup> July 2011 for allegedly having been served out of time. The grounds relied on have been elaborated in the first applicant's affidavit sworn on 5<sup>th</sup> September, 2011. On the other hand, the application is opposed vide the respondent's affidavit in reply sworn by the respondent on 21<sup>st</sup> November 2011.

At the hearing, the applicants were represented by Mr Waiganjo Mwangi, advocate and the respondent was represented by Mr K.B. Gicheru, advocate.

The principal grounds advanced by Mr Waiganjo were that although the judgment the subject matter of the intended appeal was delivered on 15<sup>th</sup> July 2011 the notice of appeal was lodged on 27<sup>th</sup> July 2011 but served on 8<sup>th</sup> August 2011, outside the seven days prescribed in the relevant rule and that the intended appeal is not arguable. Counsel contended that because of the aforesaid reasons, the notice of appeal was incompetent.

On the other hand, Mr Gicheru submitted that the Notice of Appeal was lodged within time but the delay in effecting service was attributable to the delay on the part of the Court registry which did not release it for service until 5<sup>th</sup> August 2011 which is the date the registry signed the notice. In addition, the appeal involves an alleged trust relating to ancestral land.

It is common ground that the delay occasioned was seven days which in the circumstances cannot be said to be inordinate.

We are not oblivious to the fact that the heart of this matter is the respondent's right of appeal. The judgment, the subject matter of the intended appeal has quoted extensively from this Court's past decisions on when a trust may be created or not created under the Registered Land Act, the law governing the suit property. This in our view does reflect arguability and there is nothing before us at this stage to indicate to us that the intended appeal will be frivolous. For this reason, we do not consider that the delay complained of should stifle the appellant's right to have a second appeal involving an alleged trust of ancestral land articulated on merit. In addition, the applicants failed to prove the prejudice they might suffer should the application be declined. In the circumstances, it is our view that what furthers the overriding objective is the articulation of the second appeal on merit, and in addition, what facilitates the expeditious disposal of the intended appeal is a refusal to strike out the notice of appeal. In the result, the application is dismissed. We order that the costs of the application abide the outcome of the intended appeal.

It is so ordered.

***Dated and delivered at Kisumu this 22<sup>nd</sup> day of March 2012.***

**S.E.O. BOSIRE**

.....  
**JUDGE OF APPEAL**

**E.O. O'KUBASU**

.....  
**JUDGE OF APPEAL**

**J.G. NYAMU**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**