



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL (APPLICATION) NO. 107 OF 2009

BETWEEN

AYUB MURUMBA KAKAI..... APPLICANT/RESPONDENT

AND

TOWN CLERK OF WEBUYE

COUNTY COUNCIL RESPONDENT/APPELLANT

*(Application to strike out memorandum and record of appeal from
the judgment and decree of the High Court of Kenya at Nairobi
(Wendoh, J.) dated 26th March, 2009*

in

H.C.MISC.APPLICATION NO. 448 OF 2006)

RULING OF THE COURT

This is an application by way of notice of motion expressed as having been brought “***Under Rules 42, 76(1), 180, (sic) 85(1)(b) and 87(1) of the Court of Appeal Rules***” in which the applicant, ***AYUB MURUMBA KAKAI*** “(Suing as a legal representative of the Estate of the Late ***WELLINGTON WELAKHASIA KAKAI***)” seeks the orders that:-

- “1. The Civil Appeal No. 107 of 2009 lodged on 29th May, 2009 be struck out.***
- 2. The costs of and incidental to this application and of the appeal be borne by the respondent/appellant.***

This application is brought on the following grounds:-

- “1. The Memorandum of Appeal and Record of Appeal lodged on 29th May, 2009 were not served on the respondent until 5th June, 2009 which is 1 day outside the time limited by Rule 87(1) of the Court***

of Appeal Rules.

2. *The appeal is incompetent as the appellant's Notice of Appeal included in the Record of Appeal was not served upon the applicant intended respondent in the appeal.*
3. *The Memorandum of Appeal purports to appeal against a consent judgment recorded in HIGH COURT CIVIL CASE NO. 1145 OF 1987 WELLINGTON WELAKHASIA KAKAI VS. WEBUYE TOWN COUNCIL on 1st July, 1991. Under section 67(2) of the Civil Procedure Act an appeal shall not lie from a decree passed with consent of parties.*
4. *The Record of Appeal at page 5 being a copy of the supporting affidavit sworn by AYUB MURUMBA KAKAI in support of the application dated 19th June, 2008 for an order of mandamus has omitted page 2 of the said supporting affidavit contrary to Rule 85 (1) of the Court of Appeal Rules.*
5. *The appeal is against an Order of Mandamus of the Superior Court compelling the appellant to comply with a valid judgment delivered on 2nd May, 2002 in High Court Civil Case No. 1145 of 1987*
6. *The respondent/appellant has not taken any steps to appeal against and/or set aside the judgment afore referred to.*
7. *Consequently this appeal is an attempt by the respondent/appellant to reopen the case and/or review the consent judgment and/or defeat the final judgment in High Court Civil Case No. 1145 of 1987."*

When the application came up for hearing before us on 28th April, 2010, Mr. Orare appeared for the applicant, while Mr. Ondieki appeared for the respondent.

Mr. Orare in his brief address sought to rely on **grounds 2 and 3** of his grounds in support of the application.

On his part, Mr. Ondieki asked us to dismiss the application as, in his view, this was a frivolous application.

When we perused the record it was clear that the applicant had not been served with the notice of appeal. On noticing that omission, Mr. Ondieki changed his tune and now told us that the appeal ought not to be struck out from what he considered a "**minor omission.**" He in the end asked us to dismiss the application but offered to pay for the costs of the application.

We have considered this application and we think this is a typical example of applications which might be more of an obstacle than assistance in achieving expeditious disposal of proceedings. We draw the counsel's attention to **sections 3A(1) and 3B(1)** of the Appellate Jurisdiction Act as inserted by **The Statute Law (Miscellaneous Amendments) Act No. 6 of 2009** which provide:-

"3A.(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

"3B.(1) For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-

(a) the just determination of the proceedings;

(b) the efficient use of the available judicial and administrative resources;

(c) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(d) the use of suitable technology.”

In the circumstances before us, we would not act justly if we were to strike out the appeal for failure to serve the memorandum of appeal within **7 days** in a situation where the memorandum of appeal was served only one day before the expiry of the prescribed time and as regards the non service of the notice of appeal, the Court could order its service on the affected party within a reasonable time so as to have the appeal heard on merit.

In view of the foregoing, we are not ready to accede to this application since granting the order sought would be contrary to the overriding objectives of the amendments to the **Appellate Jurisdiction Act**. Accordingly, the notice of motion dated 18th June, 2009 and filed in Court on 26th June, 2009 is hereby dismissed but we order that the respondent do serve the notice of appeal on the applicant within seven days of the date hereof. As regards costs of the application, the same shall be paid by the respondent. It is so ordered.

Dated and delivered at NAIROBI this 7th day of May, 2010.

R.S.C. OMOLO

.....

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