



**IN THE COURT OF APPEAL OF KENYA**  
**AT NYERI**  
**Civil Appeal (Appli) 305 of 2006**

**MORRIS THURANIRA .....APPLICANT**

**AND**

**1. M'IBIRI MBOGORI**

**2. JUSTUS MURUGA M'IKIUGU**

**3. NATIONAL BANK OF KENYA**

**4. NDIUNGI AGENCIES AUCTIONEERS .....RESPONDENTS**

*(An application to strike out the notice and record of appeal from the ruling of the High Court of Kenya at Meru (Lenaola, J) dated 12<sup>th</sup> October, 2006*

**in**

**H.C.C.C. NO. 26 OF 2005)**

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**RULING OF THE COURT**

This is an application under **rule 80** of the Court of Appeal Rules (the Rules) for an order to strike out the appeal on two grounds. First, that the record of appeal was served outside the time stipulated by the Rules; and secondly, that **Quickline Auctioneers**, a party directly affected by the appeal was not served with the notice of appeal in breach of the mandatory provisions of **rule 76(1)** of the Rules. It is worthy of note that **Quickline Auctioneers** was the 2<sup>nd</sup> defendant in Meru CMCC No. 170 of 2006 which was later consolidated with Meru H.C. Misc. No. 83 of 2006 to constitute Meru HCCC No. 26 of 2005 the subject of this appeal.

It is common ground that this appeal was filed on 6<sup>th</sup> December, 2006 and was served on the 3<sup>rd</sup> respondent herein on 14<sup>th</sup> December, 2006, one day outside the seven day period limited by **rule 76(1)** aforesaid. The delay, though one day, has not been sanctioned by the Court and it must follow therefore that the application on this ground cannot be resisted.

Dr. Khaminwa for the appellants readily admits that the notice of appeal and the record of appeal have not been served on **Quickline Auctioneers** but avers that the matters in issue in the appeal did not concern them, and moreover; the two courts below had not made any orders against **Quickline Auctioneers** and they were parties who were not necessary in the appeal. Dr. Khaminwa also complained that the applicant had acted out of desperation in filing this application because the appeal had not been expeditiously disposed of.

Though it may be correct to assert that **Quickline Auctioneers'** role in the appeal is minimal, nevertheless, they are a party which will be directly affected by the results of the appeal. Moreover, if the appellants wished to exclude them, the Rules provide for a way out. The appellants could, if they wished, apply to the Court for an order directing that service need not be effected on them. The proviso to **rule 76** of the Rules refers.

In their omission to serve the applicant and there being no order to sanction it, the appellants will have acted in breach of **rule 76(1)**.

This Court is anxious that matters before it should be disposed of expeditiously. But, this does not grant a generous leave to the litigants to act in blatant breach of the Rules, which in our view, serve as a faithful handmaid of justice.

We allow this application. In the result, Civil Appeal No. 305 of 2006 is hereby ordered struck out with costs to the respondents. The applicant shall also have the costs of this application.

***Dated and delivered at NYERI this 23<sup>rd</sup> day of May, 2008.***

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

.....

**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**