



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT MOMBASA**

**Civil Appeal (Appli.) 160 of 2007**

**JOHN KIMANI NJOROGE .....APPLICANT/RESPONDENT**

**AND**

**SERAH NJERI MWOBI appealing**

**in her Capacity as the Administrator of the Estate of the late**

**JOHN MUGAI MWOBI..... RESPONDENT/APPELLANT**

**(Application to strike out Civil Appeal No. 160 of 2007 being an appeal from a ruling and orders of the High Court of Kenya at Mombasa (Khaminwa, J) dated 8<sup>th</sup> February, 2007**

**in**

**H.C.C.C No. 90 of 1999)**

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

**RULING OF THE COURT**

This is an application expressly brought under **rule 80** of the Rules of this Court to strike out the notice of appeal dated 15<sup>th</sup> February, 2007, and consequently; Civil Appeal No. 160 of 2007 on the ground that the notice of appeal was served on the respondent out of time.

The decision the subject matter of the appeal was delivered on 8<sup>th</sup> February, 2007. The respondent, Serah Njeri Mwobi, being aggrieved, timeously filed a notice of appeal on 15<sup>th</sup> February, 2007. It is the contention of Mr. Mabeya, for the applicant, Mr. John Kimani Njoroje, and the respondent in Civil Appeal No. 160 of 2007, that his firm was served on 7<sup>th</sup> March, 2007, outside the period limited by **rule 76(1)** of the Rules of this Court. To buttress his contention, Mr. Mabeya has annexed to the motion the notice of appeal with an endorsement acknowledging service on the even date.

However, Mr. Odhiambo, for the respondent, opposes the application on the ground that his process server, Mr. Peter Kahinga, did effect service on the firm of Messrs Hezron Gekonde & Co. Advocates, who previously acted for the applicant, on 16<sup>th</sup> February, 2007, but, the

said Advocates who though accepted service declined to sign and stamp at the back of Mr. Kahinga's copy of the notice of appeal. But, Mr. Mabeya has vehemently attacked the credibility of the affidavit of

Mr. Kahinga. He has termed it entirely false.

Our close scrutiny of the said affidavit shows that it is headed “**Court of Appeal**” and refers to Civil Appeal No. 16 of 2007. It further shows that it was sworn on 20<sup>th</sup> February, 2007 and yet the appeal sought to be struck out was filed on 9<sup>th</sup> July, 2007. Thus, it is manifestly plain that the said affidavit was not deposed to on the date shown on it.

It has been candidly acknowledged by Mr. Odhiambo from the bar that the affidavit is erroneous on the face of it, especially in that it was not sworn on 20<sup>th</sup> February, 2007 and “**the Court**” shown therein and the number of the appeal are entirely false.

We have no hesitation whatsoever in holding that the affidavit deposed to by Mr. Peter Kahinga is false and we accordingly reject it. We strongly deplore any attempt to try to lodge false document before this Court.

It must follow, therefore, that in the circumstances, the application cannot be resisted by means of the falsified affidavit.

In the result, the application is allowed as prayed. The Notice of Appeal dated 15<sup>th</sup> February, 2007 is hereby ordered struck out and, consequently, Civil Appeal No. 160 of 2007 is also ordered struck out. The applicant shall have the costs of the Notice of Motion and the struck out appeal. These shall be our orders.

**Dated and delivered at Mombasa this 25<sup>th</sup> day of July, 2008.**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**