



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Civil Appeal (Appli) 86 of 2005

DR. FREDRICK GIKANDI APPLICANT/1ST RESPONDENT

AND

CEDRIC MARIO DE SOUZA RESPONDENT/APPELLANT

THE MOMBASA HOSPITAL 2ND RESPONDENT

(Application to strike out notice of appeal and Civil Appeal No. 86 of 2005 being an appeal from a ruling and order of the High Court of Kenya at Mombasa (Sergon, J) dated 15th April, 2004

in

H.C.C.C No. 608 of 2000)

RULING OF THE COURT

The appellant in Civil Appeal No. 86 of 2005, **Cedric Mario De Souza** (respondent in this application), filed the appeal against Dr. Fredrick Gikandi (first respondent in the appeal who is now the applicant in this application) and The Mombasa Hospital (second respondent) on 4th March, 2005 and served the record of appeal upon both respondents. The first respondent thereafter brought this notice of motion dated 6th dated 6th April, 2005 and filed on the same date. In the notice of motion, the applicant is seeking an order that the notice of appeal lodged on 3rd June, 2004 and memorandum of appeal lodged on 4th March, 2005 be struck out on seven grounds namely:

- “(i) The Notice of Appeal has been lodged against a decision not on record.**
- (ii) The Notice of Appeal has not been served upon the applicant.**
- (iii) The Memorandum of Appeal and record of Appeal are incurably defective, in that, no appeal lies against a wrongly stated ruling and order.**
- (iv) The decision delivered on 20th May, 2004 decided the whole suit in totality and a decree should have been drawn from the said decision.**
- (v) The order dated 15th April 2004 was not on any ruling.**

(vi) That the appeal has not been instituted within the stipulated period of sixty (60) days of the date of lodgment of the Notice of Appeal.

(vii) The Record of Appeal was not served on the Applicant/1st Respondent within seven days of the date of lodgment of the appeal pursuant to the provisions of rule 87(1) of the Court of Appeal Rules.”

The application was supported by an affidavit sworn by James Kamanja Muthui, an advocate in the firm of Kaplan & Stratton Advocates who have the conduct of the matter on behalf of the applicant. That affidavit states at paragraph 7 that the respondent (appellant) did not serve Messrs Kaplan & Stratton, advocates with the notice of appeal as required by **rule 76(1)** of the Court of Appeal Rules (**the Rules**). He further depones on other matters, but for what is to be stated later in this ruling, we do not need to reproduce the same.

The respondent (appellant) opposed the application and filed a replying affidavit sworn by its advocate, Joel O. Obura. In that affidavit, the deponent states at paragraph 3 as follows:

“(3) That, I wish to state that the record of appeal herein was served on time on the applicant’s advocates but they declined receipt until later. Hereto annexed is a copy of the affidavit of service marked as exhibit “A”.”

That annexure, i.e. affidavit of service sworn by one George Mwema, a process server, states at paragraph 2 as follows:

“2. That on the 10th day of March 2005, I received from M/s Obura & Co. Advocates copies of record of appeal dated 3rd March 2005 with intensions to effect service upon M/s Kaplan & Stratton Advocates for the 1st defendant herein.”

Before us, Mr. Gachuhi, the learned counsel for the applicant, urged two matters and these were first, that the notice of appeal was not served upon the applicant and that the letter purportedly written to the court pursuant to **rule 81(2)** was not served upon the applicant although the same was allegedly copied to Kaplan & Stratton Advocates. Mr. Gachuhi did not urge the other grounds but left them to the Court to consider. Mr. Obura, the learned counsel for the respondent, maintained in his submissions that the notice of appeal was served and that was the reason why the respondent’s advocates filed and served upon them notice of change of address for service dated 10th May, 2004. He also stated that as the other respondent was not complaining on that issue, the applicant must have been served and further contended that the letter seeking proceedings was sent to the applicant’s advocates by post.

On our own consideration of the application before us, we cannot accept Mr. Obura’s contention that the applicant’s advocates were served with the notice of appeal on the grounds he advanced i.e. it was that service which led to the applicant’s advocates filing the notice of change of address for service. The notice of change of address for service was dated 10th May, 2004 and filed thereafter. It appears to us to have been prompted by the notice of change of advocates dated 30th April, 2004 filed by the respondent’s advocates and served upon the applicant.

On Mr. Obura’s contention that as the other respondent is not complaining against non service of the notice of appeal, the present applicant must have also been served, it goes without saying that that argument cannot stand. Each interested party is entitled to be served on his own and the respondent has a duty to show that each interested party was served. In this case, the applicant says he was not served with the notice of appeal and there is no acceptable rebuttal of that claim. We do agree that as far as the letter seeking proceedings is concerned, once it was shown that it was copied to the applicant and that it was sent to him, that would have been enough as the rule clearly does not require it to be served but only requires that it be sent to the interested party.

Our view of the matter is that there is no proof that the notice of appeal was served upon the

applicant. All that Mr. Obura's affidavit says and all that the annexed copy of the affidavit says is that the record of appeal was served. That is not the subject of the complaint before us. None service of the notice of appeal is fatal as it is the notice of appeal that gives this Court jurisdiction and is what initiates the appeal. As the notice of appeal was not served in this appeal, we have no alternative but to strike out the notice of appeal which we hereby do and consequently, the record of appeal is also struck out. The applicant shall have costs of this application and of the struck-out appeal.

Dated and delivered at Nairobi this 13th day of October, 2006.

R.S.C OMOLO

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JUDGE OF APPEAL

S.E.O BOSIRE

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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