



Erdemann Property Limited v Safaricom Staff Pension Scheme Registered Trustees & 3 others; Everest Limited & another (Interested Parties) (Petition (Application) E013 of 2023) [2023] KESC 76 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KESC 76 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION (APPLICATION) E013 OF 2023
PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & W OUKO, SCJJ
SEPTEMBER 22, 2023**

BETWEEN

ERDEMANN PROPERTY LIMITED APPELLANT

AND

**SAFARICOM STAFF PENSION SCHEME REGISTERED TRUSTEES 1ST
RESPONDENT**

KENYA URBAN ROADS AUTHORITY 2ND RESPONDENT

MAVOKO WATER & SEWERAGE COMPANY LIMITED 3RD RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY 4TH RESPONDENT

AND

EVEREST LIMITED INTERESTED PARTY

SUNSET HOUSING LIMITED INTERESTED PARTY

(Being an application to strike out the Notice of Appeal dated 23rd March 2023 and lodged at the Registry on 27th April 2023 and the Record of Appeal dated 28th April 2023 and lodged in court on 2nd May 2023)

Supreme Court strikes out notice of appeal for lack of service within 7 days as required under rule 37 of the Supreme Court Rules.

The 1st respondent filed an application that sought to strike out the notice of appeal filed by the appellants on grounds that it that was not served to the respondents within the 7 day period required under rule 37 of the Supreme Court Rules. The 1st respondent also sought to get the record of appeal struck out for being incomplete, in that it did not contain the record of appeal that was filed in the first appeal (Court of Appeal). The Supreme Court held that the notice of appeal was defective for failing to comply with rule 37(1) of the Supreme Court Rules; and further that the record of appeal lodged in the Supreme Court was incomplete.



Reported by John Ribia

Civil Practice and Procedure – appeals – appeal to the Supreme Court – notice of appeal – requirement to serve the notice of appeal on the respondent within seven days – consequences of not serving the respondent within seven days - whether a notice of appeal to the Supreme Court that was served on the respondents beyond the seven day timeline was defective - , 2020, rule 37.

Civil Practice and Procedure – appeals – appeal to the Supreme Court – record of appeal – supplementary record containing additional documents that were filed in the first appeal before the Court of Appeal – where the same were not filed in the record of appeal in the second appeal - whether a record of appeal to the Supreme Court that did not contain a supplementary record that was filed in the first appeal before the Court of Appeal was incompetent - , 2020, rule 40(1)(d) and (4).

Brief facts

The 1st respondent filed an application that sought to strike out the notice of appeal filed by the appellants on grounds that it was not served to the respondents within the 7-day period required under rule 37 of the . The 1st respondent also sought to get the record of appeal struck out for being incomplete, in that it did not contain the record of appeal that was filed in the first appeal (Court of Appeal).

The appellant opposed the application on grounds that it was in the interest of justice that the Supreme Court exercised its discretion to admit the notice of appeal, petition, and the record of appeal, since no probable prejudice would be occasioned to the respondents; that the inadvertent omission of the supplementary record was not deliberate; and that the grounds of appeal before the Supreme Court were not dependent upon the omitted record since they did not center on a factual dispute but rather on the interpretation.

Issues

- i. Whether a notice of appeal to the Supreme Court that was served on the respondents beyond the requisite seven-day timeline was defective.
- ii. Whether a record of appeal to the Supreme Court that did not contain a supplementary record that was filed in the first appeal before the Court of Appeal was incompetent.

Relevant provisions of the Law

37. Service of Notice of Appeal

(1) *A petitioner shall, within seven days of lodging a notice of appeal, serve transmitted copies of the notice upon all persons directly affected by the appeal.*

(2) *A person upon whom a notice of appeal is served shall—*

(a) *within fourteen days of receiving the notice, file in the registry a notice of address for service, which shall contain that person’s contact detail, including telephone numbers and email address, and shall serve the intended appellant with copies of the notice; and*

(b) *within a further fourteen days, shall serve a copy of the notice of address for service on every other person named in the notice of appeal.*

(3) *Where a party cannot serve a petition or a response to a petition, or cannot make any other service under these Rules, the party may apply in writing to the Court for an order of substituted service.*

Held

1. The notice of appeal dated March 23, 2023 was filed on the e-filing portal of the Court of Appeal on March 30, 2023 and on April 28, 2023 in the Supreme Court and service of the same was effected on May 4, 2023, exactly thirty-five days from filing before the Court of Appeal. In terms of rule 37 of the , the appellant was required, within seven days of lodging a notice of appeal, to serve transmitted copies of the notice upon the respondents with or without the endorsement from the Registrar of the Court of Appeal as was the practice before the court.
2. The appellant having failed to serve the notice within 7 days as prescribed by the missed a crucial preliminary step in instituting the appeal. Rules of procedure had to be applied and followed at all



times by the parties and the courts to ensure there was fairness of proceedings and to afford parties the equality of arms. Because the object of judicial proceedings was to arrive at the truth by using the best available procedure and process, the infringement of the rules could have serious consequences.

3. Rule 40 of the stipulated what the contents of a record of appeal from the Court of Appeal included, one of which was relevant pleadings required to determine the appeal. The nine documents that the appellants introduced in the record of appeal were presented before that court because the appellant believed they were important for the just determination of the first appeal. By necessary implication, they would equally be relevant for the determination of the instant appeal.
4. The nine documents contained in the supplementary record were minutes, sketches, drawings, approvals, affidavits, and other pleadings from the Environment and Land Court. They ought to have been included in the record before the Supreme Court. The notice of appeal dated March 23, 2023 was defective for failing to comply with rule 37(1) of the ; and further that the record of appeal lodged in the Supreme Court was incomplete.

Application allowed.

Orders

- i. *The notice of appeal dated March 23, 2023 and the record of appeal dated April 28, 2023 were struck out.*
- ii. *Costs awarded to the 1st respondent.*

Citations

Cases

1. Hamida Yaroi Shek Nuri v Faith Tumaini Kombe, Amani National Congress & Independent Electoral and Boundaries Commission (Petition 38 of 2018; [2019] KESC 42 (KLR)) — Explained
2. Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others (Civil Appeal No (Application) 228 of 2013; (2013) eKLR) — Explained
3. Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission, Wilfred Rotich Lesan, Robert Siolei County Returning Officer Bomet County, Kennedy Ochayo, Wilfred Wainaina, Patrick Wanyama, Mark Manzo & Abdikadir Sheikh (Application 16 of 2014; [2014] KESC 12 (KLR)) — Explained
4. University of Eldoret & another v Hosea Sitienei & 3 other ([2020] eKLR) — Explained
5. Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others (Application No. 7 of 2014; (2014) eKLR) — Explained

Statutes

1. Court of Appeal Rules — rule 31(6); (37(1); 40(1)(d); 65(1)(2) — Interpreted
2. Supreme Court Act (No. 7 of 2011) — section 3A, 21(1)(2) — Interpreted
3. Supreme Court Rules 2020 (Act No 7 of 2011 Sub Leg) — rule 37(1); 40(1)(d)(4) — Interpreted

Advocates

CM Advocates, LLP for the appella

Muthaura Mugambi Ayugi & Njonjo Advocates for the 1st respondent

RULING

Representation:

CM Advocates, LLP for the appellant

Muthaura Mugambi Ayugi & Njonjo Advocates for the 1st respondent

1. Upon perusing the notice of motion dated June 23, 2023 and filed on even date by the 1st respondent, pursuant to section 3A, 21(1) and (2) of the [Supreme Court Act](#) but erroneously expressed as rules



- 31(6), (37(1), 40(1)(d), 65(1) and (2) of the *Court of Appeal Rules* instead of the *Supreme Court Rules*, seeking the striking out the notice of appeal dated March 23, 2023 and the Record of Appeal dated April 28, 2023; and
2. Upon perusing the supporting affidavit sworn on 21st June 2023 by Richard Gitahi, the trust Secretary of the Safaricom Staff Pension Scheme Registered Trustees, the 1st respondent in support of the motion and a further affidavit sworn by Bernard Nderitu on July 25, 2023; and
 3. Upon considering the written submissions by the 1st respondent filed on June 23, 2023, wherein they argue the notice of appeal was not served upon them contrary to the mandatory requirement of rule 37(1) of the *Supreme Court Rules*; that this Court, in determining this application may be guided by the principles set out in *Hamida Yaroi Shek Nuri v Faith Tumaini Kombe & 2 others*, SC PT (Application) No 38 of 2018; (2019) eKLR; *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others*, SC Application No 7 of 2014; (2014) eKLR and *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others*, CA No (Application) 228 of 2013; (2013) eKLR, where this court and the Court of Appeal emphasized it is a jurisdictional prerequisite to file and serve the notice of appeal; that the record of appeal is incomplete in contravention of rule 40(1)(d) and (4) of the Supreme Court Rules since it does not include the supplementary record of appeal dated November 19, 2019 which was part of the record in the Court of Appeal, and the appellant has failed to apply for leave for their inclusion out of time; and that this omission is not only deliberate but also meant to deny the court the opportunity to have all the necessary relevant documents for a just and informed decision; and
 4. Noting that the appellant in its replying affidavit sworn by Otieno John Kenneth Rajwayi, their Planning Manager on July 10, 2023 and the written submissions of even date are opposed to the application on grounds that the underlying dispute herein was presented by the 1st respondent as a public interest litigation which fact was noted in the judgment of the trial court; that in compliance with rule 36(1) of the *Supreme Court Rules*, they filed a notice of appeal on March 30, 2023 but the Registrar of the Court of Appeal only endorsed his signature on the filed notice on April 27, 2023; that only then did the appellant transmit the endorsed notice of appeal together with the petition and record of appeal to this court on April 28, 2023 and thereafter service of the notice of appeal, petition of appeal and record of appeal was effected on May 4, 2023;
 5. Further, the appellant has pleaded that in the interest of justice, this court exercises its discretion to admit the notice of appeal, petition, and the record of appeal, since no probable prejudice will be occasioned to the respondents; that the inadvertent omission of the supplementary record of appeal in CA No 185 of 2017 was not deliberate; and that the truth of the matter is that the two grounds of appeal before this court are not dependent upon the omitted record since they do not centre on a factual dispute but rather on the interpretation.
 6. Upon considering the appellant's reliance on the holding of this court in *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others* (*supra*), and his argument that where no prejudice has been occasioned, the court ought to excuse noncompliance with a procedural rule; that equally, as this court held in following the holding of this court in *Hamida Yaroi Shek Nuri v Faith Tumaini Kombe & 2 others* (*supra*), failure to include the supplementary record of appeal from the Court of Appeal as part of the record does not automatically render the appeal fatal; and
 7. Noting that the 2nd to 4th respondents as well as the 1st and 2nd interested parties did not file any pleadings with respect to this application;



We now therefore opine as follows:

8. Upon examining rule 36 of the *Supreme Court Rules 2020*, upon which this application rests, and which demands that;

- “(1) A person who intends to make an appeal to the court shall file a notice of appeal within fourteen days from the date of judgment or ruling which is the subject of appeal.
2. The notice of appeal shall be— (a)
- (b) filed at the first instance with the Registrar of the court, or with the tribunal from which an appeal originates.
2. Upon filing of the notice of appeal, the petitioner shall transmit a copy of the notice to the Registrar”. (Our emphasis).

The registrar in the highlighted section above is according to Rule 2, the Registrar of the Supreme Court; and

9. Upon examination of rule 37(1) which provides that;

- “ A petitioner shall, within seven days of lodging a notice of appeal, serve transmitted copies of the notice upon all persons directly affected by the appeal”. (Our emphasis).

It is the copies of the notice that the petitioner is required to transmit to the registrar of this court that are to be served upon all persons directly affected by the appeal; and

10. Restating the principles enunciated by this court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*, SC Application No 16 of 2014; (2014) eKLR and *University of Eldoret & another v Hosea Sitienei & 3 other*, SC Application No 8 of 2020; (2020) eKLR, both of which underscored the vital nature of a notice of appeal as a jurisdictional pre-requisite whose filing signifies the intention to appeal; and further state that where the law provides for the time within which something ought to be done and that time lapses, one needs to first seek an extension of time before one can proceed to do that which the law requires; and

11. Upon applying these strictures to the rival submissions in this application, we note that the notice of appeal dated March 23, 2023 was filed on the e-filing portal of the Court of Appeal on March 30, 2023 and on April 28, 2023 in this court and service of the same was effected on May 4, 2023, exactly thirty-five days from filing before the Court of Appeal; and

12. In terms of rule 37, the appellant was required, within seven days of lodging a notice of appeal, to serve transmitted copies of the notice upon the respondents with or without the endorsement from the Registrar of the Court of Appeal as is the practice before this court; and

13. Emphasising this court’s consistent pronouncement that rules of the court must be observed and the prescribed time limits are requirements to be met, we find that the appellant having failed to serve the notice within seven days as prescribed by the Rules missed a very crucial preliminary step in instituting the appeal. Rules of procedure must be applied and followed at all times by the parties, counsel, and even the courts to ensure there is fairness of proceedings and to afford parties the equality of arms. Because the object of judicial proceedings is to arrive at the truth by using the best available procedure and process, the infringement of the rules may have serious consequences; and



14. Upon further examining rule 40 which stipulates what the contents of a record of appeal from the Court of Appeal must include, one of which is “relevant pleadings required to determine the appeal”; and looking at the nine documents which were introduced in the Court of Appeal by a supplementary record of appeal, there cannot be any doubt that they were presented before that court because the appellant believed they were important for the just determination of the first appeal. That being the case, by necessary implication, they would equally be relevant for the determination of this appeal; and
15. Noting that the nine documents contained in the supplementary record are minutes, sketches, drawings, approvals, affidavits, and other pleadings from the Environment and Land Court, we find that the same ought to have been included in the record before this court; and ultimately the inevitable conclusion we must draw is that the notice of appeal dated March 23, 2023 is defective for failing to comply with rule 37(1) of the *Supreme Court Rules*; and further that the record of appeal lodged in this court is incomplete.
16. Bearing in mind our finding above that there is no subsisting appeal having found the notice of appeal defective, we make the following orders:
 - i. The notice of motion dated June 21, 2023 and filed on even date is hereby allowed.
 - ii. Consequently, the notice of appeal dated March 23, 2023 and the record of appeal dated April 28, 2023 are hereby struck out.
 - iii. The 1st respondent shall have costs of this application noting that the other respondents did not file any pleadings in respect of the application.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

.....

P.M MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

.....

M. K IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S.C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR



SUPREME COURT OF KENYA

