Odongo v Mwalimo (Civil Application E095 of 2021) [2023] KECA 252 (KLR) (17 March 2023) (Ruling)

Neutral citation: [2023] KECA 252 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E095 OF 2021

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

MARCH 17, 2023

BETWEEN

STEPHEN NICK OMONDI ODONGO ..... APPLICANT

AND

JAPHETH PHIDELIS LUMERENYI MWALIMO ..... RESPONDENT

(An application to strike out Notice of Appeal dated 12th October 2021 in respect of the judgment of the High Court of Kenya at Mombasa (Onyiego J.) delivered on 30th September 2021 in Succession Cause No 359 of 2014)

RULING

1. Stephen Nick Omondi Odongo, the applicant herein and respondent in the substantive appeal, seeks to strike out the notice of appeal dated October 12, 2021 and lodged on October 14, 2021 by Japheth Phidelis Lumerenyi Mwalimo, who is the appellant in the substantive appeal (hereinafter "the appellant"). This prayer is in a notice of motion application dated December 8, 2021, which we heard during a virtual hearing held on November 8, 2022. Learned counsel Mr Muriithi appeared for the applicant, while learned counsel, Mr Tabayo Muyala appeared for the appellant during the said hearing.

2. The applicant swore an affidavit on December 8, 2021 in support of the application, and his case is that the appellant, being dissatisfied with the judgment by the High Court at Mombasa (Onyiego J) delivered in Succession Cause No 359 of 2014 on September 30, 2021, lodged a notice of appeal, but did not serve the notice of appeal to the applicant within seven (7) days, thus contravening rule 77 (1) of the *Court of Appeal Rules, 2010*. That the applicant only learnt of the notice of appeal when it was exhibited as an annexure in summons dated November 1, 2021, where the respondent sought a stay of execution from the trial court. The applicant herein had filed a summons for revocation of grant in the trial court, which allowed the summons and the respondent being aggrieved by the decision subsequently lodged the subject notice of appeal on October 14, 2021. The applicant also contends that no application was made nor any order obtained by the respondent to enlarge time to

serve the notice of appeal. The applicant attached copies of the judgment delivered by the trial court on September 30, 2021 in Succession Cause No 359 of 2014, the notice of appeal dated October 12, 2021 and lodged on October 14, 2021, and the appellant's memorandum of appeal dated November 1, 2021.

3. During the hearing of the application, Mr Muriithi, the learned counsel for the applicant, relied on his submissions dated October 25, 2022 in which he stated that the only question for this court to consider was whether to strike out the notice of appeal as prayed. The counsel reiterated the averments as aforestated, save to add that by the time the applicant learnt of the notice of appeal, it was over 27 days from the time the notice of appeal was lodged. Further, that no explanation was offered by the appellant for the default, and that this court is empowered under rule 84 of the *Court of Appeal Rules of 2010* to strike out the notice of appeal where an essential step had not been taken in the prescribed timeline. Lastly, that the applicant's notice of motion application was filed timeously as required under rule 84. The counsel relied on the decisions in the cases of *Mistry Premji Ganji (Investment) Limited v Kenya National Highways Authority* [2019] eKLR and *Hanos (K) Limited v Dhiren Mohanlal Shah* [2021] eKLR, which reiterated that rule 77 (1) is couched in mandatory terms and that service of a notice of appeal must be done in accordance with the rules.

4. The appellant did not file a replying affidavit or written submissions, and Mr Muyala made oral submissions opposing the application during the hearing. According to the learned counsel, the rules should not be a means to an end but as hand maidens to achieve substantive justice. While conceding that the notice of appeal was not served on time, he asserted that striking out the notice of appeal at this stage would prejudice the appellant and would not be in the interest of substantive justice.

5. Rule 75 of the *Court of Appeal Rules of 2010*, which were then applicable, specified the period within which the notice of appeal should be filed as 14 days. Rule 77(1) provided that an intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal. The impugned notice of appeal was lodged on October 14, 2021 and was therefore lodged within the requisite fourteen days of the ruling delivered on September 30, 2021. The appellant however does concede that the notice of appeal was not served on the applicant within seven days of its lodging prescribed by the rules, and has not explained the reasons for the failure to serve the notice of appeal.

6. It has in this regard been emphasised by this court that the timelines for taking of certain steps are indispensable to the proper adjudication of the appeals that come before us, and that the rules are expressed in clear and unambiguous terms and command obedience. This court (Karanja, Okwengu & Azangalala JJ.A) held as follows in the case of *Daniel Nkirimpa Monirei v Sayialel Ole Koilel & 4 others* [2016] eKLR on the timelines for service of the notice of appeal:

> "The purpose of service of a notice of appeal is to alert the parties being served that the case in question has not been concluded yet as the same has been escalated to another level. This enables the party to prepare and get ready for another fight, be it by way of gathering resources or just getting mentally prepared for defending the intended appeal. Failure to serve a party with a notice of appeal within the time prescribed by law gives a party false belief that the matter has been concluded, only to be ambushed later with the record of appeal in which the said notice is tucked away somewhere in the record. That occasion prejudice to the ambushed party and it
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> is in our view a habit that should not be countenanced in any fair and just process. That would explain why rule 77(1) of the Court of Appeal Rules is couched in mandatory terms."

7. Since it is not contested that the appellant's notice of appeal was not served on the applicant within the required time, and the delay in effecting service has not been satisfactorily explained by the appellant, we find that the applicant's notice of motion application dated December 8, 2021 is merited, and the appellant's notice of appeal dated October 12, 2021 and lodged herein on October 14, 2021 is hereby struck out with costs to the applicant.

8. Orders accordingly.

Dated and Delivered at Mombasa this 17th day of March, 2023

S. GATEMBU KAIRU (FCIArb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a rue copy of the original

Signed

DEPUTY REGISTRAR