



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, AZANGALALA & KANTAI JJ.A)**

**CIVIL APPEAL NO. 36 OF 2013**

**BETWEEN**

**JOHN FRANCIS MUYODI ..... APPELLANT**

**AND**

1. **PETER LUNANI ONGOMA }**
2. **CELTEL alias ZAIN KENYA LTD} .....RESPONDENTS**
3. **SAFARICOM LIMITED}**

***(Appeal from the Judgment of the High Court of Kenya at Busia (Kibunja, J.) dated 4<sup>th</sup> July, 2013***

**in**

**HCCC. NO. 65 OF 2009**

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**RULING OF THE COURT**

1. Safaricom Limited (the applicant), is the 3<sup>rd</sup> respondent in this appeal. By its Notice of Motion dated 12<sup>th</sup> November, 2013 and brought under **Rules 42, 82, 83, and 84** of the **Court of Appeal Rules** (the Rules), it has applied to strike out both the appellant's notice of appeal and record of appeal on the ground that the record of appeal was filed out of the prescribed period of 60 days. The application is supported by the affidavit of Daniel Ndaba, the applicant's Principal in-House Litigation Counsel.

2. Presenting the application before us and relying on the averments in the supporting affidavit, Miss Kinyanjui, learned counsel holding brief for Mr. Muchiri for the applicant, submitted that though the appellant filed the notice of appeal and applied for a copy of the proceedings on 9<sup>th</sup> July, 2013 which was within the required time, he failed to serve the applicant with a copy of the application for proceedings as required by **Rule 82(2)** of the Rules. In the circumstances according to counsel, the appellant cannot rely on the provisions of **Rule 82(1)**, which freezes the running of time until the proceedings are supplied.

She said the appellant was therefore supposed to file the record of appeal within 60 days of filing the notice of appeal. She said the appellant having filed the notice of appeal on 9<sup>th</sup> July, 2013, he was supposed to file the record of appeal on or before 7<sup>th</sup> September, 2013. In the premises, counsel urged us to allow this application and strike out both the notice and the record of appeal in this matter.

3. At the hearing of the application before us on 5<sup>th</sup> November, 2014, there was no appearance for the 2<sup>nd</sup> respondent though his counsel was served. Counsel for the 3<sup>rd</sup> respondent supported the application and associated himself with the submissions by counsel for the applicant.

4. The application is opposed. In his replying affidavit, John Francis Muyodi (the appellant) challenged its competence and dismissed it as unmeritorious. He submitted before us that this application is not only frivolous and vexatious but was also maliciously brought. He said this is because, right from the High Court, the parties to this appeal adopted registered post as the mode of serving each other with pleadings and all other documents. As proof of that assertion, he annexed to his replying affidavit a copy of the applicant's advocates' letter dated 24<sup>th</sup> September, 2009 serving him with a copy of the memorandum of appearance by registered post.

5. The appellant further submitted that the applicant's advocates received all the documents he sent to them by registered post within two days of posting. In the premises, the appellant having sent the record of appeal to the applicant's advocates on 3<sup>rd</sup> October, 2013, they must have received it within two days, that is on 6<sup>th</sup> October, 2013. That being the case, as required by **Rule 84** of the Rules, the applicant should have filed this application by 4<sup>th</sup> November, 2013 but they filed it on 14<sup>th</sup> November 2013. In the circumstances, the appellant challenged the competence of this application and urged us to strike it out.

6. The appellant further submitted that after filing the notice of appeal in this matter on 9<sup>th</sup> July 2013, he served a copy thereof upon the applicant's advocates by registered post on 10<sup>th</sup> July, 2013. He said the applicant's advocates having, admittedly, received all the other documents he sent to them, they cannot have failed to receive the letter bespeaking of proceedings. He therefore urged us to dismiss this application with costs.

7. We have considered the application. We wish to start with the mode of service, which the appellant claimed was adopted by the parties. As we have said, the appellant averred in the replying affidavit that right from the High Court, the parties adopted registered post as the mode of service of documents on each other. In this regard, we have seen a letter dated 24<sup>th</sup> September, 2009 from M/s Daly & Figgis who are the Advocates for the applicant in this matter sending by registered post under the provisions of **Order IX Rule 7** of the then **Civil Procedure Rules**, copies of the memorandum of appearance they had filed in the High Court on behalf of the applicant to the appellant as well as the 1<sup>st</sup> and 2<sup>nd</sup> respondents in this appeal.

8. As it stood then, **Order IX Rule 7** of the **Civil Procedure Rules** authorized service of pleadings by, *inter alia*, registered post. That, together with the fact that the appellant served, without any protest, the notice of appeal upon the other parties is, in our view, confirmation of the appellant's assertion that the parties adopted registered post as the mode of serving each other with pleadings and other court process.

9. That provision did not state when posted documents were deemed to be served. If the current **Order 5 Rule 9(2)** of the Civil Procedure Rules which deals with posting of documents to Government offices is anything to go by, "*the time at which the document so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof.*"

10. In this case, there is evidence from paragraph 4 of Daniel Ndaba's affidavit in support of this application that on 12<sup>th</sup> July, 2013, the applicant's advocates received the notice of appeal that the respondent had posted on 10<sup>th</sup> July, 2013. That confirms the respondent's assertion that posted documents were received within two days. That being the case, the issue we should now resolve is when the appellant's advocates are deemed to have received the record of appeal to determine whether or not the present application is incompetent for having been filed out of time.

11. The appellant admittedly filed the record of appeal on 2<sup>nd</sup> October, 2013. He averred in his replying affidavit that he sent by registered post copies thereof to all the respondents on the following day, that is on 3<sup>rd</sup> October, 2013. As proof of that, he annexed to his replying affidavit three copies of certificates of posting showing that on that day, he indeed sent documents to the advocates for the respondents in this appeal, M/s Dally & Figgis Advocates, M/s SilaMunyao & Co Advocates and M/s Magare & Co Advocates. It cannot therefore be correct that the applicant's advocates received a copy of the record of appeal 12 days later when it had been posted on 3<sup>rd</sup> October, 2013.

12. In the circumstances, we find and hold that the applicant's advocates received the record of appeal on or before 6<sup>th</sup> October, 2013. It follows, as the appellant contended, that this application filed on 14<sup>th</sup> November 2013 is incompetent for having been filed out of time. Consequently, the same is hereby struck out with costs to the appellant.

**DATED and delivered at Kisumu this 18th day of December, 2014**

**D.K. MARAGA**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

I certify that this is a true copy

of the original

**DEPUTY REGISTRAR**



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