



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: NAMBUYE, ASIKE-MAKHANDIA & KANTAL, J.J.A.)

CIVIL APPLICATION NO. 110 OF 2018

BETWEEN

HANOS (K) LIMITED.....APPLICANT

AND

DHIREN MOHANLAL SHAH.....RESPONDENT

*(Being an application for an Order to strike out the Notice of Appeal from
the Judgment of the Environment and Land Court of Kenya at Mombasa*

(Yano, J.) dated 18th October, 2018 in ELC No. 52 of 2016)

RULING OF THE COURT

The Motion on notice is brought under **rules 75, 77(1), 83 and 84** of the **Court of Appeal Rules** and it is prayed that the respondent's Notice of Appeal dated 22nd October, 2018 be struck out on the grounds that no appeal lies and that essential steps required by the rules have not been taken or have not been taken within the time prescribed by the rules. It is said that the respondent has failed to lodge Notice of Appeal within the prescribed time or at all; that the respondent has not served the applicant with a Notice of Appeal within seven days of filing the same and without having the same lodged as required; that no appeal lies as of right and that the respondent has no *locus standi* to institute the intended appeal. The Motion is supported by the affidavit of **Ushwin Khanna, Advocate**, where he deposes amongst other things that Judgment was delivered by the Environment and Land Court ("ELC") – **Yano, J.** on 18th October, 2018; that the respondent on 22nd October, 2018 filed a Notice of Appeal through counsel giving notice to appeal against the whole Judgment; that the Notice was not served as required under **rule 77** of the **Court of Appeal Rules** when it was served on the applicant's law firm; that the same was served on the law firm on 30th October, 2019 out of time; that Notice of Appeal was not served within seven days as required; that this means an essential step in the proceedings was not taken. Further, that no appeal lies from an order given under **Order 37 rule 7 of Civil Procedure Rules** from an Originating Summons without leave and that no leave had been sought or granted, amongst other things.

There is a affidavit of **Terence Omondi, a Process Server** attached to the law firm of **Ndegwa Muthama Kitisya Advocates** who states that on 22nd October, 2018 he received Notice of Appeal together with a letter bespeaking proceedings with instructions to file and serve the same upon the applicants' lawyers; that he proceeded to the Court Registry filed and lodged the same, that the next day the same had not been signed or sealed by the Deputy Registrar; that on realising that time was running out he served an

unlodged copy of Notice of Appeal upon lawyers for the applicant; that he served the lodged copy on 30th October, 2019. He explains the many visits he made to the Registry where he found that the Deputy Registrar had not signed or sealed the Notice of Appeal. It is in essence admitted that the notice was served later, outside the time required by the Rules.

Mr. Ushwin Khamna found it necessary to file a Supplementary Affidavit when he restated the case at the ELC stating, in addition, that his law firm was served with a lodged and signed Notice of Appeal on 5th September, 2019, almost 11 months after the same was filed and almost 6 weeks after it had been signed by the Deputy Registrar. There are so many other things said in that affidavit but they are not helpful in determining the Motion before us.

There is a Further Replying Affidavit by **Peter Mutuku Mbithi**, Advocate of **Mutuku Mbithi & Butoyi** Advocates on record for the respondent. He says that he was instructed to be on record for the respondent for taxation of a bill of costs and related matters. He says that Notice of Appeal was signed by the Deputy Registrar on 5th September, 2019

... “...and any delays have been explained in the Affidavit of Terence Omondi”. He says that the Notice was properly lodged and served and the Motion **should fail and be dismissed**.

We are asked in the Motion to strike out Notice of Appeal because an essential step in the proceedings has not been taken on time or it has not been taken within the prescribed time.

A party who desires to appeal to this Court against a Judgment or decision of the High Court is required by **rule 75** of the rules to lodge an appeal within fourteen days of the date of the decision and under **rule 77** of the rules this party must serve that lodged Notice of Appeal on the adverse party within seven days of lodging it. It has been held by this Court in cases such as **Salama Beach Limited & 3 Others v Kenyariri & Associates Advocates [2016] eKLR** that the effect of a notice of appeal lodged without endorsement by the Registrar automatically impacts on the timeliness of all other steps to be taken on appeal.

The Process Server of the respondent’s law firm says that he served a lodged copy of Notice of Appeal on the applicant’s Advocates on 30th October, 2018. Counsel for the applicant says that Notice of Appeal was served almost 11 months after the same was filed and nearly 6 weeks after it had been signed by the Deputy Registrar. It is true that the Constitution of Kenya, 2010 frowns at procedural technicalities. Rules of procedure are however not technicalities. They are part of the process of the Court and they regulate the conduct of parties before the Court so that there is proper notice to the other side and no party is ambushed by the other in litigation or in an appeal.

Notice of Appeal was served late – outside the timelines required by the rules which is to say, as stated by the applicant, that an essential step in the proceedings was not taken within time at all. It cannot therefore sustain unless validated in accordance with the Rules.

We note that Notice of Appeal was served on counsel for the applicant on 30th October 2018 and the Motion is dated 15th November, 2018 which is within the timeliness required by rules 83 and 84 of the Court of Appeal Rules.

The Motion dated 15th November, 2018 has merit and it is hereby allowed. The Notice of Appeal dated 22nd October, 2018 is hereby struck out. The applicant will have costs of the Motion.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2021.

R.N. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR



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