



REPUBLIC OF KENYA



KENYA LAW
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**Masiga v Masiga (Succession Appeal E009 of 2022)
[2023] KEHC 22776 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22776 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION APPEAL E009 OF 2022
WM MUSYOKA, J
SEPTEMBER 28, 2023**

BETWEEN

CICILIA ACHIENO MASIGA APPELLANT

AND

MARGARET AKONGO MASIGA RESPONDENT

(An appeal arising from orders made in the ruling of Hon. Mrs. Lucy Ambasi, Chief Magistrate, CM, in Busia CMCS No. E507 of 2021, of 28th November 2022))

JUDGMENT

1. The memorandum of appeal lodged herein on 1st December 2022, dated 30th November 2022, purports to be challenging orders made in a ruling that Hon. Ambasi, CM, delivered on 28th November 2022. I have closely perused the record of appeal filed herein, as well as the original trial court record, and it reflects that Hon. Ambasi, CM, did not deliver any ruling on 28th November 2022. Indeed, Hon. Ambasi, CM, did not even sit on 28th November 2022.
2. The sitting, by Hon. Ambasi, CM, closest to 28th November 2022, was on 29th November 2022, arising from orders made on 25th November 2022, for a mention on 29th November 2022, when the trial court ordered that a title deed be made available to the Registrar within 24 hours. For avoidance of doubt, the ruling of 29th November 2022 reads:

“24 hours for the title deed to be availed to the Registrar in default you will be in contempt.
M on 1/12/2022.”
3. Could the order of 29th November 2022 be the one that the appeal is about? I do not think so. The grounds of appeal are about orders that Hon. Ambasi, CM, had made on distribution of the estate. The appellant is unhappy with the order that the estate be distributed at ½ share between the widows; that the other dependents, apart from the widows, were not taken into account; that all the family



members had not filed a consent on distribution; that children born outside wedlock had not been considered; and the units in each house and outside the houses were not considered. The order made on 29th November 2022 had nothing to do with the issues raised in the grounds of appeal, and the appeal herein has nothing to do with the orders of 29th November 2022.

4. If that is the case, then on which other order or ruling is the appeal predicated? The ruling, which appears to me to be about distribution of the estate, was delivered on 7th July 2022, where Hon. Ambasi, CM, recorded:

“The children of the deceased are vehemently opposed to the distribution of the estate as set out in the application. I however see no problem whatsoever with the distribution as set out. Grant allowed as prayed.”

5. I am persuaded that the appeal herein is about the ruling delivered on 7th July 2022, and not the non-existent ruling or orders of 28th November 2022. However, parties are bound by their pleadings. The appellant chose to appeal against non-existent orders, and she must suffer the consequences of it. I am not even sure that my conclusion, that the appeal turns on the orders of 7th July 2022, is on solid ground, for the memorandum of appeal makes no reference to those orders.
6. I also hazard that the appellant is up to some mischief. Her appeal was lodged on 1st December 2022. If she intended to appeal against the orders of 7th July 2022, then 1st December 2022 was way out of the 30 days within which she should have appealed. Instead of seeking leave to appeal out of time, she opted to embark on the ill-fated approach of lodging an appeal against orders that did not exist.
7. The appeal herein is woefully misconceived and incompetent, and was filed in abuse of the process of the court. It is for striking out, and I hereby strike it out. The striking out of such incompetent appeals should attract costs, but, since this is a family matter, I shall not award any. Let the original trial court record be returned to the trial court, for execution or implementation of the orders of the trial court. The temporary orders of 17th April 2023 are hereby discharged. The appeal file to be closed. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 28TH DAY OF SEPTEMBER 2023.

WM MUSYOKA

JUDGE

