



REPUBLIC OF KENYA



KENYA LAW
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**Jembe v Kalenga (Civil Appeal E008 of 2021)
[2022] KEHC 17191 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 17191 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CIVIL APPEAL E008 OF 2021
SM GITHINJI, J
DECEMBER 20, 2022**

BETWEEN

RONALD WANJE JEMBE APPELLANT

AND

PHEOBIANA REHEMA KALENGA RESPONDENT

*(Being an Appeal from part of the Judgment delivered by the Hon. E. Kadima SRM
at Garsen on the 25th day of September 2020 in Garsen SRMCC No. 49 of 2019)*

RULING

1. Before this Court is a Notice of Motion dated March 22, 2022, premised on Section 1A, 1B, 3A, 3B, and 79G of the *Civil Procedure Act* and Order 2 Rule 15 (1) (d) of the *Civil Procedure Rules 2010*, seeking an order that the memorandum of appeal dated July 15, 2021 be struck out. It is supported by the grounds included in the prayer for striking out and reiterated in the supporting affidavit together with annexures thereto. The application was not opposed by way of a replying affidavit by the Appellant. All that counsel for the Appellant stated in court was that the court can consider the application against the record.
2. In summary, the Respondent avers that on January 25, 2021, the court granted leave to the Appellant to file an appeal and record of appeal out of time on conditions that the same is filed within 30 days and the decretal amount is deposited. The Appellant failed to comply and he was granted a 21 days extension from April 7, 2021. Again, the Appellant did not comply but filed the present memorandum of appeal on July 15, 2021, out of time and without leave of the court. Since then, the Appellant has neither filed the record of appeal nor deposited the decretal amount as was directed.
3. The Application was canvassed through the sole written submissions filed by the Respondent. I have given careful consideration to the application, supporting affidavit, the Respondent's submissions



and the court's record. Having done so, I find that the sole issue for determination is whether the memorandum of appeal should be dismissed.

Analysis and Determination

4. The law governing appeals from subordinate courts to the High Court is section 79G of the [Civil Procedure Act](#) which provides as follows:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

5. It is not in doubt that judgment of the lower court was delivered on September 25, 2020. The Appellant was expected to file his appeal within thirty days, of which he did not. The Respondent stated that the court granted extension to the Appellant twice, but still failed to file the appeal in time. That the memorandum of appeal on record should be struck out for being filed after April 28, 2021 which was the deadline date of the last extension.
6. It is evident that the memorandum of appeal was filed out of time. While section 79G above grants this court discretion to admit an appeal out of time, it is also pertinent that an appellant must demonstrate why their appeal should be admitted out of time. It is not lost on me that the court's overriding objective is to administer justice without undue regard to technicalities. However, grave procedural improprieties cannot be ignored. The court has to exercise discretion by weighing the prejudice likely to be suffered by either party for the benefit of the wider interests of justice.
7. From the time judgment was delivered on September 25, 2020, the Appellant did not file the memorandum of appeal until July 15, 2021, approximately 10 months later. It must also be noted that the Appellant herein has not sought this Court's intervention to regularize the position. No explanation whatsoever has been availed by the Appellant for the inordinate delay in filing the Appeal.
8. In the circumstances, I find no reason why the Respondent should be held captive by the Appellant's indolence. The outcome is that the Respondent's application dated March 22, 2022 is merited and the same is allowed with costs to the Respondent.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 20TH DAY OF DECEMBER, 2022.

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S.M. GITHINJI

JUDGE

In the Presence of; -

