



**Masiga v Masiga (Succession Appeal E009 of 2022)  
[2024] KEHC 1378 (KLR) (16 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1378 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
SUCCESSION APPEAL E009 OF 2022  
WM MUSYOKA, J  
FEBRUARY 16, 2024**

**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. I will start by setting the record straight, as I sense that some parties do not appear to understand what has transpired so far. On 28<sup>th</sup> September 2023, I delivered a judgement herein, disposing of the appeal. It turned out that the delivery of the judgement was in error, as the matter had not gotten to that stage. What should have been delivered should have been a ruling, on the application dated 5<sup>th</sup> December 2022. When that was brought to my attention, through the application, by the appellant, dated 29<sup>th</sup> September 2023, I corrected that error, by setting aside that judgement, in the ruling that I delivered on 20<sup>th</sup> December 2023. In that ruling I also admitted the appeal, as it was yet to be admitted, and allocated it a date for mention for directions, on 16<sup>th</sup> January 2024. Directions were taken on 16<sup>th</sup> January 2024, for canvassing of the appeal, by way of written submissions. The respondent had already filed hers, and it was left to the appellant to file hers. The matter was next mentioned on 29<sup>th</sup> January 2024, to confirm whether the appellant had complied, and I allocated the matter a date for judgement on the appeal, being 16<sup>th</sup> February 2024. That is the background.
2. The respondent filed her written submissions on 5<sup>th</sup> May 2023, while the appellant filed hers on 23<sup>rd</sup> January 2024. In my judgement of 28<sup>th</sup> September 2023, which was vacated by the ruling of 20<sup>th</sup> December 2023, I had raised the issue of the competence of the appeal. In the ruling of 20<sup>th</sup> December 2023, I had directed the parties to address me, in their written submissions, on that issue. This is a



preliminary issue, which goes to jurisdiction, and I should dispose of it first, for the outcome of it may have the consequence of finally determining the appeal.

3. This is what I wrote at paragraph 6 of the ruling of 20<sup>th</sup> December 2023:

“Whether the appeal was filed within time, is an issue that should be canvassed at the hearing of the appeal, for the appellants are still mixed up on whether their appeal is founded on the memorandum of appeal filed on 1<sup>st</sup> December 2022, against orders made on 28<sup>th</sup> November 2022; or the amended memorandum of appeal filed on 19<sup>th</sup> April 2023, which challenges orders made on 7<sup>th</sup> July 2022. If we go by the memorandum of appeal of 1<sup>st</sup> December 2022, then the appeal was filed within time, but if we go by that filed on 19<sup>th</sup> April 2023, then there would be something fundamentally wrong.”

4. I have most carefully and closely perused through the written submissions that the appellant filed on 23<sup>rd</sup> January 2024, and I note that the appellant identifies it as an issue for determination, and she frames it as follows:

“Whether the mistyping of the date on the memorandum of appeal dated 30/11/2022 and filed on 1/12/2022 is incurably defective that it cannot be salvaged under article 159 of *the constitution*.”

5. In the body of the written submissions, the appellant cites Article 159(2)(d) of *the Constitution*, on justice being administered without undue regard to technicalities, and purposes and principles of *the Constitution* being promoted and protected. She also cites Article 10 of *the Constitution*, to enumerate the principles of *the Constitution*: human dignity, equity, social justice, equality, human rights, inclusiveness and non-discrimination. It is submitted that the appeal had been filed by the appellant in person. It is submitted that the appeal was filed in time, and was admitted. It is further submitted that the error was clerical or a typo, which should not be so grave as to affect the appeal, and the same ought to be determined on merit, rather than on a technicality. No authorities are cited in the written submissions, to support these contentions.

6. The respondent did not file written submissions after the ruling of 20<sup>th</sup> December 2023, and so she did not address the issue of the competence of the appeal. She did not address the issue of the competence of the appeal in her submissions of 5<sup>th</sup> May 2023.

7. So, do I have a competent appeal before me, which I can determine on its merits?

8. The appeal herein was commenced by way of a memorandum of appeal, filed herein on 1<sup>st</sup> December 2022, dated 30<sup>th</sup> November 2022. It is indicated that the same is an appeal against orders that had been made on 28<sup>th</sup> November 2022. Under section 79G of the *Civil Procedure Act*, Cap 21, Laws of Kenya, an appeal from a decision of a subordinate court should be filed at the High Court within 30 days of the making of the order or the passing of the decree. There is proviso that an appeal filed out of time could be admitted, upon the appellant satisfying the court that there was good cause for not filing the appeal on time. Consequently, an appeal filed on 1<sup>st</sup> December 2022, against an order or decree passed on 28<sup>th</sup> November 2022 was filed within the 30 days allowed, for it was filed just 3 days after the making of the impugned order.

9. Section 79G of the *Civil Procedure Act* provides as follows:

“Time for filing appeals from subordinate courts



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.”

10. The record of appeal was lodged herein on 19<sup>th</sup> April 2023, dated 17<sup>th</sup> March 2023. the appellant did not include, in that record of appeal, the memorandum of appeal that she filed herein on 1<sup>st</sup> December 2022, instead she put in there an amended memorandum of appeal, dated 17<sup>th</sup> March 2023, which purported to introduce 3 amendments, relating to addition of a second appellant, to indicate the provisions under which the memorandum of appeal was brought under, and a prayer for costs. Those 3 were the only items underlined in red. None of the sentences or words or clauses in the earlier memorandum of appeal, of 1<sup>st</sup> December 2022, were crossed out, indeed, a closer look at the purported memorandum of appeal would reveal that it was not an amendment of the memorandum of appeal of 1<sup>st</sup> December 2022 at all.
11. Why do I say so? The memorandum of appeal of 1<sup>st</sup> December 2022 was with respect to the decision of 28<sup>th</sup> November 2022, while the purported amended memorandum of appeal of 19<sup>th</sup> April 2023 is in respect of a decision made on 7<sup>th</sup> July 2022. Curiously, the purported amended memorandum of appeal makes no mention at all of 28<sup>th</sup> November 2022, yet that date ought to have been included in any amended memorandum of appeal, and crossed out or cancelled in red. Secondly, the grounds set out in the purported amended memorandum of appeal are worded differently from those in the amended memorandum of appeal of 1<sup>st</sup> December 2022, yet the changes in the grounds of appeal are not indicated by red in the purported amended pleading. The clause on prayers in the purported amended memorandum of appeal are also totally different from what is reflected in the memorandum of 1<sup>st</sup> December 2022, yet those changes are not indicated in red.
12. Amendment of pleadings does not bring into the record a new pleading. It would be the original pleading being changed by way of some new material being introduced, or some of the original material being removed. The new material introduced is indicated by underlining in red, and the material going out is indicated by crossing out in red. The original wording in the amended pleading should be clear from the amended pleading. It should not be the case that the purported amended pleading should appear to be a new pleading completely different from the original pleading. There can only be one originating pleading, which is then amended. Where the purported amended pleadings are radically different from the original pleading, tending to a new pleading altogether, issues would arise as to whether the party will not have filed a totally new originating pleading within the same cause, thereby originating another cause within an existing cause. What is expected is that the amended pleading should be a replica of the pleading sought to be amended, save for the additional material.
13. The differences between the memorandum of appeal of 1<sup>st</sup> December 2022 and the purported amended memorandum of appeal of 19<sup>th</sup> April 2023 is just not on form, or, more specifically, on the failure to comply fully with the rules of procedure governing appeals, particularly those relating to underlining the new words, and crossing out the words to be removed. Those can be dealt with under Article 159 of *the Constitution*. The problem is more fundamental than that. Whereas the memorandum of appeal of 1<sup>st</sup> December 2022 was in respect of a decision made on 28<sup>th</sup> November 2022, the purported amended memorandum of appeal of 19<sup>th</sup> April 2023 was against an order that was made on 7<sup>th</sup> July 2022. The memorandum of appeal of 1<sup>st</sup> December 2022 was filed within the 30 days allowed in law.



However, filing an appeal on 1<sup>st</sup> December 2022, against orders that were made on 7<sup>th</sup> July 2022 would be outside the 30 days, and that filing would require leave of court, going by the wording of section 79G of the *Civil Procedure Act*. The filing of the appeal on 1<sup>st</sup> December 2022 against orders made on 28<sup>th</sup> November 2022 required no leave of court, given that such filing would be within the timelines. However, filing an appeal on 1<sup>st</sup> December 2022 against orders made well before the 30-days timelines, required leave of court. that leave was not obtained, to file the memorandum of appeal of 19<sup>th</sup> April 2023. No reasons or explanations have been given for the delay, to warrant exercise of discretion to allow admission out of time. Whereas the appeal against the orders of 28<sup>th</sup> November 2022 was filed within time, an appeal against orders made on 7<sup>th</sup> July 2022 could not have been filed within time, whether filed on 1<sup>st</sup> December 2022 or 19<sup>th</sup> April 2023. The appeal that the appellant is urging is purportedly against the orders of 7<sup>th</sup> July 2022. If any such appeal exists, then it was filed out of time, and without leave, and the same is improperly before the court.

14. Section 79G of the *Civil Procedure Act* gives appellants a lifeline. They can get the nod of the court to have the appeal filed or admitted out of time. The appellant did not obtain the leave of the court before filing an appeal to challenge the orders of 7<sup>th</sup> July 2022 outside the 30-day window. What she did was to ride on an amendment of the memorandum of appeal that had been filed within time, by way of changing the dates, to sneak in the date of an order that could only be challenged on appeal with leave, as time had run out. That was a clever move, in a classic abuse of court process. It was submitted that the date of 28<sup>th</sup> November 2022 was a mistyping. Well, in the record before me, that date was inserted by hand.
15. Article 159 of *the Constitution* was cited. That provision was not designed to override rules of procedure. It was not intended to overthrow procedure. Procedure is said to be the handmaiden of justice, and without it there would be total anarchy. Timelines are critical in legal proceedings, and without them, there would be no end to litigation. Article 159 does not obviate the need to observe procedure. One does not even need to cite Article 159, to have an appeal admitted out of time, for section 79G itself gives the parties a way out, where time runs out for filing pleadings at appeal. The court is granted power to admit an appeal out of time. The appellant did not avail herself of that, instead she sought to beat the system, by sneaking in an amendment, which would have mischievously had an appeal filed out of time, without leave, hidden within one filed within time.
16. In my ruling of 20<sup>th</sup> November 2022, I admitted the appeal, as it had not been formerly admitted. What I admitted was the appeal that was properly filed, within the timelines, on 1<sup>st</sup> December 2022. The appeal that was lodged herein, on 19<sup>th</sup> April 2023, by way of amendment, was filed without leave, it was not properly on record, and it did not displace the one that had been filed on 1<sup>st</sup> December 2022, to the extent that the amendment did not cancel out the particulars pleaded in the memorandum of appeal of 1<sup>st</sup> December 2022. The appeal that is properly before me was that filed on 1<sup>st</sup> December 2022. No orders were made on 28<sup>th</sup> November 2022, and so there is no basis to grant any of the orders sought in that appeal.
17. In view of what I have stated in paragraph 16 hereabove, there is no merit in the appeal before me, and I hereby dismiss the same. Being a family matter, each party shall bear their own costs. It is so ordered.

**JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 16<sup>TH</sup> DAY OF FEBRUARY 2024**

**WM MUSYOKA**

**JUDGE**



Mr. Arthur Etyang, Court Assistant.

Ms. Margaret Akongo Masiga, the Respondent, In Person.

Advocates

Mr. Masiga, instructed by Masiga Wainaina & Associates, Advocates for the Appellants.

