



**Murenga v Amakobe (Civil Appeal E013 of 2023)
[2024] KEHC 4765 (KLR) (19 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4765 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E013 OF 2023
WM MUSYOKA, J
APRIL 19, 2024**

BETWEEN

UMULIKHAIR ASHISWA MURENGA APPELLANT

AND

MUSA ODERA AMAKOBE RESPONDENT

(An appeal arising from judgment and decree by Hon. N. Nyaboga, Senior Resident Kadhi, SRK, in Busia KCDC No. 01 of 2020, of 23rd February 2021)

RULING

1. After the appeal herein was lodged in this cause on July 27, 2023, *vide* a memorandum of appeal of even date, the appellant filed a Motion, dated December 18, 2023, seeking stay of execution of an order, made by the Kadhi on September 7, 2022, pending hearing and determination of the appeal herein. The grounds on the face of that application, and in the supporting affidavit, are that the appeal herein was filed after the appellant was aggrieved of the said orders of September 7, 2022, and that she believes that she has an arguable appeal. It is also averred that there was pending, before the Kadhi, an application seeking to enforce the said orders.
2. The respondent, upon being served, filed a notice of preliminary objection, dated February 2, 2024, principally raising 1 ground, that the appeal was incompetent, for it was filed out of time, without leave of the court. It is averred that the impugned judgement was delivered on February 23, 2021, and the appeal was filed 29 months later, on July 27, 2023, contrary to section 79G of the Civil Procedure Act, Cap 21, Laws of Kenya.
3. The appellant responded to that preliminary objection, by filing a replying affidavit, wherein she averred that she had obtained leave to file appeal out of time, in Busia HC Misc. Application No. E039 of 2022. She has attached a copy of the order made in Busia HC Misc. Application No. E039 of 2022.



4. I directed, on 5th February 2024, that the preliminary objection be canvassed by way of written submissions. Both sides have complied. The respondent cites section 79G of the *Civil Procedure Act* and *Josephine Wambui Mwangi vs. Michael Mukundi Ngugi* [2021] eKLR (Eboso, J), to argue that an appeal filed out of time, without an order enlarging time, was fatally defective. The appellant has submitted that she filed appeal after she had obtained leave of court to file it out of time.
5. Under section 79G of the *Civil Procedure Act*, an appeal to the High Court, from a decree or order of a subordinate court, should be filed within 30 days of the decree or order. According to the memorandum of appeal on record, the decree under challenge was issued on February 23, 2021. 30 days from that date would take us to the region of March 23, 2021, or thereabouts. That would be the date by which any challenge, by way of appeal, against that decree, should have been lodged at the High Court. The same provision though allows the court to admit an appeal out of time for good cause. There is evidence that such leave was obtained, on 13th July 2023, and the appeal was lodged herein on July 27, 2023, within the 14 days allowed in that order.
6. In view of the order, obtained in Busia HC Misc. Application No. E039 of 2022, there can be no merit in the preliminary objection raised by the respondent, and the same is hereby overruled.
7. Having disposed of the preliminary objection, I now turn to the pending application, dated December 18, 2023, which provoked the filing of the preliminary objection, which I have just overruled. That application appears to be premised on orders that were made in Busia KCDC No. 01 of 2020, on September 7, 2022, yet the appeal herein is founded on orders made on February 23, 2021. That application is in respect of contempt proceedings, relating to orders made on September 7, 2022. I believe that there is something not quite right about that application, and I sense that the said application ought to have been filed elsewhere.
8. I have before me another appeal file, Busia HCCA No. E033 of 2022, between the same parties, arising from the proceedings in Busia KCDC No. 01 of 2020, but founded on the orders of September 7, 2022. It would appear that the application, dated December 18, 2022, filed herein, should have been filed in Busia HCCA No. E033 of 2022. Curiously, the appellant had filed a replica of the same application, in Busia HCCA No. E033 of 2022, word for word, but dated September 29, 2022. That application was argued before Karanjah J, who rendered a ruling on it, on November 17, 2022, dismissing it.
9. This is what abuse of process is about. Advancing the same cause in 2 different suits, in the hope that the court will not find out about the duplicity, and grant you favourable orders in at least 1 of the 2. Indeed, the application, dated December 18, 2023, was filed after that in Busia HCCA No. E033 of 2022 was dismissed, on November 17, 2022. This is a blatant abuse of the court process. Indeed, it would appear that the entire project that is Busia HCCA No. E013 of 2023, was to obtain that which the appellant was apparently not getting in Busia HCCA No. E033 of 2022. As the application, dated 18th December 2023, was filed in blatant abuse of the court process, I do hereby strike it out, with costs to the respondent.
10. I note that the original trial court records, in Busia KCDC No. 01 of 2020, have been placed in Busia HCCA No. E033 of 2022. The 2 files, that is to say Busia HCCA No. E033 of 2022 and Busia HCCA No. E013 of 2023, shall be consolidated, with Busia HCCA No. E033 of 2022 being the lead file. The 2 appeals shall be canvassed together, by way of written submissions. I note that the respondent has already filed his submissions with respect to Busia HCCA No. E033 of 2022, he shall file a set with respect to Busia HCCA No. E013 of 2023. The matter shall be mentioned on May 7, 2024, for compliance and allocation of a date for judgement. Orders accordingly .



**DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 19TH DAY OF
APRIL 2024**

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Ouma, instructed by BM Ouma & Company, Advocates for the appellant.

Mr. Egesa, instructed by Bogonko Otanga & Company, Advocates for the respondent.

