



REPUBLIC OF KENYA



**Khatibu v Wandogho (Civil Appeal E054 of 2023)
[2023] KEHC 22179 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 22179 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E054 OF 2023
F WANGARI, J
JULY 14, 2023**

BETWEEN

KHATIBU MWINYIHAJI KHATIBU APPELLANT

AND

KELIAS POTUA WANDOGHO RESPONDENT

RULING

1. The Notice of Motion dated March 14, 2021 seeks for orders that;
 - a. Spent
 - b. Spent
 - c. That the honorable court be pealed to issue interim orders of stay of execution of the judgment and decree of Hon Mutuku (M.S) entered on the 27th day of January 2022 in MSA CMC NO. E921 of 2021 pending the hearing and determination of this application.
 - d. That this honorable court be pleased to issue order of stay of execution of the judgment and decree of Hon. Mutuku (M.S) entered on the 27th day of January 2022 in MSA CMCC No. e921 of 2021 pending the hearing and determination of the present appeal.
 - e. That the Appellant/Applicant is ready to comply with any such conditions/terms as may be determined by this honorable court for granting the orders sought, including depositing part of the judgment sum in court and or in the joint name of the advocates into and interest earning account pending hearing and determination of the appeal.
 - f. That the costs of this application be provided for.
2. The appeal herein that is said to be pending was filed on March 8, 2023 against a decision given on January 27, 2022. The court had dealt with 3 other applications for stay.



3. Section 79G of the *Civil Procedure Act* 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.

4. The Judgement was delivered on January 27, 2022. The appeal should have been filed by February 26, 2022. The appeal is file 1 year out of time. There is not valid appeal. The application is based on a nullity. In the case of *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169 as cited favorably by the Court of Appeal in *Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Limited & 2 others* [1998] eKLR Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

5. The appeal cannot stand it is a nullity from day one. All the applications annexed on it are a nullity as nothing cannot be built on nothing. Consequently, the application dated March 14, 2023 is untenable. I therefore make the following orders

- a. The appeal herein was filed out of time without leave. It is accordingly struck out.
- b. The application dated March 14, 2023 is accordingly dismissed.
- c. Costs are awarded to the Respondent.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 14TH DAY OF JULY, 2023.

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F. WANGARI

JUDGE

In the presence of;

N/A by the Appellant

N/A by the Respondent

Abdullahi, Court Assistant

