



REPUBLIC OF KENYA



**Shemu v Simon (Civil Appeal 181 of 2023)  
[2024] KEHC 15492 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15492 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL 181 OF 2023  
SM GITHINJI, J  
DECEMBER 5, 2024**

**BETWEEN**

**KABIBI KITUKU SHEMU ..... APPELLANT**

**AND**

**KARISA SIMON ..... RESPONDENT**

*(An Appeal from the Ruling of the Honourable James Ongondo –SPM delivered on 18th October, 2023 and 15th November, 2023 in Malindi Civil Suit No.201 of 2012)*

**RULING**

1. The application for determination is dated 10/6/2024. It was filed by the Respondent pursuant to section 3A of the *Civil Procedure Act* and Order 2 Rule 15 (1) (d), Order 42 Rule 13, Order 43 Rule 1 (2) and (3), and Order 51 Rule 1 of the Civil Procedure Rules. The Respondent wants this court to strike out the memorandum of appeal dated 5/12/2023 and record of appeal dated 12/3/2024 for being incompetent and an abuse of the court process.
2. The application which was supported by the affidavit sworn by Catherine Kaburu on the even date, was premised on the following grounds: -
  1. That the appellant never served the Respondent/applicant with any application in relation to extension of time for filing an appeal out of time or date for admission of the appeal.
  2. That the appeal herein was filed without leave of the subordinate court under order 43 of Civil Procedure Rules 2010 being an appeal from a ruling on order 9 of Civil Procedure Rules 2010.
  3. That the appeal is fatally defective for purporting to be an appeal from two decisions to wit the rulings of Hon J. Ongondo SPM dated 18/10/2023 and 15/11/2023.
  4. That the appeal is equally out of time for the decision of the subordinate court dated 15/11/2023.



5. That the appeal is an abuse of the court process by a litigant that has displayed extreme laxity and highly prejudices the respondent/applicant herein.
  6. That the Respondent/applicant will be prejudiced if the Appellant/respondent's appeal is to proceed as it will have to prosecute a matter that has been dismissed not less than four times by the subordinate court.
  7. That the appeal as filed is a waste of the judicial time as it goes against the principles of expeditious resolution of civil disputes and litigation having an end.
  8. That it is in the interest of justice that the orders sought are granted.
3. The Appellant filed a replying affidavit dated 6/8/2024 opposing the motion. She deposed that the application as drawn and filed is bad in law, incurably and fatally defective. She stated that her appeal is properly on record having been granted leave by this court on 8/12/2023 to have the memorandum of appeal dated 5/12/2023 be admitted out of time.
  4. The application was canvassed by way of written submissions which I have keenly perused and considered in this ruling.
  5. The main issue in this matter is that the present appeal is not properly on record for various reasons:
    - that the Appellant failed to seek leave to appeal in the first instance at the trial court; that the appeal seeks to appeal two decisions, which is said to be unknown in law; and that the Respondent was never served with any application for extension of time to file the appeal.
  6. The undisputed facts in this case are that the Appellant's primary suit before the lower court was dismissed for want of prosecution on 10/5/2023. Her application dated 14/9/2023 to reinstate the suit was equally dismissed on 18/10/2023 for being presented by an advocate not properly on record. The Appellant moved the trial court once again seeking to reinstate the suit and leave to have the advocate come on record. The lower court disallowed the application on 15/11/2023 stating that the same was res judicata.
  7. That prompted the Appellant to approach this court under a miscellaneous application for leave to appeal out of time as against the two rulings of the subordinate court. On 8/12/2023, this court granted leave allowing the Appellant 21 days to appeal. The Appellant thus lodged her appeal on 18/12/2023. The Appeal was admitted for hearing on 7/5/2024.

### **Disposition**

8. This is quite a peculiar application. Firstly, for the grounds relied upon and secondly, because the supporting affidavit is sworn by a person other than the Respondent himself, describing herself as the legal officer of the Respondent. The Respondent is an individual with no capacity of having a legal officer but counsel. Be that as it may, and assumedly replacing thereon the term officer with counsel, there is no record of counsel Catherine Kaburu representing the Respondent at any point. There was also no explanation given that the said Catherine Kaburu was or is an advocate in the firm that is on record for the Respondent. I find guidance in Order 9 Rule 1 of the Civil Procedure Rules which provides: -

“ Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf:



Provided that—

- a. any such appearance shall, if the court so directs, be made by the party in person; and
- b. where the party by whom the application, appearance or act is required or authorized to be made or done is the Attorney- General or an officer authorized by law to make or to do such application, appearance or act for and on behalf of the Government, the Attorney-General or such officer, as the case may be, may by writing under his hand depute an officer in the public service to make or to do any such application, appearance or act.”

9. As already established, the said Catherine Kaburu does not appear in these proceedings as the Respondent’s advocate. She is therefore a stranger as far as the present matter is concerned. Striking out of any document in a matter before the court is a drastic measure but in the instant case it is well deserved. The supporting affidavit is therefore struck out. Having done so, the notice of motion cannot stand on its own. It is therefore dismissed. Costs shall be in the cause.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 5<sup>TH</sup> DAY OF DECEMBER, 2024.**

.....

**S.M. GITHINJI**

**JUDGE**

In the presence of; -

1. Mr Olwande holding brief for Ms Carol Ng’anga for the Appellant

