

**IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: DR. K. I. LAIBUTA, JA. - IN
CHAMBERS) CIVIL APPLICATION NO. E009 OF
2025**

BETWEEN

MAWINGO CONSTRUCTION 2010 LIMITED.....APPLICANT

AND

MOMBASA WATER PRODUCTS LIMITED.....RESPONDENT

*(Being an application for extension of time to file and serve the
Notice of Appeal out of time from the Judgment and Decree of
the High Court of Kenya at Mombasa (L. L. Naikuni, J.) delivered
on 3rd July 2024*

in

E.L.C Case No. 288 of 2014)

RULING

1. Before me is an “omnibus” Notice of Motion dated 10th February 2025 in which the applicant, Mawingo Construction 2010 Limited, seeks, *inter alia*, extension of time pursuant to rule 4 of the Court of Appeal Rules to file its notice of appeal and record of the intended appeal from the judgment of the Environment and Land Court at Mombasa (L. L. Naikuni, J.) dated 3rd July 2024 in Mombasa ELC Case No. 288 of 2014.

2. I hasten to point out that, when the applicant's Motion came for hearing on the Court's virtual platform on 15th May 2025, learned counsel for the applicant, Miss. Abwao, orally sought leave to abandon prayer No. 5 for stay of execution. There being no objection from Mr. Mwanzia, learned counsel for the respondent, the prayer for stay of execution pending the intended appeal stood abandoned.

3. The applicant's Motion for extension of time is supported by the annexed affidavit of its Director, Clive Erskine, sworn on 10th February 2025 deposing to a whopping 17 grounds set out on the face of the Motion, but to which I need not address myself in extenso, save to take note of the salient grounds relating to the application under rule 4, namely: that the 7 months' delay in lodging the notice of appeal was occasioned by the fact that the applicant was still "pursuing recourse in the trial court"; that, after the impugned judgment was delivered on 3rd July 2024, the applicant filed an application dated 2nd August 2024 seeking to have the judgment set aside; that its application was determined on 3rd December 2024; that they have since filed a notice of appeal dated 7th February 2025 on 10th February 2025; that the intended

appeal is “plausible” with a “very high chance of success”; and that no prejudice would be suffered by the respondent if the instant application is allowed.

4. In support of the Motion, learned counsel for the applicant, M/s. Soni & Associates, filed written submissions dated 12th May 2025, which Miss. Abwao highlighted orally.

5. Even though counsel for the respondent, Mr. Mwanzia, indicated that they had filed a replying affidavit and written submissions on the morning of the hearing, I find nothing on record so far to suggest that such material was ever filed. However, counsel made oral submissions opposing the Motion, contending that it did not meet the requirements for grant of the orders sought.

6. Having gone through the applicant’s Motion and the documents annexed thereto, it is clear that the notice of appeal alluded to does not form part of the record before me. Neither is it referenced in or annexed to the supporting affidavit. The apparent omission to lodge the notice of appeal is further compounded by the applicant’s failure to demonstrate that they had applied for the

proceedings in the trial court to lay sufficient ground for the intended appeal despite the inordinate delay in taking the decisive step to institute it. In the circumstances, I find that the applicant is yet to lodge its notice of appeal in respect of which it seeks to invoke the provisions of rule 4 of the Rules of this Court. The pertinent question is whether I have jurisdiction to determine its Motion. I do not.

7. Addressing itself to the mandatory requirement to file and serve a notice of appeal, the Supreme Court in **University of**

Eldoret and another v Hosea Sitienei and three others
[2020]

eKLR observed at para 36:

“The filing of a notice of appeal is not premised on any occurrence or condition to be fulfilled by the appellant. The filing of a notice of appeal signifies the intention to appeal.”

8. On the authority of the University of Eldoret and Sitienei case (ibid), it is true to say that, in the absence of a notice of appeal properly on record, the applicant herein is yet to

express its intention to appeal. Citing the Supreme Court decision in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral**

and Boundaries Commission and 7 others [2014] eKLR,
this

Court had this to say in **Apungu Arthur Kibira v Independent**

Electoral and Boundaries Commission and 2 others
[2018]

eKLR:

“A notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite.”

9. In so far as a notice of appeal is a jurisdictional pre-requisite, nothing flows from a non-existent notice to invoke this Court’s jurisdiction to grant the orders sought pursuant to Rule 4 or any other Rule. In effect, its hands are tied, so to speak. I so hold cognisant of the general principle that it is only in exceptional circumstances that this Court would raise its hand to slam shut the door to justice on the face of a litigant despite the constitutional guarantee of access to justice as enshrined in Article 48.

10. In addition to the foregoing, I must also add that the jurisdictional pre-requisite for a notice of appeal is not merely a technicality of procedure curable by invoking the provisions of

Article 159(2) (d) of the Constitution, which mandates courts to administer justice without undue regard to technicalities of procedure, and which I have taken to mind.

11. In this regard, the cases of **Jaldesa Tuke Dabelo v IEBC &**

Another [2015] eKLR; **Raila Odinga and 5 Others v IEBC & 3**

Others [2013] eKLR; **Lemanken Arata v Harum Meita Mei**

Lempaka & 2 Others [2014] eKLR; **Patricia Cherotich Sawe v**

IEBC & 4 Others [2015] eKLR, among others, are a constant

reminder that Article 159(2) (d) is not a panacea for all procedural ills even though *“the exercise of the jurisdiction under Article 159 of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice, save that Article 159(2) (d) of the Constitution is not a panacea for all procedural ills”*

12. I hasten to observe that it matters not that the overriding objectives set out in sections 3A and 3B of the Appellate Jurisdiction Act (Cap. 9) confer powers on this Court to dispense

justice with greater latitude (see **City Chemist (NBI)**
Mohamed)

Kasabuli suing for and on behalf of the Estate of Halima

Wamukoya Kasabuli v Orient Commercial Bank Limited Civil

Appeal No. Nai 302 of 2008 (UR No. 199 of 2008)
(Unreported).

13. Having found that there is no notice of appeal properly on record, I find and hold that I have no jurisdiction to determine the applicants' Motion or grant any of the orders sought.

Dated and delivered at Mombasa this 21st day of November 2025.

DR. K. I. LAIBUTA CARb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed
DEPUTY REGISTRAR