

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ELC APPEAL NO 004 OF 2023

**JONATHAN
ODHIAMBOAPPELLANT**

VERSUS

**WILLIS
OKECH.....RESPONDENT** **OKELLO**

RULING

**(On whether there is an Appeal on record upon which
Notice to Show Cause could issue)**

1. I am not a prophet of doom and neither do I intend ever to be one. But I see someone tempting me here to be one yet I pray that I be strong to stand against this hidden force of forming an opinion early herein regarding the facts I see demonstrating doom which are so clear that there seems to be no escape therefrom: I mean there seems to be no way of salvage in the instant Appeal but I must be patient and consider deeply the facts and argument. Be that is it may, I must point out the doom early enough, sigh and cry aloud over what would befall the doomed. How I wish every human being did the right thing at the right time because when the time flies past, it is never recovered however fast the being runs after it, believing that he or she has shortened the spent period, and mistakes dents for life even after correction! At best then, if opportunity for doing something escapes one due to indolence, deliberate

inaction or error, I would that they owned up to the mistake and sought for mercy: mercy which in courts is shown through exercise of discretion is always available until a party crosses the Rubicon. Herein is a classic example of a “Rubicon crossed”.

2. This Appeal came up, on 13/10/2025, for the hearing of the Notice to Show Cause (NTSC) why it should not be dismissed for want of prosecution and also on the preliminary issue as to whether there was a competent Appeal before the court. The NTSC had initially issued on 29th January 2025 and fixed for 24th March 2025 when it was postponed to 16th June 2025 to allow the Appellant to show the cause. On the latter date the Respondents raised an issue that even if cause would be shown there was no appeal in existence upon which the appellant would base the cause. A few arguments were made on that date about the compliance which would, if found to have occurred, have given the basis for the hearing of the NTSC. The Court gave the Appellant fourteen days to submit on that issue as well as show the cause.

Background

3. The Appellant herein filed a suit in Migori ELC Case No. 3 of 2022. The same was heard and determined. The trial court rendered its judgment dated 6th February 2023 on 8th March 2023. The Appellant never filed this appeal within the stipulated thirty (30) days. Realizing the delay, on 11th April 2023, after the 30-day statutory mandated period had lapsed,

the Appellant filed the instant Appeal simultaneously with Migori ELC Misc. Application No. E004 of 2023, annexing thereto a draft memorandum of appeal. What a coincident in the numerical references of the filed document!

- 4.** The Miscellaneous Application contemporaneously filed was aimed at obtaining ordered for validating the act of filing the appeal out time and without leave of the court at the time. Hence, the Applicant sought leave to file the Appeal out of time.
- 5.** The court record of the Miscellaneous file bears that the application was prosecuted. This record was captured in part by this Court on 16th June 2025 when the preliminary issue of the non existence of the appeal was raised. Thus, the record bears, and it is not disputed by the parties, that on 24th May 2023, the court granted the applicant leave to file his appeal out of time. The court gave him the condition that he files a fresh Memorandum of Appeal (the Appeal) within seven (7) days.
- 6.** An examination of the court record shows that the Appellant did not file the Memorandum of Appeal within the time given by the court or thereafter. He did not even purport by any stretch of imagination to pay for the already filed Memorandum of Appeal within the said period or afterward. Rather, he filed a Record of Appeal some time before the 6th November 2024 but after 26th January 2024 since the law firm now on record for the appellant was granted leave by consent to come on record on

that date, and on 6th November 2024 learned counsel reported that they had since filed it.

7. A further review of the court record shows that no step was taken in the appeal by the appellant until 29th January 2025 when this court fixed it for the Notice to Show Cause (NTSC) on 24th March 2025 as stated at paragraph 2 above. The court served the NTSC on the parties. It would appear that when the appellant's counsel received the NTSC he served the date on the Respondent. However, he filed the Affidavit of Service twice on the same date of 5th February 2025 in the Miscellaneous file No. E004 of 2023.
8. On 24th March 2025 when the matter came up before court, counsel for both parties were present. Counsel for the appellant prayed for seven days to show cause. The court granted the prayer, and fixed the NTSC on 16th June 2025. That is the tired history of the Appeal herein.

Argument

9. Counsel for the respondent argued that there was no appeal before court since the applicant had earlier sought leave to file an appeal out of time and this leave was granted on 24th May 2023. However, the memorandum of appeal was to be filed within seven (7) days. Counsel for the respondent argued that the appellant did not comply with the condition given by the court and only filed record of appeal on 28th November 2023, five (5) months after leave had been granted, allowing the applicant to

file his memorandum of appeal within seven days. Counsel for the respondent also argued that in effect, no memorandum of appeal had been filed as the order of the court did not deem the draft memorandum of appeal to have been properly. Learned counsel for the Appellant thought otherwise.

10. The court invited the parties to submit on this issue.

Submissions

11. The application was canvassed by way of written submissions. The respondent did not file his submission. The appellant filed his submissions dated 10th July 2025 and argued that he had complied with the directions of the court, only that there was confusion on the part of the registry regarding his appeal and miscellaneous files. These files he argues, were placed before two judicial officers on the same day and thus he was not able to attend to one of the courts. Nevertheless, he maintained that he complied with directions of the court and the only thing that was coming up on 20th March 2025 was the highlining of his submissions or the taking of a judgment date. He referred the court to his affidavit dated 25th March 2025, which maintained, captured the true background of the conduct of the instant appeal.

12. On the issue of whether there is an Appeal or rather, a competent appeal, before the court, the appellant submitted that the main concern herein was whether leave ought to have been obtained before or after filing the application, he relied **on**

Gerald Mlimbine v Joseph Kangangi, Misc Civ Appeal no 40 of 2007 [2008] eKLR to argue that a party seeking to file an appeal out of time need not file the application separate from the appeal.

- 13.** Finally, the appellant submitted that that the unfortunate mix-up of his files at the registry led to his leave to file out time being granted in the miscellaneous file and not the appeal file, hence the filing of submissions in the wrong file. He argued that his appeal exists, and that the same is competent.

Issue, Analysis and Determination

- 14.** The sole issue for determination herein is whether there is an appeal upon which NTSC can issue. If so, then whether the Appellant has shown sufficient cause to have the appeal spared from dismissal.
- 15.** The court has, in the interest of justice, analyzed the court records of both the appeal and miscellaneous file as well as the submissions filed by the appellant since at some point the Appellant submitted that he has complied in the Miscellaneous Application file. The Respondent argued that there is no appeal on record, the appellant having applied for leave to file an appeal out of time but failed to do so. The applicant, on the other hand, argued that he has a competent appeal on record, having filed an appeal at the time he was filing his miscellaneous application to file the appeal out of time.

16. After perusing the court file herein, the court finds that, indeed, the appellant filed a draft memorandum appeal. He filed separately the Miscellaneous Application also on 11th April, 2023. Thereafter, on 24th May, 2024, the court granted him leave to file his appeal out of time but with the condition that he files a memorandum of appeal within seven days of the ruling. Time started running from the 24th May 2023. The court also notes that the appellant never filed the Memorandum of appeal with the seven days granted but rather filed a record of appeal on 28th November 2023, as per his submission.

17. Given the above stated circumstances, it is imperative to consider the effect of the applicant's failure to file the Memorandum of Appeal within the seven days granted by the court. Section 79 G of the civil procedure Act provides as follows concerning the filing of appeals:

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.

18. The Supreme Court in **Nick Salat v Independent electoral and Boundaries Commission & 7 others (Application 16 of 2014) [2014] KESC 12 (KLR)** cited the Supreme Court of California in *Silver brand v County of Los Angeles* [2009] 46 Cal. where it was held that:

Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal..... The purpose of this requirement is to promote the finality of judgements by forcing the losing party to take an appeal expeditiously or not at all.”

19. In the Salat Case the Court went on to add that any document filed without the leave of the Court is a nullity in law. At the Court of Appeal level, Kiage JA in **Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission, Civil Application 228 of 2013** underscored the importance of observing timelines in litigation. the learned judge held that:

“I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts,

must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.”

- 20.** The applicant was ordered by the court to file a Memorandum of appeal within 7 days but failed to do so. Instead, he filed a record of appeal after a period of about 5 months. This being the position, this court finds that, any steps taken and any orders issued were based on an erroneous record as there is no appeal competent Appeal in the first place upon which a Notice to Show Cause may issue.
- 21.** The upshot is that all documents filed and all the steps taken in this appeal after the end of the seven (7) days from 25th May

2023 without the Appellant first having complied with the orders of the said date as issued in the misc. ELC No. E004 of 2023 wherein leave was granted for the applicant to file the draft memorandum of appeal in Seven (7) days were a nullity, irregular and based on a non existent Appeal. They are, thus, struck out and declared irregular respectively, with costs to the Respondent. In short, the entire Appeal incompetent since it was filed without leave of the Court, and is struck out accordingly as stated in the previous sentence.

22. It is so ordered.

RULING Dated, Signed and Delivered virtually via the **Teams Platform this 20th day of January 2026.**

HON. DR. IUR NYAGAKA

JUDGE

In the presence of,

Ms. Theuri Advocate for the Applicant

Mr. Kiseru Advocate for the Respondent