



**Igweta & another v Kathambi & 2 others (Civil Appeal (Application)
E442 of 2024) [2025] KECA 457 (KLR) (7 March 2025) (Ruling)**

Neutral citation: [2025] KECA 457 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E442 OF 2024
FA OCHIENG, LA ACHODE & AO MUCHELULE, JJA
MARCH 7, 2025**

BETWEEN

GRACE RIGIRI SILAS 1ST APPLICANT

MATHEW KOBIA IGWETA 2ND APPLICANT

AND

SARAH KATHAMBI 1ST RESPONDENT

PURITY KINYA 2ND RESPONDENT

MIRIAM MAKENA 3RD RESPONDENT

*(An application to mark as withdrawn, the Notice of Appeal dated 22nd
May 2024, against the Judgement of the High Court of Kenya at Nairobi
(Riechi, J.) dated 21st May 2024 in HC Family Division Appeal E034 of 2024)*

RULING

1. Grace Rigiri Silas and Mathew Kobia Ingweta moved the court by an application dated 27th August 2024 seeking an order that the notice of appeal dated 22nd May 2024 be deemed as having been withdrawn.
2. The judgment, in respect of which the notice of appeal had been filed, was delivered on 21st May 2024. Following the delivery of the said judgment, the respondents herein sought and were granted an order for stay of execution, for a period of 30 days during which time they were required to have filed their intended appeal.
3. As a result of the order for stay of execution, the body of Silas Kamuta Igweta continues to stay at the Umash Funeral Home.



4. The late Silas Kamuta Igweta passed away on 17th February 2024. Ordinarily, the demise of a person would be followed by an appropriate interment by his family. However, in this case, the demise of Silas was followed by a highly emotive dispute between his two wives and their families. Each of the wives, and their respective families, expressed the desire to bury Silas, and to do so on their preferred pieces of land.
5. The applicants, Grace and Mathew, were a widow and a son, respectively, to the deceased. Their wish was to bury Silas in accordance with Meru customary law, at a place to be determined in line with the said customary law.
6. On the other hand, the respondents, Sarah Kathambi, Purity Kinya and Miriam Makena, desired to bury Silas on a piece of land situate at Laivangi/Mumui.
7. The learned trial magistrate ordered that Silas be buried at Laivangi/Mumui. That decision prompted an appeal to the High Court.
8. After giving due consideration to the appeal, the High Court ordered that the body of Silas would be released to his two wives, who would then proceed to inter his remains on the parcel of land No. Kianjai/Kianjai/2585, which property was registered in the name of the deceased.
9. That decision was the subject matter of the appeal lodged before this Court.
10. Whilst the appeal was still pending, the applicants sought and were granted an order for stay of execution. The said order was made by this Court (differently constituted), on 26th July 2024.
11. It is noteworthy that the order for stay of execution was conditional upon the institution of the appeal within 30 days.
12. Having waited for over 30 days, from the date which the court ordered that execution be stayed, the applicants have invited this Court to deem the notice of appeal as having been withdrawn.
13. The application is premised upon the failure by the respondents to file the appeal within 30 days.
14. When the application came up for hearing on 3rd February 2025, the applicants were represented by the firm of Matheka Oketch & Company Advocates, whilst the respondents failed to attend court, although they had been duly served with a hearing notice. Furthermore, the respondents did not file any replying affidavits, to challenge the matters of fact which had been deposed to on the supporting affidavit sworn by the 2nd applicant.
15. Thirdly, the respondents failed to file any submissions, to challenge the matters of both facts and the law, as put forth by the applicants.
16. Accordingly, we find that the respondents have not controverted the assertions made by the applicants, on both matters of law and of fact.
17. In the circumstances, we find that the respondents failed to take the essential step of filing their appeal within 30 days as the court had directed them to do. The respondents have not made available any explanation to satisfy the Court that the delay in compliance with the court's directions was attributable to a plausible and acceptable reason.
18. Rule 85 of the Court of Appeal Rules provides that:

“(1) If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, that party shall be deemed to have withdrawn the notice of



appeal and the Court may, on its own motion or on application by any other party, make such order.

(2) The party in default under sub-rule (1) shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.”

19. In effect, we find and order that the applicants failed to file the appeal within the time specified by the court. The said failure constitutes a failure to take an essential step in the appeal, and as such, the notice of appeal herein is marked as withdrawn.

20. In consequence of the said finding, the order for stay of execution stands vacated as it cannot be sustained in the absence of the appeal.

21. The respondents shall pay to the applicants the costs of the application dated 27th August 2024.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH, 2025.

F. OCHIENG

JUDGE OF APPEAL

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L. ACHODE

JUDGE OF APPEAL

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A. O. MUCHELULE

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

