



Owners and Master and Crew of the Motor Tugs "Barbara" and "Steve B" v Owners and Master of the Motor Vessel "Joey & another (Civil Application E083 of 2024) [2025] KECA 909 (KLR) (23 May 2025) (Ruling)

Neutral citation: [2025] KECA 909 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E083 OF 2024**

KI LAIBUTA, JA

MAY 23, 2025

BETWEEN

**THE OWNERS AND MASTER AND CREW OF THE MOTOR TUGS
"BARBARA" AND "STEVE B" APPLICANT**

AND

**THE OWNERS AND MASTER OF THE MOTOR VESSEL
"JOEY 1ST RESPONDENT**

**THE OWNER OF THE CARGO LADEN ABOARD MOTOR VESSEL
"JOEY 2ND 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 (Magare Kizito, J.) delivered on 24th May 2024 in Admiralty Cause No. 2 of 1998)

RULING

1. Before me is a Notice of Motion dated 12th July 2024 in which the applicants (the Owners, Master and Crew of the Motor Tugs "Barbara" and "Steve B") seek extension of time pursuant to rule 4 of the [Court of Appeal Rules](#) to file and serve a notice of appeal from the judgment and decree of the High Court of Kenya at Mombasa (Admiralty Division) (M. Kizito, J.) dated 24th May 2024 in Admiralty Cause No. 2 of 1998.
2. The applicant's Motion is supported by the annexed affidavit of Ushwin Khanna, learned counsel for the applicants, sworn on 12th July 2024 essentially deposing to the grounds on which their Motion is anchored, namely: that the 1st and 2nd respondents lodged their notices of appeal on 28th May 2024 and 4th June 2024 respectively; that the 1st respondent having filed its notice of appeal first in time would be deemed to be the appellant and the 2nd respondent would be deemed to be a respondent in its appeal;



that, in the event that the 1st or 2nd respondent fail to institute their appeal within the prescribed time or at all, the applicants would be left with no remedy due to the inability to file a cross- appeal; that it is necessary that the applicants be accorded an opportunity to pursue their intended appeal; and that no prejudice would be suffered by the respondents if the orders sought are granted.

3. In support of the Motion, learned counsel for the applicants filed written submissions dated 5th May 2025 and further written submissions and case digest dated 12th May 2025 citing the case of *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR, submitting that “where law provides for the time within which something ought to be done, if that time lapses, one needs to first seek extension of that time within which something ought to be done”. Counsel urged that the Motion be allowed as prayed.
4. Opposing the applicants’ Motion, the 1st respondent filed a replying affidavit of its learned counsel, Mrs. Collette Akwana, sworn on 7th May 2025 together with grounds of opposition of even date as well as written submissions, list of authorities and case digest of even date.
5. Citing 6 judicial authorities, counsel highlighted the principles that the Court should consider when exercising its discretion in determination of applications under rule 4 of the Court’s Rules. In conclusion, she urged me to dismiss the applicants’ Motion.
6. On its part, the 2nd respondent filed written submissions and grounds of opposition dated 7th May 2025. Learned counsel, M/s. Kinyua Muyaa & Company, submitted that, according to section 7 of the *Appellate Jurisdiction Act*, jurisdiction in applications for extension of time to file a notice of appeal is vested in the superior court and not in the Court of Appeal; that rule 4 is ultra vires that section and is therefore null and void; and that the applicants’ decision to lodge a notice of appeal should not be predicated on the respondents’ decision. Counsel urged me to dismiss the applicants’ Motion.
7. I hasten to observe that the applicants are yet to lodge their notice of appeal in respect of which they seek to invoke the provisions of rule 4 of the *Rules of this Court*. What is before me is an undated “Draft Notice of Appeal”. The pertinent question is whether I have jurisdiction to determine their Motion. I do not.
8. 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.”
9. 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.”
10. 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.



11. 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.
12. 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”
13. 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)).
14. 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 23RD DAY OF MAY 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

