



**Lulu v Njenga & another (Civil Application E014 of 2024)
[2025] KECA 804 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KECA 804 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E014 OF 2024
F TUIYOTT, KI LAIBUTA & GWN MACHARIA, JJA
MAY 9, 2025**

BETWEEN

JULIUS CHILUMO LULU APPLICANT

AND

FLORENCE NICOLE NJENGA 1ST RESPONDENT

KENNETH MESEMBI 2ND RESPONDENT

(Being an application for stay of proceedings pending appeal against the Order of the High Court of Kenya at Malindi (S. M. Githinji, J.) dated 15th June 2023 in H.C.C.A No. 89 of 2022)

RULING

1. We need to point out right at the outset that the scanty record accompanying the Notice of Motion before us has been selectively compiled to exclude such vital documents as: the pleadings and decision in the Chief Magistrate’s Court at Malindi Succession Cause No. E001 of 2022; the respondents’ interlocutory application dated 14th June 2023 culminating in the impugned order dated 15th June 2022 in HCCA No. 89 of 2022; the affidavits in support and in reply to the application aforesaid; the prerequisite notice of appeal; and the requisite memorandum of appeal setting out the grounds on which the intended appeal is anchored, all of which are relevant in determination of the applicant’s Motion now before us. Whether the glaring exclusion by the applicant of these records was by design or inadvertence, is not for us to judge.
2. Presented with this scanty record, the most we can do is to pronounce ourselves on the fate of the applicant’s Motion dated 16th May 2024 in which he seeks, inter alia: an order to vacate the orders issued by the High Court of Kenya at Malindi (S. M. Githinji, J.) on 15th June 2023; and stay of proceedings “including writing and/or delivery of any ruling or judgment in Malindi Civil Appeal No. 89 of 2022 pending determination of the intended appeal. He also requests that costs “be provided for”.



3. The applicant's Motion is supported by his annexed affidavit sworn on 16th May 2024 to which the respondents filed a reply vide the 1st respondent's affidavit sworn on 23rd May 2024 on her own behalf and on behalf of the 2nd respondent. To our mind, no useful purpose would be served by analysing the contents of the two affidavits in view of the status of the record to which we will shortly return. Suffice it to observe that, in response to the respondents' replying affidavit, the applicant filed a further affidavit sworn on 7th June 2024 in which he annexed a notice of appeal relating to "directions dated 20th July 2023 in HCCA No. 89 of 2022", which have no relation to the impugned order.
4. In support of the applicant's Motion, learned counsel M/s. Angeline Omollo & Associates filed written submissions and a list of 2 authorities dated 7th June 2024 in rebuttal to which learned counsel for the respondents, M/s. Rukenya A. Murigu & Company filed written submissions and a list of 2 judicial authorities. Counsel for the applicant addressed us on the arguability of the intended appeal and the need to preserve the substratum thereof while, in response, counsel for the respondents addressed us on the merits of their appeal to the High Court, contending that the applicant's Motion "is a deliberate attempt to suppress the appeal from proceeding for hearing".
5. Whether or not to grant orders sought in the appellant's Motion pending appeal, the Court must be satisfied that the applicant has successfully invoked the Court's jurisdiction. We hasten to observe that, although the impugned order is dated 15th June 2023, the Notice of Appeal annexed in the applicant's further affidavit relates to directions given on 20th July 2023; that the applicant comes to this Court pursuant to Order 42 rule 6 and Order 22 rule 22 of the Civil Procedure Rules and section 3A of the *Civil Procedure Act*, all of which have no place in the proceedings before this Court; and that there is no material before us to suggest that the intended appeal is arguable.
6. We need not overemphasise the fact that a notice of appeal is a jurisdictional prerequisite. Addressing itself to the mandatory requirement to file 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."
7. 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 his 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."
8. Having carefully examined the record as put to us, the applicant's Notice of Motion dated 16th May 2024, the affidavit in support thereof, the 1st respondent's replying affidavit, the applicant's further affidavit, the written and oral submissions of learned counsel for the applicant and for the respondents, we reach the inescapable conclusion that the applicant's Motion is incompetent and is hereby struck out with costs to the respondents. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF MAY 2025.



F. TUIYOTT

JUDGE OF APPEAL

DR. K. I. LAIBUTA CARB, FCIARB.

JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

JUDGE OF APPEAL

