



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Lelei v Bitok (Civil Appeal (Application) 040 of 2022)
[2025] KECA 749 (KLR) (6 May 2025) (Ruling)**

Neutral citation: [2025] KECA 749 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL (APPLICATION) 040 OF 2022**

PM GACHOKA, JA

MAY 6, 2025

BETWEEN

KIMUTAI LELEI APPLICANT

AND

HOSEA BITOK RESPONDENT

(An application for extension of time and validation of the notice of appeal and record of appeal against the ruling and order of the Eldoret Environment and Land Court (M. Odeny, J.) delivered on 10th December 2019 in ELC Case No. 414 OF 2012)

RULING

1. The Notice of Motion dated 8th December 2022 has been filed by the applicant. It is hinged on rule 4 of the Court of Appeal Rules 2022 seeking:
 1. ... Spent;
 2. That the Honourable Court be pleased to extend time for the lodging and service of the notice of appeal and record of appeal as against the order made on 10th December 2019 in Eldoret ELC No. 414 of 2012; Kimutai Lelei v Hosea Bittok & another and the said extension does operate as a validation of the notice of appeal and record of appeal lodged by the applicant;
 3. That the costs of this application be provided for.
2. The application is supported by the grounds on its face and the supporting affidavits of the applicant and Raphael Wambua Kigamwa. According to the applicant, he instituted Eldoret HCCC No. 23 of 2008 against the respondent and another seeking a raft of reliefs. The respondent was the only defendant who filed a response to the suit. He filed an amended statement of defence and counterclaim which sought several reliefs against the applicant. The suit was heard ex parte in the absence of the



- applicant. By judgment of the trial court dated 31st July 2019, the counterclaim was allowed while the primary suit was dismissed.
3. Aggrieved, the applicant filed an application for review seeking to set aside the said judgment. By ruling of the learned judge dated 10th December 2019, that application was dismissed. Dissatisfied, the applicant lodged his notice of appeal dated 20th December 2019 and sought for typed proceedings. Contemporaneously, the respondent commenced the execution process.
 4. The applicant continued that he filed his memorandum of appeal and record of appeal on 5th October 2020. He was under the impression that his then advocates uploaded the said record in the e-filing portal at the Eldoret and Kisumu registries and sent to the Deputy Registrar on 8th October 2020. After it was uploaded again on 9th October 2020, the applicant received an invoice on the computation of fees. Meanwhile, the memorandum of appeal and record of appeal were stamped, signed and sealed.
 5. The applicant deposed that there was confusion regarding the mode of payment of the requisite fees. At the same time, the applicant's counsel on record at that time was bereaved and remained out of office. He also stated that he was of advanced age and suffered financial challenges. Owing to this predicament, his Notice of Appeal was deemed as withdrawn on 4th November 2022 by this Court in Eldoret Civil Application No. E037 of 2022 on the application of the respondent.
 6. The applicant indicated that he had now filed another Notice of Appeal dated 10th November 2022 and had since uploaded his record of appeal having paid the prescribed fees. He urged this Court to allow the application for the following reasons: this Court was vested with jurisdiction to grant extension of time and validation; the appeal raises matters that are not frivolous; and the application was filed timeously.
 7. The application is opposed. Through his replying affidavit deposed on 19th June 2024, the respondent prayed that the application be dismissed on the following grounds: his firm of advocates were properly on record for the period they represented him; in any event, the issue of representation was an afterthought; his pleadings were properly and duly filed in the trial court; the applicant could only blame himself for not following up on the matter keenly; his advocates were not to be blamed for his lack of compliance; the applicant's Notice of Appeal was previously found to be filed outside the statutory timelines; the Notice of Appeal was filed inordinately and no excusable reason had been advanced by the applicant to justify the delay; the applicant was intent on denying the respondent the right to enjoy the fruits of his judgment; and the applicant has violated the eviction orders.
 8. The application was canvassed by way of written submissions. In his written submissions, together with his list and digest of authorities dated 24th January 2024, the applicant summarized the facts giving rise to his application to submit that it had met the threshold for the exercise of this Court's discretion under rule 4 of the Court of Appeal Rules. Furthermore, his appeal raised grounds of appeal that were arguable. He prayed that his application be allowed.
 9. The respondent similarly filed his written submissions. However, they are incomplete and I am therefore unable to rely on them entirely.
 10. I have considered the application, the affidavits in support and the annexures thereto as well as the affidavit in opposition, examined the applicant's submissions and analyzed the law. The applicant seeks for extension of time to file a Notice of Appeal dated 10th November 2022 out of time.



11. The discretion exercised under Rule 4 of the Court of Appeal Rules has been well settled. In Paul Wanjohi Mathenge v Duncan Gichane Mathenge [2013] eKLR, the Court gave the following useful guidelines:

“The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance.”

12. Does the application meet the threshold? It is not gainsaid that the applicant had filed a previous Notice of Appeal dated 20th December 2019. That Notice of Appeal was deemed as withdrawn by this Court, constituted differently, in Eldoret Civil Application No. E037 of 2022 on 4th November 2022 under rule 85 of this Court’s rules. Inexorably, the applicant filed another Notice of Appeal dated 10th November 2022 praying that it be filed out of time.
13. The import and tenor of rule 85 (then rule 83) was demystified by this Court in the case of John Mutai Mwangi & 26 Others v Mwenja Ngure & 4 Others [2016] eKLR that held as follows:

“This deeming provision appears to us to be inbuilt case-management system loaded into the Rules. It enables the Court, ideally, to clean up its records by striking out all the notices of appeals that have not been followed up, within 60 days, by records of appeal. It is a rule that telegraphs that notices of appeal should not be lodged in jest or frivolously, with no real or serious intention to actually institute appeals. The rationale of this is self-evident but made the more compelling by a recognition that mischievous or crafty litigants may be content to merely park the bus at appeal gate and not move thereafter – especially should they obtain some kind of stay or injunctive orders protective of their interests pending appeal. To that category of appellants, a delayed, snail speed or never-happen institution of the appeal means a perpetual enjoyment of interim relief. The rule was designed to give to such no succour. Under the rule, the Court deems and orders that a notice unbacked by institution of an appeal has been withdrawn. It essentially concludes that the intended appellant has abandoned his intention to appeal notwithstanding that he has not formally withdrawn the notice of appeal under Rule 81. The Court makes the order upon being moved by any party or, significantly, on its own motion. It is a clean-up exercise born by the need for rationality in appellate litigation and practice”.

14. Taking into account the above holding, I am persuaded that the applicant wants to have second bite at the cherry. The ruling of this court in Eldoret Civil Application No. E037 of 2022 was determined on the premise of the respondent’s application seeking to withdraw the applicant’s Notice of Appeal. The parties ably made representations before that Court. In fact, the applicant disclosed that it had not paid the requisite fees and thus sought leave to comply. To allow the present application would be akin to discharging the ruling of this Court delivered on 4th November 2022. In essence, the applicant is inviting me to sit on appeal against that decision.
15. The applicant has exhausted all avenues. He has no recourse before this Court. Had he filed a notice of withdrawal himself, rather than have the court determine the respondent’s application in Eldoret Civil Application No. E037 of 2022 under rule 85 of the rules of this Court, perhaps he would



have succeeded. Accordingly, I come to the unwavering conclusion that not only is the application incompetent but is also unmerited. The same is dismissed with costs to the respondent.

DATED AND DELIVERED AT ELDORET THIS 6TH DAY OF MAY, 2025.

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

Signed

DEPUTY REGISTRAR

M. GACHOKA C.Arb, FCIArb.

.....

JUDGE OF APPEAL

