



REPUBLIC OF KENYA



KENYA LAW
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**Lelei v Bittok (Civil Appeal (Application) 041 of 2022)
[2025] KECA 746 (KLR) (6 May 2025) (Ruling)**

Neutral citation: [2025] KECA 746 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL (APPLICATION) 041 OF 2022**

PM GACHOKA, JA

MAY 6, 2025

BETWEEN

KIMUTAI LELEI APPLICANT

AND

HOSEA BITTOK 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 14th June 2024, the respondent prayed that the application be dismissed on the following grounds: the Notice of Appeal and application seeking certified proceedings were filed out of time and without leave; a smooth payment process would not have cured the delay occasioned by the applicant as the record of appeal was sent to parties outside the statutory parameters; he had previously successfully sought and obtained orders to strike out the Notice of Appeal; no good reasons had been furnished to explain the delay; the advocate seized of the matter ought to have delegated the file to a colleague in the firm if indeed he was unable to discharge his duties; and he stood to suffer prejudice if the orders sought were granted.
 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 filed his written submissions dated 14th June 2024. Together with a list and bundle of authorities of similar date, the respondent submitted that sections 6, 7 and 9 of the *Appellate Jurisdiction Act* were blatantly ignored by the applicant. He was therefore undeserving of the orders sought. He computed that though the proceedings were ready in 2020, the applicant acted with tardiness only lodging the present application four years later. He abridged the facts giving rise to the application to argue that the applicant had failed to place himself within the precincts of rule 4 of this Court's rules to grant him extension of time to appeal out of time. He prayed that the application be dismissed with costs.
 10. I have considered the application, the affidavits in support and the annexures thereto as well as the affidavit in opposition, examined the parties diametrically opposed written 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. The discretion exercised under Rule 4 of the Court of Appeal Rules has been well settled. In *Wasike v Swala* [1984] KLR 591, this Court held:

“As Rule 4 now provides that the Court may extend the time or such terms as it thinks just, an applicant must now show, in descending scale of importance, the following factors:

- a. That there is merit in his appeal.
- b. That the extension of time to institute and/or file the appeal will not cause undue prejudice to the respondent; and
- c. That the delay has not been inordinate.”

11. Does the application meet the threshold? It is not gainsaid that the applicant had filed a previous Notice of Appeal dated 20th December 2019 and a subsequent one dated 28th February 2020. They were challenging the decisions of the learned judge delivered on 10th December 2019 and 25th February 2020 respectively. Those Notices of Appeal were 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. Thereafter, the applicant filed another Notice of Appeal dated 10th November 2022 praying that it be filed out of time.
12. 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”.

13. 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 appealing or setting aside the ruling of this Court delivered on 4th November 2022.
14. 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.

M. GACHOKA C.Arb, FCIArb.

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

