



Kithendu & another v Housing Finance Company Ltd & another (Civil Appeal (Application) E007 of 2024) [2024] KECA 736 (KLR) (21 June 2024) (Ruling)

Neutral citation: [2024] KECA 736 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E007 OF 2024
KI LAIBUTA, JA
JUNE 21, 2024**

BETWEEN

JOHNSON MATITI KITHENDU 1ST APPLICANT

KALEKYE NGUI 2ND APPLICANT

AND

HOUSING FINANCE COMPANY LTD 1ST RESPONDENT

TITUS MUSYA T/A MAKURI AUCTIONEERS 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 21st November 2023 in HCCC No. 75 of 2019)

RULING

1. Before me is a Notice of Motion dated 12th February 2024 in which Johnson Matiti Kithendu and Kalekye Ngui, the applicants, seek 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 21st November 2023 in HCCC No. 75 of 2019. The applicants' Motion is supported by the annexed affidavit of Johnson Matiti Kithendu (the 1st applicant) sworn on 12th February 2024, and is made on 10 grounds set out on the face of the Motion, but to which I need not address myself presently.
2. A cursory look at the applicant's Motion and the affidavit in support thereof reveals that, even though the affidavit alludes to annexures that include the notice of appeal said to have been lodged on 17th January 2024 and the impugned judgment, those documents are not annexed to the 1st applicant's affidavit as claimed, and neither are they included in the record as put to me. Also excluded are the memorandum of appeal and the requisite letter bespeaking the applicants' request for proceedings.



3. The effect of the scanty record comprising the applicants’ Motion is that I am unable to verify: (i) the date on which the notice was filed and served in accord with rules 77(1) and 79(1) of the [Court of Appeal Rules](#); (ii) whether the applicants filed and served on the respondents their request for proceedings and, if they did, when – see the proviso to rule 84(1); (iii) and whether their intended appeal is arguable with a likelihood of success (see *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA p231.
4. In my considered view, the foregoing procedural infractions are not mere technicalities 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.
5. 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”
6. 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)*).
7. In conclusion, I find that the record of the applicants’ Motion is incomplete and not properly before me for grant of the orders sought pursuant to rule 4 of the Rules of this Court. The same is incompetent and is hereby struck out with no orders as to costs.

DATED AND DELIVERED AT MALINDI THIS 21ST DAY OF JUNE, 2024.

DR. K. I. LAIBUTA C.Arb, FCI Arb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

