



Kandie & another v Kapkoros & another (Civil Application E047 of 2023 & E048 of 2024 (Consolidated)) [2024] KECA 700 (KLR) (7 June 2024) (Ruling)

Neutral citation: [2024] KECA 700 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E047 OF 2023 & E048 OF 2024 (CONSOLIDATED)
S OLE KANTAI, FA OCHIENG & WK KORIR, JJA**

JUNE 7, 2024

BETWEEN

PHILOMENA KANDIE APPLICANT

AND

**KIMOJ KAPKOROS ALIAS ELIZABETH KIMOJ JACOB
KAPKOROS RESPONDENT**

**AS CONSOLIDATED WITH
CIVIL APPLICATION E048 OF 2024**

BETWEEN

**KIMOJ KAPKOROS ALIAS ELIZABETH KIMOJ JACOB
KAPKOROS APPLICANT**

AND

PHILOMENA KANDIE RESPONDENT

(An application to strike out the Notice of Appeal from the Judgment of the High Court of Kenya at Eldoret (Nyakundi, J.) dated 17th July, 2023 in HC. Succ. Cause No. 145 of 2000)

RULING

1. By an order made by this Court on 4th October, 2023 it was ordered *inter alia* that Civil Application No. E047 and E048 both of 2023 be consolidated and that the former be the lead file. Philomena Kandie (Philomena) is the applicant in E047 of 2023 which is against Kimoi Kapkoros Alias Elizabeth Kimoi Jacob Kapkoros (Elizabeth) who is named as respondent. The reverse is the position in E048 of 2023 – Elizabeth is the applicant while Philomena is named as the respondent.



2. The Motion in the lead file is brought under Rule 5(1) (2) (b) (sic) of the *Court of Appeal Rules* as read with Sections 3A, 3B and 5 of the *Appellate Jurisdiction Act*. It is prayed that we stay execution and any further proceedings arising out of the decision of Nyakundi, J. given at Eldoret on 17th July, 2023 in Eldoret Succession Cause No. 145 of 2000 which was between Philomena (as petitioner) against Elizabeth (as objector) pending the hearing and determination of an intended appeal. The application is supported by Philomena’s affidavit.
3. The Motion by Elizabeth is brought under rules 44, 77(2), 79(1), 86(b) and 87 of the Rules and various sections of the *Appellate Jurisdiction Act* and Articles of the *Constitution*. It is prayed in the main that we be pleased to strike out Notice of Appeal dated 29th because it was filed out of the prescribed time. In grounds in support of the Motion and in a supporting affidavit by a lawyer Thomas K. Kigen it is stated amongst other things that Notice of Appeal dated 29th August, 2023 was filed on 31st August, 2023 where Philomena expressed her desire to appeal against the whole decision delivered by Nyakundi, J. on 17th July, 2023; that Notice of Appeal should have been lodged within 14 days of delivery of Judgment but that the same was filed 29 days after Judgment; that the said Notice of Appeal was served upon the applicant on 15th September, 2023 some 14 days after it had been filed; that in those circumstances there is an abuse of the process of the court. Mr. Kigen in the affidavit gives a detailed history of the matter before the Judge but it is not necessary to repeat that information here.
4. In a replying affidavit by Philomena it is deponed that she or her lawyers were not aware when Judgment had been delivered and they only received a copy of the Judgment on 29th August, 2023 from the High Court Registry; that a notice of appeal was then filed and a letter bespeaking proceedings served on the Registry on 29th August, 2023 and 31st August, 2023 respectively; that these documents were served on applicant’s counsel 14 days late. The rest of the affidavit dwells on the case that was before the High Court. When the Motion came up for hearing before us on a virtual platform learned counsel Mr. Cheptarus appeared for Philomena; learned counsel Mr. Cheruiyot appeared for Elizabeth while learned counsel Mr. Bundotich Korir informed us that he was appearing for an applicant in E057 of 2023. He did not explain that matter’s relationship with the application we were dealing with.
5. In moving the Motion to strike out notice of appeal counsel for Elizabeth submitted that notice of appeal was not lodged on time as required by *Court of Appeal Rules* and it was also served out of time.
6. In opposing the Motion Mr. Cheptarus referred to Philomena’s replying affidavit, a supplementary affidavit and a further affidavit.
7. Both sides had filed written submissions which we have perused.
8. It is common ground that Judgment was delivered by the High Court on 17th July, 2023. It is required by rule 77 of this Court’s rules that a party who desires to appeal a Judgment of the High Court shall give notice in writing to the Registrar of the High Court within 14 days of delivery of Judgment. Such party who has lodged a notice of appeal must, under rule 79, serve all parties directly affected by the appeal within 7 days of lodging notice of appeal.
9. We asked counsel for Philomena whether an application had been made for extension of time to file and serve notice of appeal out of time and he confirmed that there had not been such application made.
10. We note from notice of appeal attached to Elizabeth’s Motion that it is dated 29th August, 2023. There is a receiving stamp by M/S Kipkorir Cheruiyot & Kigen Advocates received on 15th September, 2023 endorsed “Received under protest for reason that it’s been served out of time.” That is to say that counsel for Philomena was given notice that the notice of appeal served had issues and it is surprising that no action was taken by the lawyers to remedy the situation.



11. We agree with submissions by counsel for Elizabeth. Notice of appeal by Philomena was filed out of time contrary to the rules of this Court; and it was served out of the time prescribed by the rules. The notice of appeal is incompetent and is struck out with costs to Elizabeth. That being the position, and without a notice of appeal, the Motion by Philomena is incompetent and it is struck out.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JUNE, 2024.

S. ole KANTAI

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

