



**Rono & 32 others v Kiplagat & another (Civil Application  
E072 of 2022) [2023] KECA 360 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KECA 360 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPLICATION E072 OF 2022  
F SICHALE, FA OCHIENG & LA ACHODE, JJA  
MARCH 31, 2023**

**BETWEEN**

**SAMUEL K RONO & 32 OTHERS ..... APPLICANT**

**AND**

**JANE JEPKEMEI ..... 1<sup>ST</sup> RESPONDENT**

**HUDSON KIPTUM KIPLAGAT ..... 2<sup>ND</sup> RESPONDENT**

*(An application for striking out the notice of appeal dated 12th May, 2021 filed on 13th May, 2021 from the ruling of the Environment and Land Court at Eldoret (S. M. Kibunja, J.) dated 12th May, 2021 in ELC Case No. 599 of 2012)*

**RULING**

1. The application dated May 5, 2022 seeks the following orders;
  - “1. The notice of appeal dated May 12, 2021 and filed in the Environment and Land Court Eldoret on May 13, 2021 be struck out.
  2. The respondents be deemed to have abandoned their desire to pursue an appeal.
  3. The stay of execution of the decree granted in Eldoret Court of Appeal, Civil Application No E078 OF 2021 be vacated.
  4. Costs of the application be borne by the respondents.”
2. The applicants pointed out that the respondents had not filed any notice of appeal challenging the decision made on May 12, 2021. The notice of appeal which was filed had made reference to a Ruling that had been delivered on October 12, 2021. Therefore, it was the opinion of the applicants that the



notice of appeal herein was untenable. In any event, the notice of appeal which was filed on May 13, 2021 was not served upon the applicants until April 27, 2022.

3. Similarly, the respondent's letter, seeking the supply of the proceedings in issue, had been served upon the applicants on April 27, 2022.
4. As both the notice of appeal, and the letter seeking the proceedings ought to have been served upon the applicants, by June 3, 2021, it was the applicants' case that both documents were a nullity because they had been served after a period of inordinate delay.
5. In answer to the application, the respondents filed a replying affidavit which was sworn by Hudson Kiptum Kiplagat (the 1<sup>st</sup> respondent).
6. The respondents denied the contention that the notice of appeal and the letter seeking the proceedings had been served upon the applicants on April 27, 2022. The respondents categorically stated that service was effected upon the applicants on May 14, 2021.
7. The respondents told this court that on May 14, 2021, they filed an application at the Environment and Land Court, seeking conservatory orders pending the hearing and determination of their intended appeal. When the said application (which is dated May 14, 2021) came up for hearing, the applicants did not raise the issue of the alleged failure to file or to serve the notice of appeal.
8. In this matter the court is faced with two diametrically opposed statements of fact.  
On the one hand, the applicants emphasise that they were not served with the notice of appeal as well as the letter seeking proceedings, until April 27, 2022. Whilst on the other hand, the respondents insist that they not only effected service on May 14, 2021, but they even filed an affidavit of service to verify that fact. Neither of the parties sought to cross-examine the persons who swore the affidavits which contain the contradictory depositions.
9. The process of cross-examination of the deponents could have enabled the court to verify the veracity of the depositions.
10. As matters stand currently, there remains two inconsistent depositions on the record, and the court was not able to ascertain the accurate facts.

Pursuant to the provisions of Section 107 of the *Evidence Act*;

- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

11. In this case the applicants had asserted that the notice of appeal and the letter seeking the proceedings were served upon them on April 27, 2022. The respondents denied that assertion, and insisted that service was effected on May 14, 2021.
12. In order to succeed in the application, it was incumbent upon the applicants to prove their assertion. Section 108 of the *Evidence Act* stipulates thus;

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”



13. We find that if no evidence was tendered by both sides herein, it is the applicants who would fail. Therefore, the burden of proving their assertion lay on them. They failed to discharge the burden of proof. Therefore, we find that the applicant failed to demonstrate that the notice of appeal was filed late. Accordingly, the application fails.
14. As the application is unsuccessful, and because ordinarily costs follow the event, we order that the applicants will pay to the respondents, the costs of the application dated May 5, 2022. We so order because the applicants did not demonstrate to us that there was any justifiable reason to warrant a shift from the normal situation, in which the party who is successful is also awarded costs.

**DATED AND DELIVERED AT NAKURU THIS 31<sup>ST</sup> DAY OF MARCH, 2023.**

**F. SICHALE**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**L. ACHODE**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

