



**Khonde & another v Ngomeni Swimmers Limited & 7 others; St Patrick Hill School Limited (Interested Party) (Civil Application E029 of 2021) [2023] KECA 300 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 300 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPLICATION E029 OF 2021  
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA  
MARCH 17, 2023**

**BETWEEN**

**TABU TUVA KHONDE ..... 1<sup>ST</sup> APPLICANT**

**KAHINDI KAINGU GONDA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**NGOMENI SWIMMERS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**ZEDI AHMED SAID ..... 2<sup>ND</sup> RESPONDENT**

**HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**THE LAND REGISTRAR KILIFI ..... 4<sup>TH</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 5<sup>TH</sup> RESPONDENT**

**DIRECTOR OF SURVEY ..... 6<sup>TH</sup> RESPONDENT**

**THE DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT .... 7<sup>TH</sup> RESPONDENT**

**REGISTRAR OF TITLES MOMBASA ..... 8<sup>TH</sup> RESPONDENT**

**AND**

**ST PATRICK HILL SCHOOL LIMITED ..... INTERESTED PARTY**

*(Being an application to strike out the 1st respondent’s notice of appeal dated 5th March 2021 lodged in court on 8th March 2021 challenging the judgment of the Environment & Land Court at Malindi in Malindi Case No. 15 of 2010 delivered by Justice J.O. Olola, on 19th February 2021)*



## RULING

1. The applicants, Tabu Tuva Khonde and Kahindi Kaingu Gonda, have by their Notice of Motion dated March 23, 2021, applied for an order that the Notice of Appeal dated March 5, 2021 lodged in court on March 8, 2021 by Ngomeni Swimmers Limited, the 1<sup>st</sup> respondent, challenging the judgment of the Environment and Land Court delivered on 1February 9, 2021 be struck out.
2. In the affidavit in support of the application, Tabu Tuva Khonde deposes that judgment, the subject of the notice of appeal, was delivered by the ELC on February 19, 2021; that the 1<sup>st</sup> respondent filed its notice of appeal on March 8, 2021 and served it on March 18, 2021; that the time for filing the notice of appeal lapsed on March 5, 2021 and the notice of appeal was therefore filed out of time and should be struck out.
3. In his written submissions on which he relied during the hearing of the application on October 24, 2022, learned counsel for the applicants Mr. Sumba submitted that the 14 days period within which the notice of appeal should have been filed lapsed on March 5, 2021 and the notice of appeal in this case is therefore out of time and should be struck out. Counsel referred to the case of *Ransa Company Limited and 2 others vs. Manca Francesco*, Mld Civil Appeal No. 46 of 2014 [2015] eKLR where the court struck out a notice of appeal that was two days late.
4. Although served with notice of hearing, the firm of Gicharu Kimani & Associates for the 1<sup>st</sup> respondent did not appear for the hearing of the application. However, in a replying affidavit in opposition to the application, Daniel Ricci, a director of the 1<sup>st</sup> respondent deposed that the notice of appeal was indeed filed on Friday 5<sup>th</sup> March 2021. He exhibited the court payment receipt dated March 5, 2021. He deposed further that the notice was collected from the court on March 8, 2021 having been executed by the Deputy Registrar and served on the applicants' advocates on March 10, 2021 and not March 18, 2021 as claimed by the applicants.
5. Miss. Thuku, learned counsel instructed by the firm of Kilonzo & Aziz Company Advocates for the 2<sup>nd</sup> respondent in supporting the application relied on written submissions dated October 14, 2022 in urging that the notice of appeal was filed out of time and should be struck out. In support, the case of *Patrick Kirunja Kithinji v Victor Mugira Matere* [2015] eKLR was cited.
6. For the 3<sup>rd</sup> to 8<sup>th</sup> respondents, learned counsel Miss. Lutta, indicated that application is not opposed.
7. Rule 75(1) of the *Court of Appeal Rules, 2010* provided that any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court. Rule 75(2) provided that such notice shall be lodged within 14 days of the date of the decision against which it is desired to appeal.
8. In this case, the impugned judgment of the ELC was delivered on 19<sup>th</sup> February 2021. Consequently 14 days within which the notice of appeal should have been filed lapsed on 5<sup>th</sup> March 2021. The notice of appeal is indeed dated 5<sup>th</sup> March 2021. The 1<sup>st</sup> respondent has demonstrated that the notice of appeal was in fact lodged before the ELC at Malindi and paid for on 5<sup>th</sup> March 2021. Produced as an exhibit was the court receipt bearing the date March 5, 2021. The date (of March 8, 2021) on which the notice of appeal is endorsed by the Deputy Registrar of the ELC Malindi as having been lodged is not a matter that would have been in the control of the 1<sup>st</sup> respondent and cannot in the circumstances of this case be taken as the date on which the notice of appeal was filed.



9. We are satisfied that the 1<sup>st</sup> respondent has demonstrated that the notice of appeal was filed within the stipulated 14 days period. The application is devoid of merit. It is dismissed with costs to the 1<sup>st</sup> respondent.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MARCH 2023.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**G.V. ODUNGA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

