



REPUBLIC OF KENYA



Tuaha v Tsuma (Civil Application E008 of 2022) [2023] KECA 499 (KLR) (12 May 2023) (Ruling)

Neutral citation: [2023] KECA 499 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E008 OF 2022
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MAY 12, 2023

BETWEEN

ASHA SAID TUAHA APPLICANT

AND

PATIENCE ABEID TSUMA RESPONDENT

(Being an application to strike out the notice of appeal lodged on 15th February 2022 against the judgement rendered on 1st February 2022 In Malindi ELCA 12 of 2019)

RULING

1. By their Motion dated April 27, 2022, expressed to be anchored on Section 3A of the *Appellate Jurisdiction Act* and Rules 41, 42, and 84 of the *Court of Appeal Rules, 2010*, [now 43, 44 and 86 of the 2022], herein after the Rules, the Applicant seeks that this Court strikes out the Respondent's Notice of Appeal dated February 15, 2022 and lodged on April 4, 2021 in Malindi ELC Case No 12 of 2019, for being filed out of time. The Applicant has supported the application by her affidavit dated April 27, 2022.
2. According to the Applicants, the ruling sought to be appealed against was delivered on February 1, 2022. Being aggrieved by the said decision, the Respondent filed a Notice of Appeal dated February 15, 2022. According to the Applicant, the said Notice of Appeal infringes Rule 79 of the Rules that mandates that the Notice be served within 7 days of the date of the lodging the Notice of Appeal against which it is desired to appeal. It was further averred that the Respondent's said Notice of Appeal was filed on the February 15, 2022 and lodged on April 4, 2022, which was 48 days after it was filed, which was way out of time prescribed under the Rules. The Applicant urged the Court to strike out the Notice of Appeal under Rule 86 of the Rules.
3. The Respondent vide the Replying affidavit dated June 10, 2022 averred that her advocate sent the Notice of Appeal through email to the Court for filing on the February 15, 2022. That the advocate followed up on the endorsement by the Deputy Registrar of the Notice of Appeal through phone calls



and physical visits to the Court but that it was not until April 13, 2022 that the Court gave hard copies of the Notice to the advocates clerk. The Respondent averred that the mistake of counsel and of the Court in delaying to file the Notice of Appeal be not visited on her and further that she was desirous to prosecute her appeal.

4. The application was heard on the virtual platform on the December 8, 2022. Learned counsel Mr Tamimi Lewa was present for the Applicant, while learned counsel Ms Antoinette Wambani was present for the Respondent. Both counsel relied on their respective written submissions dated December 5, 2022. They did not wish to highlight.
5. We have perused the record of this application and find that the ruling intended to be appealed against was delivered on February 1, 2022. The Respondent had 14 days to file the Notice of Appeal. From our computation of time based on Rule 3 of the Rules, the last day for doing so ought to have been February 15, 2022. The Applicant filed the Notice one day before the deadline. However, it was not until April 4, 2022 that the Deputy Registrar of the ELC signifying lodgement endorsed the Notice of Appeal. Service of the Notice of Appeal was effected on the Applicant on the same date of April 4, 2022.
6. Rule 79(1) of the Rules provides as follows:

“An intended appellant shall, before or within seven days after lodging notice of appeal serve copies of the notice on all persons directly affected by the appeal.”

Our view of that Rule is that what an intended Appellant is required to do is to file the Notice of Appeal within 14 days of the decision sought to be appealed from. Since he has no control over the endorsement of the same by the Deputy Registrar he ought not to be penalized for the delay in having the same lodged by way of endorsement by the Deputy Registrar. Once he files the Notice, he then is at liberty to serve the same even before it is lodged, which lodgement is signified by the endorsement thereon by the Deputy Registrar. (See Attorney General v Miriam Mueni Musembi, Mombasa Civil Application No E063 of 2021). Having said that, it is noted that the Respondent’s advocate admitted that after the Notice of Appeal was filed in Court on February 15, 2022, no copy was served upon the Applicant’s advocate, whether physically or through email. Having not served the Notice of Appeal upon filing it in Court, the Respondent cannot escape penalization.

7. We find that the Respondent has admitted that there was delay in service of the Notice of Appeal within the prescribed time and thus default of compliance with the Rule 79 (1) of the Rules. To this extent the application dated April 27, 2022 is merited. In the circumstances the orders that commend themselves to us are as follows:
 1. The notice of appeal dated February 15, 2022 and lodged on April 4, 2021 in Malindi ELC Case No 12 of 2019, is hereby struck out for being filed out of time.
 2. Order (1) above is suspended to give time to the respondent to file and serve an application within 30 days of the date of this ruling to regularize the position, and pending the outcome of the said application.
 3. In default of filing of the application directed in order (2) above within the stated timelines, the suspension granted herein shall lapse.
8. Those are the orders of the court.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF MAY 2023.

S. GATEMBU KAIRU, FCIArb



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JUDGE OF APPEAL
P. NYAMWEYA

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JUDGE OF APPEAL
J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

