



REPUBLIC OF KENYA



**Baya (Suing on her own behalf and on behalf of the Estate of Baya
Mwanyule Jefa alias Baya Yaa) v Kalama & 2 others (Civil Application
E021 of 2022) [2023] KECA 701 (KLR) (9 June 2023) (Ruling)**

Neutral citation: [2023] KECA 701 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E021 OF 2022
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
JUNE 9, 2023**

BETWEEN

**JUSTINE KAZUNGU BAYA (SUING ON HER OWN BEHALF AND ON
BEHALF OF THE ESTATE OF BAYA MWANYULE JEFA ALIAS BAYA
YAA) APPLICANT**

AND

PETER KAZUNGU KALAMA 1ST RESPONDENT

ALBET KALAMA NZARO 2ND RESPONDENT

THE LAND REGISTRAR, KILIFI 3RD RESPONDENT

*(An application for striking out a Notice of Appeal lodged on 17th February 2021 in
the Environment and Land Court against the judgment of the Environment and Land
Court at Mombasa (J.O. Olola J.) delivered on 29th January 2021 in ELC No. 206 of 2014)*

RULING

1. The Applicant herein, Justine Kazungu Baya, is, by a Notice of Motion dated October 13, 2022, seeking to strike out the Notice of Appeal dated February 15, 2021 and lodged on February 17, 2021 together with all consequential orders thereto. He also seeks an alternative order that the Notice of Appeal dated February 15, 2021 lodged on February 17, 2021 be deemed as withdrawn together with all consequential orders thereto. The application is supported by an affidavit sworn on October 13, 2022, by the Applicant, and the main ground for the application is that since the filing of the Notice of Appeal on February 15, 2021, no Record of Appeal had been filed and served contrary to the express provisions of the law that provided for the same to be done within 60 days.
2. The Applicant also averred that after delivery of the judgment in Malindi ELC 206 of 2014 on January 29, 2021 in his favour, Peter Kazungu Kalama, the 1st Respondent herein, applied for orders of stay of



proceedings and execution which were granted by this Court (Okwengu, Gatembu & J. Mohammed JJA) on June 4, 2021 in Malindi Civil Application No 24 of 2021- [*Peter Kazungu Kalama & Albert Kalama Nzaio vs Justine Kazungu Baya*](#), and that he has now become aware that the 1st Respondent took a loan a facility of Kshs 11,000,000/- and charged the suit property as security, and is taking undue advantage of the prevailing orders to illegally transact and deal with the suit property to the Applicant's detriment. The Applicant annexed a copy of the Notice of Appeal dated February 15, 2021 lodged by the 1st Respondent on February 17, 2021, and of the search and green card with respect to land parcel Kilifi/Kadzozzo/Madzimbani/146 which showed a charge in favour of Gulf of African Bank dated May 27, 2012 which was entered on June 8, 2018.

3. These averments were reiterated in written submissions dated January 9, 2023, which learned counsel Mrs Nyange, holding brief for Mr Nyange for the Applicant relied upon during the hearing of the application held on February 8, 2023. The counsel submitted that the 1st Respondent had admitted that they received a copy of the certificate of delay on October 14, 2021 and that the memorandum of appeal and the record had not been filed since then. Reliance was placed on the decision of this Court (Waki, Kiage & M'Inoti JJA) in [*Mae Properties Limited vs Joseph Kibe & another*](#) [2017] eKLR which in which Rule 83 of the [*Court of Appeal 2010*](#) Rules was resorted to in allowing an application to strike out a Notice of Appeal filed outside the 30- day limit in Rule 84.
4. Peter Kalama, the 1st Respondent, appeared in person during the hearing of the application, and relied on a replying affidavit that he swore on November 23, 2022 and written submissions dated January 31, 2023 in opposing the application. He averred that the trial Court acted without jurisdiction, and gave detailed reasons for this opinion, as well as various judicial authorities in support of this argument. He explained that he only knew of the delivery of the judgment by the trial Court in Malindi ELC No 206 of 2014 on February 14, 2021, and being dissatisfied with the judgment he filed the impugned notice of appeal and a letter requesting for certified proceedings on January 15, 2021. He averred that he was supplied with the certified proceedings on September 20, 2021 and a certificate of delay issued on October 14, 2021. However, that the 2nd Respondent became ill and needed his direct attention and later died on June 29, 2022 and was interred on July 9, 2022. He deponed that as per Rule 85 (1) of the Court of Appeal Rules of 2010, a record of appeal could not be instituted in the name of a dead person but could be instituted by his legal representative. He averred that the record of appeal was ready but not yet filed for the reasons he had elucidated, and annexed to his affidavit a copy of the 2nd Respondent's death certificate, and of a draft memorandum of appeal. Mr. Kalama informed us during the hearing of the application that the 2nd Respondent was his father, and that they were in the process of applying for letters of administration in respect to his estate.
5. Learned counsel Ms. Lutta appeared for the 3rd Respondent during the virtual hearing, and relied on written submissions dated filed by Mr. Martin Munga, a Senior State Counsel in the Office of the Attorney General. While citing Rule 85 and Rule 86 of the [*Court of Appeal Rules of 2022*](#), the counsel submitted that the application was devoid of merit, was fatally defective and liable to be struck out on the ground that it was filed outside of the mandatory thirty-day period of service of the Notice of Appeal provided under Rule 86 of the Court of Appeal Rules. Reliance on was placed on the decision to this effect in the case of [*Tome & another vs Attorney General & 2 others*](#) (Miscellaneous Civil Application no 185 of 2019) [2021] KECA 150 (KLR).
6. It is not in disputed that under the then applicable Rule 82 of the [*Court of Appeal Rules of 2010*](#), an appeal was instituted by lodging a Memorandum of Appeal and Record of Appeal in the appropriate registry, within sixty (60) days of the date when the Notice of Appeal was lodged. The proviso to Rule 82 (1) excluded such time as may be certified by the Registrar of the superior court as having been required for the preparation and delivery to the appellant of the copy of the proceedings, where an



application for the proceedings was made within thirty (30) days of the date of the decision intended to be appealed against. Rule 82 (2) in addition provided that an Appellant shall not be entitled to rely on the proviso unless the application for the copy of the proceedings was in writing and a copy of it served on the Respondent. Similar provisions are now found in Rule 84 of the *Court of Appeal Rules, 2022*.

7. Under Rule 84 of the 2010 *Court of Appeal Rules*, any person affected by an appeal may apply to strike out Notice of Appeal or Appeal on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. However, the proviso to Rule 84 required such an application to be brought before the expiry of thirty (30) days from the date of service of the Notice of Appeal or Record of Appeal as the case may be. Similar provisions are now found in Rule 86 of the 2022 Rules. In this regard, it is notable that the instant application to strike out the Notice of Appeal was lodged on October 14, 2022, over one year after the lodging and service of the Notice of Appeal, and to this extent the application is incompetent.
8. As regards the alternative prayer that this Court deems the Notice of Appeal withdrawn, this indeed is an option and route that this Court has the power and discretion to take, pursuant to Rule 83 of the Court of Appeal Rules of 2010 and Rule 85 of the Court of Appeal Rules 2022, either on application or on its own motion as was held in the case of Mae Properties Limited vs Joseph Kibe & another [*supra*]. The provisions of Rule 83 of the Court of Appeal Rules, 2010 and Rule 85 of the Court of Appeal Rules 2022 are however predicated on the existence of circumstances from which the Court can deem that a Notice of Appeal had been withdrawn.
9. It is our view that such circumstances do not exist in the instant application, for two reasons, Firstly an examination of the Notice of Appeal dated February 15, 2021 lodged by the 1st Respondent on February 17, 2021 reveals that it was lodged by the 1st Respondent on his own behalf and on behalf of the 2nd Respondent herein, and since evidence of the fact of death of the 2nd Respondent has been provided and is not disputed, it is necessary for substitution of the said Respondent to be undertaken before further steps are taken in this appeal. Secondly the steps taken of seeking typed proceedings and issuance of a certificate of delay to the 1st Respondent have also not been disputed by the Applicant, and therefore this is not a case where we can hold that the Appellants have gone to slumber. On the alleged misuse by the 1st Respondent of this Courts orders of stay, it is notable that the alleged loan facility and charge over the suit property was dated May 27, 2012 and registered on June 8, 2018, long before the ruling and orders given by this Court on June 4, 2021, and also before the judgment by the trial court on January 29, 2021. We therefore find these allegations to be baseless and not supported by the facts.
10. For these reasons we find that the alternative order sought by the Applicant is also not merited. The Notice of Motion application dated October 13, 2022 is accordingly dismissed, with costs to the 1st and 3rd Respondents.
11. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF JUNE 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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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

