



REPUBLIC OF KENYA



KENYA LAW
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**Linguyani v Mbwabi (Civil Application E030 of 2022)
[2022] KECA 865 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KECA 865 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E030 OF 2022
F TUIYOTT, JA
JULY 22, 2022**

BETWEEN

SAMUEL MUHATI LINGUYANI APPLICANT

AND

PAUL MBWABI RESPONDENT

(An application for enlargement or extension of the ruling delivered on 15th June, 2021 allowing the application for enlargement or extension of time to file and serve Notice of Appeal and Record of Appeal, respectively, out of time in an intended Appeal from the judgment (M. N. Nderi, J) delivered on 16th April, 2020 in Kisumu ELRC NO. 63 of 2016)

RULING

1. Samuel Muhati (the applicant) successfully moved this Court (Warsame, JA) for leave to file a Notice and Record of Appeal out of time. In a Ruling of 15th June, 2021 the court made the following order:

“I therefore order that the applicant file and serve the notice and record of appeal within the next 14 days. The applicant shall pay costs of Kshs. 20,000/= to the respondent within the next 14 days.”
2. The order has not been complied with and before me is a Notice of Motion dated 21st February, 2022 seeking extension of time for compliance. In an affidavit sworn on even date, the applicant explains that he came to learn of the ruling on 21st January, 2022 when he received a mention notice from counsel for the respondent.
3. The application is opposed by Paul Mbwabi (the respondent) through a replying affidavit sworn on 27th April, 2022 by Abraham Balusi, his counsel. Counsel explains that he learnt that a ruling had been delivered in this matter when, on 18th June, 2021, he inquired of the status of the first application and



read the summary of the outcome in a register maintained by the Court of Appeal. Counsel expected similar diligence from his counterpart.

4. Counsel also points out that the applicant has failed to comply with the second limb of the order notwithstanding that he made a demand for payment of the ordered costs of Kshs. 20,000/= through a letter of 22nd January, 2022. I am urged to find that the applicant is by all means in contempt of this Court's order and does not deserve any equitable relief until he purges the contempt.
5. The respondent takes a further view that the conduct of the applicant falls into a pattern and hence the lateness is the first place in filling the Notice and Record of Appeal within the statutory timelines. In addition, that even after learning of the ruling it took thirty (30) days for the current application to be filed.
6. I have considered the application and reply and the applicant's submissions noting that no submissions were filed by the respondent.
7. It does seem common ground that the parties herein were not notified of the ruling of this Court dated 15th June, 2021 as even the respondent came to learn of it about six (6) months later when its counsel made inquiries with the Court registry. True, it may be, that counsel for the respondent may have been more diligent than counsel for the applicant but that does not take away the fact that the Court, through error, did not notify the parties of the ruling. The applicant cannot therefore be blamed for not complying with an order he was not aware of.
8. While the applicant would have been in better standing if he paid the costs to the respondent when demanded, it has to be remembered that payment of costs was a second limb of the order to be complied with in similar timelines and the applicant cannot be begrudged for seeking extension of time to comply with both.
9. Next to the question, is this application, brought thirty (30) days after knowledge of the ruling, inordinately late? Again, the applicant could have acted with greater alacrity but thirty (30) days in the circumstances of this matter does not amount to inordinate or unreasonable delay.
10. Ultimately, I allow the application of 21st February, 2022. The applicant is granted fourteen (14) days to comply with the orders made in the ruling of 15th June 2021. Costs of this application shall be in the appeal.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF JULY, 2022.

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR

