



**Mariita v County Government of Nyamira & 4 others; Nyangau & another (Interested Parties)
(Civil Application E045 of 2022) [2022] KECA 1079 (KLR) (7 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1079 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E045 OF 2022
PO KIAGE, M NGUGI & F TUIYOTT, JJA
OCTOBER 7, 2022**

BETWEEN

VINCENT OMAO MARIITA APPLICANT

AND

COUNTY GOVERNMENT OF NYAMIRA 1ST RESPONDENT

GOVERNOR NYAMIRA COUNTY 2ND RESPONDENT

NYAMIRA COUNTY CHAIRPERSON 3RD RESPONDENT

NYAMIRA COUNTY PUBLIC SERVICE BOARD 4TH RESPONDENT

SECRETARY, NYAMIRA PUBLIC SERVICE BOARD 5TH RESPONDENT

AND

GODFREY KIRIAGO NYANGAU INTERESTED PARTY

ELMELDA KEMUNTO NYABERI INTERESTED PARTY

(Being an Application to strike out the Respondents' Notice of Appeal filed on 10th January, 2022 against the decision and judgment of the High Court of Kenya at Kisumu (Baari, J.) dated 16th December, 2021 in 1 ELRC No. E047 of 2021)

RULING

1. The notice of motion dated March 28, 2022 is said to be brought under the provisions of rules 42 (1), 75, 82 (1), 83 and 84 of the *Court of Appeal Rules*, 2010. In the motion, the applicant seeks orders that this court be pleased to strike out the notice of appeal lodged on January 10, 2022 or in the alternative, to deem the notice as withdrawn. The second prayer is that we vacate orders made on March 10, 2022 by Baari, J staying execution of the decree issued on January 10, 2022 in Kisumu ELRC No E0447 of 2021.



2. Aggrieved by the judgment of Baari, J delivered on December 16, 2021, the applicants lodged a notice of appeal against the judgment on January 10, 2022. In an affidavit sworn by the applicant on March 28, 2022 in support of the application, he deposes that the notice has not been served on him or his advocate on record. Further, that although counsel for the respondent delivered a letter to the deputy registrar ELRC on December 16, 2021 bespeaking proceedings, a copy of that letter has not been served on him or his advocate on record.
3. The applicant avers that the respondents enjoy the protection of the stay order granted by the ELRC on March 10, 2022. He takes the view that the respondents filed the notice of appeal merely to obtain the order of stay because they have not taken any steps in pursuit of the appeal.
4. The 4th respondent filed a replying affidavit through Peter Onchari Keriri, sworn on May 9, 2022. In confronting the application before court, the 4th respondent states that having lodged the notice of Appeal, and the letter dated December 20, 2021 bespeaking certified copies of proceedings, both were served on the applicant's advocates through email address esqmaxxxxx@gmail.com. It is further stated that the ELRC is yet to process the typed proceedings as requested. Annexed to the replying affidavit is a copy of a letter dated March 23, 2022 to the ELRC inquiring about the progress made in the preparation of the typed proceedings. We are told that the court has not responded to this inquiry.
5. We have considered the respective submissions filed by counsel for the parties and have come to the conclusion that the success or otherwise of the application turns on whether, after timeously filing the notice of appeal and the letter bespeaking proceedings, the respondents complied with the proviso to rule 82 of the 2010 rules (now rule 84) and sub rule (2) of the rule so as to benefit from the grace granted by the proviso where there is a delay in preparation and delivery of copies of proceedings. Rule 82 sets the timeline for instituting a civil appeal before this court as being within sixty days from the date when the notice of appeal is lodged. Rule 82 provided:

82. Institution of appeals

- (1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged—
 - (a) a memorandum of appeal, in quadruplicate;
 - (b) the record of appeal, in quadruplicate;
 - (c) the prescribed fee; and
 - (d) security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be 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 such copy.

- (2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.
- (3) The period limited by sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction.



6. The rule on service and transmission of documents of this court is to be found in rule 17 of the rules, 2010. Sub rules 1 reads: -

Where by these rules any document is required to be served on any person, service may be effected in such way as the court may in any case direct, and in the absence of any special direction shall be made personally on the person to be served or any person entitled under rule 22 to appear on his behalf or by any other recognized mode of service as provided under order 5 of the [Civil Procedure Rules, 2010](#)

7. Under the provisions of order 5 rule 22b of the [Civil Procedure Rules, 2010](#) an acceptable mode of service is through electronic mail (email). The requirement is that the document sought to be served shall be sent to the last confirmed and used E-mail address of the person to be served. Service is deemed to have been effected when the sender receives a delivery receipt.

8. It is common ground that the respondents wrote a letter dated December 20, 2021 bespeaking proceedings. Although the applicant had, in his affidavit in support of the application, deposed that his advocates were not served with a copy of that request, this court has been shown an email dated December 20, 2021 sent at 3.02pm to email address esqmaxxxxxx@gmail.com. The advocates for the applicants have not denied this email address nor have they responded to this assertion by the respondents. In addition, the averment by the respondents that the typed proceedings have not been furnished by the ELRC has not been controverted.

9. If we accept, as we must, that in compliance with the proviso to rule 82(1), and sub rule (2) thereof the respondents sought the proceedings through a written request on December 20, 2022, being a date within 30 days of the decision against which it is desired to appeal, and delivered a copy of that letter to the applicant's counsel, then we must find that in computing the time within which the appeal herein is to be instituted, the time certified by the Registrar of the ELRC as required for preparing and delivering copies of the proceedings to the appellant must be excluded. For the reason that the proceedings are not yet ready, time has not begun to run and the inexorable answer to the application before us is that it is premature.

10. Accordingly, the notice of motion dated March 28, 2022 is hereby dismissed with costs to the respondents.

Dated and delivered at Kisumu this 7th day of October, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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



Signed

DEPUTY REGISTRAR

