



**Kathuri v Munyoki (Civil Appeal (Application) E472 of 2022)
[2022] KECA 1211 (KLR) (4 November 2022) (Ruling)**

Neutral citation: [2022] KECA 1211 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E472 OF 2022
KI LAIBUTA, JA
NOVEMBER 4, 2022**

BETWEEN

BONIFACE KINYUA KATHURI APPLICANT

AND

DAVID MUNYOKI RESPONDENT

(Being an application for extension of time to file and serve the Memorandum of Appeal out of time from the Judgment and Decree of the High Court of Kenya at Kitui (R. K. Limo, J.) delivered on 19th October 2020)

RULING

1. Before me is a notice of motion dated July 22, 2022 made under rule 4 of the [Court of Appeal Rules](#) in which the applicant, Boniface Kinywa Kathuri, prays for extension of time to file and serve the memorandum of appeal; and for an order that the costs of his application be provided for.
2. The motion is supported by his annexed affidavit sworn on July 22, 2022, and is made on 5 grounds set out on the face of the motion, which I take the liberty to summarise and reframe as follows: that the delay in filing the memorandum of appeal against the impugned judgment was not deliberate; that the delay was occasioned by his inability to raise the requisite funds to instruct his advocates; and that it is in the best interest of justice that the court do extend the period to comply and not lock out the applicant from accessing justice. The supporting affidavit merely restates the grounds aforesaid.
3. The respondent did not file any affidavit in reply to the applicant's motion despite having been duly served through his counsel on record, M/s ON Makau & Mulei Advocates, on October 11, 2022 as is evident from the affidavit of service of Phillip M Muoki sworn on October 19, 2022.



4. Addressing itself to the mandatory requirement to file and serve a notice of appeal, the Supreme Court in [University of Eldoret and another vs Hosea Sitienei and three others \[2020\] eKLR](#) observed at para 36:

' The filing of a notice of appeal is not premised on any occurrence or condition to be fulfilled by the appellant. The filing of a notice of appeal signifies the intention to appeal.'
5. It also goes without saying that the notice of appeal, if filed, must have been lodged within the prescribed period, and in accordance with rule 77 of this court's rules. Rule 77(2) requires that the notice be filed within 14 days following delivery of the impugned decision and served on the appellant's counterpart within 7 days in accordance with rule 79(1) of this court's rules.
6. The judgment from which the applicant seeks to appeal was delivered on October 19, 2020. He lodged his notice of appeal on November 5, 2021, more than one year later. It is noteworthy that the applicant has not applied for extension of time to file and serve his notice of appeal. Accordingly, there is no notice of appeal properly on record to merit consideration of his application for extension of time to file his memorandum of appeal.
7. On the authority of the University of Eldoret and Sitienei case, it is true to say that, in the absence of a notice of appeal properly on record, the applicant herein is yet to express his intention to appeal. Citing the Supreme Court decision in [Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission and 7 others \[2014\] eKLR](#), this court had this to say in [Apungu Arthur Kibira vs Independent Electoral and Boundaries Commission and 2 others \[2018\] eKLR](#):

' A notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite.'
8. I also hasten to point out that the applicant's application for extension of time to file a memorandum of appeal does not of itself excuse him from the requirement to express its intention to appeal by giving the requisite notice under rule 77 within the prescribed time, or out of time with leave of the court.
9. In so far as a notice of appeal is a jurisdictional pre-requisite, nothing flows from a notice filed out of time, without leave, to invoke this court's jurisdiction to grant the orders sought pursuant to rule 4 or any other rule. In effect, its hands are tied, so to speak. I so hold cognisant of the general principle that it is only in exceptional circumstances that this court would raise its hand to slam shut the door to justice on the face of a litigant despite the constitutional guarantee of access to justice as enshrined in article 48.
10. In addition to the foregoing, I must also add that the jurisdictional pre-requisite for a notice of appeal is not merely a technicality of procedure curable by invoking the provisions of article 159(2) (d) of the [Constitution](#), which mandates courts to administer justice without undue regard to technicalities of procedure, and which I have taken to mind. In this regard, the cases of [Jaldesa Tuke Dabelo vs IEBC & Another \[2015\] eKLR](#); [Raila Odinga and 5 Others vs IEBC & 3 Others \[2013\] eKLR](#); [Lemanken Arata vs Harum Meita Mei Lempaka & 2 Others \[2014\] eKLR](#); [Patricia Cherotich Sawe vs IEBC & 4 Others \[2015\] eKLR](#), among others, are a constant reminder that article 159(2) (d) is not a panacea for all procedural ills even though 'the exercise of the jurisdiction under article 159 of the [Constitution](#) is unfettered especially where procedural technicalities pose an impediment to the administration of justice, save that article 159(2) (d) of the [Constitution](#) is not a panacea for all procedural ills' It matters not that the overriding objectives set out in sections 3A and 3B of the [Appellate Jurisdiction Act \(Cap. 9\)](#) confer powers on this court to dispense justice with greater latitude (see *City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli vs Orient Commercial Bank Limited Civil Appeal No Nai 302 of 2008 (UR No 199 of 2008)* (Unreported).



11. Having found that there is no notice of appeal properly on record, I find and hold that I have no jurisdiction to determine the applicant's motion or grant any of the orders sought.

Dated and Delivered at Nairobi this 4th day of November, 2022

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

