



**Tsuma v Tuaha (Environment and Land Appeal 12 of 2019)
[2024] KEELC 5593 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5593 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 12 OF 2019
FM NJOROGE, J
JULY 31, 2024**

BETWEEN

PATIENCE ABEID TSUMA APPELLANT

AND

ASHA SAID TUAHA RESPONDENT

RULING

1. The application before me is dated 24/5/23. It seeks leave to file a notice of appeal out of time. It has been brought under Section 1A, 1B, 3A, and 63(e) of the CPA and Order 50 rule 6 of the CPR.
2. The application is premised on the grounds at its foot and supported by the sworn affidavit of the appellant which elaborates on the said grounds. The applicant states that her first notice of appeal was filed within time on 15/2/2022 after judgment was rendered on 1/2/2022. Service of the notice was however delayed by its signing and endorsement, and upon the respondent's application her notice was struck out by the Court of Appeal. The Court of Appeal however gave direction to suspend the striking out of the notice of appeal subject to filing of the instant application to regularize the appeal. She states that the present application has been filed within the timelines set by the Court of Appeal.
3. The application is opposed. The respondent filed her replying affidavit dated 22/6/23 on 26/6/23. In it she gives the long history of the dispute. She states that the application alluded to by the Court of Appeal was to be filed in that court and not this court and that now 30 days provided for in the direction of the Court of Appeal have lapsed without filing of such an application in that court and that as such the notice of appeal filed on 15/2/2022 stands struck out.
4. In its ruling the Court of Appeal observed that the applicant filed the notice of appeal one day before the deadline but served it late on 4/4/2022. The court also stated that she was at liberty to serve the notice of appeal before endorsement since she had no control over the endorsement process, but she never did so within the time prescribed under Rule 79(1).



5. The only question raised by the respondent is whether or not the present application ought to have been filed before the Court of Appeal. The ruling of the Court of Appeal never directed the filing of any application before it.
6. The applicant cites Section 7 of the *Appellate Jurisdiction Act* and rule 77 of the *Court of Appeal Rules* to support the submission that the present application is properly before this court. On the other hand, the respondent submits that Section 7 only envisages extension of time for giving notice of intention to appeal, hearing and determining of an application for leave to appeal and certifying the case is fit for appeal.
7. Section 7 of the *Appellate Jurisdiction Act* provides as follows:

“Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

8. Notice of intention to appeal is synonymous with notice of appeal. I find that the application before me is for extension of time to file a notice of appeal. The Court of Appeal only gave leave to the applicant to take action by way of filing an application to regularize the position without stating in what particular manner. It is now trite under the current constitutional dispensation that reference to the High Court in numerous statutes includes the courts of equal status. I find that the present application is properly before this court.
9. The original notice of appeal was properly filed. What was lacking was timely service and the Court of Appeal stated so clearly. The notice of appeal was thus struck out for lack of service. By filing the notice within time the appellant demonstrated willingness to pursue the dispute. Failure to serve was a mere procedural lapse that threatened her intent. It should not now be allowed to stand in her way since she lodged the present application timeously. In my view, allowing the application as sought will permit the applicant to file and serve a fresh notice.
10. I therefore allow the application dated 24/5/23. Costs thereof shall abide by the outcome of the appeal. The applicant shall file and serve a notice of appeal within 14 days from the date of this order.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 31ST DAY OF JULY, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

