



REPUBLIC OF KENYA



**M’Ilaibuni v Kainga (Civil Appeal E019 of 2023)
[2025] KEHC 8978 (KLR) (25 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8978 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E019 OF 2023
SM GITHINJI, J
JUNE 25, 2025**

BETWEEN

KIUNGU M’ILAIBUNI APPELLANT

AND

PETER MUTABARI KAINGA RESPONDENT

RULING

1. For determination is the Notice of Motion dated 15/5/2023 brought under Article 40 of *the Constitution, Land Registration Act, Limitation of Actions Act*, Sections 1A, 1B, 3, 3A, 6, 19, 22, 23, 78 and 79 of the *Civil Procedure Act*, Order 42, Order 43, Order 53 Rule 6 and Order 51 of the Civil Procedure Rules, the High Court Practice and Procedure Rules, seeking orders that:
 1. Spent
 2. The Honourable Court be pleased to summon the Executive Officer Maua Law Courts or any other Officer of the Court to ascertain the veracity of the proceedings of the lower court.
 3. The Honourable court be pleased to strike out the instant Appeal – Meru Civil Appeal No. E019/2023.
 4. Costs of this application be provided for.
2. The application is supported by the affidavit sworn by Peter Mutabari Kainga, the Respondent herein on even date. He averred that this appeal was admitted into this court 138 days after judgment was pronounced, and in his view, the Respondent is guilty of laches for the inordinate delay in improperly filing the appeal without seeking leave to appeal out of time first. The filed appeal had forged and/or included erroneous documents specifically the judgment and the typed proceedings. The appeal is frivolous, vexatious and an abuse of the court process because it does not disclose any tangible triable



issues, and the Appellant's motive is to stagnate the matter which has been in the corridors of justice for over 10 years.

3. In opposing the application, the Appellant swore a Replying Affidavit on 27/7/2023 in which he deposed that the appeal does not offend the provisions of section 79G of the *Civil Procedure Act* as read with Order 42 Rule 11 of the Civil Procedure Rules. The memorandum of appeal was filed on 24/1/2023, which is approximately 22 days after the impugned decision was delivered on 30/11/2022 while the Record of Appeal was filed on 18/4/2023 even before directions were taken. According to him, the application is brought in bad faith and it in the interest of justice that it is dismissed with costs.

Disposition

4. Having considered the application and the replying affidavit, I find the issue for determination to be whether the orders sought therein ought to be issued.
5. Before I delve into the merits of the application, I preliminarily wish to address the allegations of forgery of the judgment and the lower court proceedings. It is contended that the typed proceedings and judgment are at parity with the handwritten ones. I have taken the liberty to peruse the lower court file, and deliberately compared the typed proceedings therein to the handwritten notes. I find that those two sets of proceedings are strikingly similar and the very same ones the Appellant used to prepare the Record of Appeal, and thus the allegations of forgery have not been substantiated. The prayer to have the Executive Officer summoned to ascertain the veracity of the lower court proceedings thus becomes superfluous and unnecessary.
6. On the merits, the judgment sought to be appealed against was delivered on 30/11/2022, and a 30 days' stay of execution was granted. The Appellant filed the memorandum of appeal on 24/1/2023 before the 30 days' window within which he was required to appeal closed. I find that the appeal was filed within the stipulated timelines and therefore obviating the need to seek leave. The record is clear that as at 20/4/2023, the lower court file had not hitherto been availed, and the Appellant filed the Record of Appeal on 18/4/2023 before the directions on the hearing of the appeal pursuant to Order 42 Rule 13 of the Civil Procedure Rules were taken.
7. The power to strike out an appeal is draconian and it must only be exercised sparingly in the clearest of cases, because it arbitrarily drives a litigant from the seat of justice, without a hearing.
8. Besides, the prejudice the Appellant will suffer if the appeal is summarily struck out, particularly when the Record of Appeal has been filed, far outweighs that of the Respondent.
9. In the spirit of Articles 50 and 159 (2) (d) of *the Constitution* and the overriding objectives under sections 1A and 1B of the *Civil Procedure Act*, I find that the application is in want of merit and it is hereby dismissed with costs to the Respondent/Appellant.

DATED AND DELIVERED AT MERU THIS 25TH JUNE, 2025

S.M. GITHINJI

JUDGE

APPEARANCES:-

Mr. Kubai for the Respondent.

Mr. Ngugi is for the Appellant.

