



Itirithia v Muturia & Inyingi (Suing as Legal Representative of the Estate of Martin Kaumbuthu M'Wamiranki - Deceased) (Miscellaneous Civil Application E019 of 2024) [2025] KEHC 11224 (KLR) (30 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11224 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CIVIL APPLICATION E019 OF 2024
SM GITHINJI, J
JULY 30, 2025**

BETWEEN

KENNEDY MWITI ITIRITHIA APPELLANT

AND

CATHERINE MUTURIA & MOSES KIRIANKI INYINGI (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF MARTIN KAUMBUTHU M'WAMIRANKI - DECEASED) RESPONDENT

RULING

1. For determination is the Notice of Motion dated 24/3/2025 pursuant to Sections 1A, 1B, 3A of the [Civil Procedure Act](#), Order 17 Rule 4, Order 42 Rule 35 (1) of the Civil Procedure Rules, seeking that:
 1. The Honourable Court be pleased to strike out the Memorandum of Appeal.
 2. The costs of this suit and this application be provided for.
2. The application is predicated on the grounds that the Appellant filed an application dated 30/1/2024, which was granted, but he failed to comply with the conditions set thereon. On 19/9/2024, the court noted that the Appellant had not complied with its earlier directions issued on 11/4/2024 and the matter was fixed for further directions on 11/12/2024. Owing to the Appellant's non-compliance, the Respondent has appropriately moved the court, in the interest of justice, to strike out the intended appeal, to pave the way for execution. It appears that the Appellant has lost interest in prosecuting the matter, and it is prudent that the application is allowed with costs.
3. Nyatta Nyamira, the Appellant's Advocate, swore a Replying Affidavit on 12/5/2025 affirming that the banker's guarantee dated 27/3/2024 had since been deposited and the memorandum of appeal duly filed as decreed by the court. The Record of Appeal had not been filed due to unavailability of the lower court proceedings, as evidenced by the exhibited follow-up letters, and the impugning judgment



was availed after the intervention by the Execution Officer. There is a clear intent to proceed with the appeal, given that the Appellant has already filed the banker's guarantee.

4. Amule Yeka, the Respondent's Advocate, swore a Supplementary Affidavit on 16/5/2025 in support of the application.
5. The application was canvassed by way of written submissions, which were duly filed by counsel.

Determination

6. Having considered the application and the replying affidavit, I find the issue for determination to be whether the appeal ought to be struck out.
7. On 1/2/2024, the court (E. Muriithi J) granted the Appellant stay of execution for 7 days and directed the application dated 30/1/2024 to be served for inter partes hearing on 8/2/2024. Come that day, the application was compromised by consent in the following terms: "1. That an order be and is hereby issued enlarging time and granting the applicant leave to appeal out of time against the judgment of Elizabeth Cheson in Maua CMCC 295 of 2022 delivered on 14th December 2023. 2. That an order be and is hereby granted admitting and deeming the memorandum of appeal as duly filed within the time prescribed in law. 3. The record of appeal to be filed within 30 days. 4. That an order for stay of execution be and is hereby granted on condition that the applicant deposits a banker guarantee of the decretal sum within 30 days."
8. The Appellant's Advocate has averred that the non-attendance on 19/9/2024 and 11/12/2024 was occasioned by an inadvertence in the Court Tracking System, which explanation I find to be plausible and excusable.
9. I am satisfied that the Appellant's failure to compile and file the Record of Appeal is attributable to factors beyond his control, because he has satisfactorily explained that the typed proceedings were not availed by the trial court, despite numerous requests and follow-ups.
10. It must be remembered that 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.
11. Further, the court is enjoined to render substantive justice without undue regard to procedural technicalities, as guided by Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates v Salama Beach Hotel Limited & 3 others [2017] KECA 578 (KLR), where the Court of Appeal espoused that; "It is these kinds of technical lapses, which do not occasion any irreparable prejudice, that Article 159 (d) of *the Constitution* and the overriding objective in section 1A & B of the *Civil Procedure Act* as well as in section 3A & B of the *Appellate Jurisdiction Act* seek to obviate. Since the promulgation of *the Constitution* and the adoption of the overriding objective, the trend in the courts of this country has been to strive to sustain rather than to strike out pleadings on technicalities, which do not occasion any prejudice."
12. I am minded that the Appellant will suffer grave prejudice if the appeal is summarily struck out, particularly when the security for the due performance of the decree in the form of a banker's guarantee has already been furnished.
13. 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.
14. Parties to pursue the appeal.



DATED AND DELIVERED AT MERU THIS 30TH JULY, 2025

S.M. GITHINJI

JUDGE

Appearances:-

Ms. Nyatta for the Applicant /Respondent.

Diro Advocates LLP for the Respondent (absent).

