EH v CSM (Family Cause 16 of 2020) [2025] KEHC 10822 (KLR) (21 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10822 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

FAMILY CAUSE 16 OF 2020

G MUTAI, J

JULY 21, 2025

BETWEEN

EH .... APPLICANT

AND

CSM .... RESPONDENT

RULING

1. Before this court is a Notice of Motion application dated 27th February 2025 *vide* which the appellant/applicant seeks the following orders:-

    a. Spent;

    b. That the honourable court be pleased to issue orders declaring the respondent's Notice of Appeal dated 2nd September 2024 and filed on 2nd September 2024 withdrawn and or abandoned by operation of the law;

    c. That the honourable court be pleased to issue orders striking out the respondent's notice of motion application dated 20th September 2024 for being overtaken by events, hence existing in a vacuum;

    d. That the honourable court be pleased to issue orders of eviction against the respondent from the appellant/applicant's property known as Plot No. 9546 (Original No 5800/56);

    e. That the honourable court be pleased to issue orders directing the OCS Nyali Police Station to provide security and maintain peace during the eviction of the respondent from the appellant/applicant's property known as Plot No. 9546 (Original No. 5800/56);

    f. That any other order(s) which the honourable court may deem fit and just to grant be issued; and

    g. That, the costs of the application be provided for.

2. The application is premised on the supporting affidavit of EHM, sworn on 27th February 2025. Vide the said affidavit, the appellant/applicant deposed that this court, in its judgment on appeal, held that there was no subsisting marriage between him and the respondent. The respondent subsequently filed a notice of appeal on 2nd September 2024, indicating her intention to challenge the said decision at the Court of Appeal. She also filed an application dated 20th September 2024 seeking to stay the execution of the court's judgment. Despite filing the Notice of Appeal, the respondent failed to request for typed proceedings on time and to file the substantive appeal within the stipulated time. He averred that the application dated 20th September 2024 had been overtaken by events and lapsed by operation of law, as it cannot exist in a vacuum without a substantive appeal being in place.

3. He stated that he is the registered proprietor of the property known as Plot No.9546 (Original 5800/56) and that the respondent is merely wasting the same as she has no proprietary interest in it following this Court's finding that there was no marriage between them. Mr EHM averred that he is desirous of taking possession and developing the property, and the respondent's illegal presence is an impediment to this. He urged the court to issue an eviction order against her.

4. In response, the respondent filed a replying affidavit sworn on 17th March 2025, vide which stated that after the judgement of the court delivered on 21st August 2024, she followed up on typed proceedings from the court registry, which are yet to be availed to her. Ms CSM deposed that she had fallen ill and was therefore unable to facilitate her advocates in processing the appeal. Her advocates also shifted from Malindi to Bungoma in Western Kenya. She further deposed that she has experienced several misfortunes, including the death of her brother, ST, in Belgium and the hospitalisation of her other brother, SB, who was supporting her financially, leaving her seriously disadvantaged. The aforementioned factors have affected her ability to process her appeal promptly.

5. She further stated that in respect of the application dated 20th September 2024, the parties filed their pleadings and submissions, and the court is yet to deliver its ruling.

6. On the Notice of Appeal, she stated that once it is duly lodged, only the Court of Appeal can deal with the matter of delay, lodging and prosecution of the appeal, and thus this court does not have jurisdiction over the same. She urged the court to dismiss the application with costs.

7. The applicant filed a supplementary affidavit sworn on 27th March 2025. He termed the replying affidavit as incomplete, bad in law and incurably defective for being based on and supported by unmarked and unattested annexures contrary to Rules 9 and 10 of the *Oaths and Statutory Declaration Rules*. The replying affidavit was not supported by documentary evidence, including evidence when the application for proceedings was lodged with the court. It was also contended that the respondent had not demonstrated sufficient grounds as to why she failed to file the appeal on time.

8. He stated that the issue of forum does not arise since there is no appeal. The appellant/applicant contended that the respondent intends to delay the execution of the judgment.

9. The application was canvassed by way of written submissions. The appellant/applicant, through his advocates, Maosa & Co. Advocates, filed written submissions dated 22nd April 2025.

10. On the Notice of Appeal, counsel relied on Rules 84 and 85 of the *Court Appeal Rules* and submitted that the same is overtaken by events and a nullity by operation of the law for failure to lodge the appeal and request proceedings within the stipulated timeframe.

11. Regarding the question of jurisdiction, counsel for the appellant/applicant relied on the *Appellate Jurisdiction Act* and submitted that the claim is unfounded as the said Act empowers both the Court

of Appeal and the High Court to be guided by the rules made thereunder while dealing with issues pertaining to appeals lodged or intended to be lodged before it.

12. Counsel submitted that the appellant/applicant's quest is to regain possession of his house, wrongfully occupied by the respondent, who continues to enrich herself to the appellant/applicant's detriment as she is not paying rent.

13. In conclusion, counsel urged the court to allow the application as prayed.

14. The respondent, on the other hand, through her advocates, Omagwa Angima & Company Advocates, filed written submissions dated 19th May 2025.

15. Counsel submitted that the application dated 20th September 2024 has been comprehensively argued and is only pending a ruling. Therefore, the application herein should be declined.

16. Counsel relied on Rule 86 of the *Court of Appeal Rules* and submitted that the notice of appeal and the record of appeal constitute the appeal. They are both property of the Court of Appeal. Therefore, the application to have the Notice of Appeal deemed withdrawn or abandoned can only be argued in the Court of Appeal, and only the said court can pronounce on its validity or otherwise.

17. On the issue of eviction, counsel submitted that the same was unfounded and urged the court to let the litigation take its full course without interfering with her occupation of the said property.

18. Before I delve into the main issues, I note that the appellant/applicant has introduced a new issue in his submissions on what he says are errors in the notice of appeal regarding the date of delivery of the judgment. It is trite law that parties are bound by their pleadings. In my view, the appellant/applicant cannot introduce new matters in submissions. I am guided by the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] KEHC 5465 (KLR) where the court stated that: -

> "It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Ano. v Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v Nigeria Breweries PLC* SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
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> > " ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings, goes to no issue and must be disregarded......
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> > ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

19. On whether the Notice of Appeal dated 20th September 2024 should be deemed as withdrawn and or abandoned by operation of the law, the reasons given by the appellant/applicant are that the respondent failed to meet the timeframe for filing a substantive appeal and requesting typed

proceedings. On the other hand, the respondent has argued that she has yet to receive the typed proceedings from the court, which would enable her to process the substantive appeal. She has also raised the issue of her being ill, as well as the death of one of her brothers who used to support her financially, and the shifting of her advocates as an impediment to the speedy processing of the appeal.

20. This honourable court delivered its judgement on 21st August 2024 and granted the respondent leave to appeal. The court also ordered that the judgment and typed proceedings be provided within 7 days from the date thereof. From the court record, it is evident that despite the court order, the respondent has never been supplied with the typed proceedings; therefore, the failure or mistake of the court cannot be attributed to her. It would be most unfair to penalise her for something she had no control over. For that reason, this prayer must fail. I am guided by the case of *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] KESC 16 (KLR), where the court stated:-

> "The issue of delay of typed proceedings is well known in our legal system, and on this basis, this Court has previously extended time and held that such a delay is not on the part of the party but the court and that this issue consists of facts beyond a party's reach. In *Hassan Nyanje Charo v Khatib Mwashetani and 3 Others*, eKLR [2014] this Court stated:
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> > " "Counsel for the applicant has stated that he has exercised all due diligence to get the proceedings from the Court of Appeal, but to no avail…
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> > Would it be in the interests of justice then to turn away an applicant who has, prima facie, exercised all due diligence in pursuit of his cause, but is impeded by the slow-turning wheels of the Court's administrative machinery? We think not."
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> However, we hasten to add that a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered. It is worth reiterating that in considering whether or not to extend time, the whole period of delay should be stated and explained to the satisfaction of the Court."

21. Further in the case of *Attorney General v Lucy Nduta Nganga* [2017] KEHC 5783 (KLR) the court quoted the case of *Abdirahman Abdi v Safi Petroleum Products Ltd & 6 Others* [2011] eKLR, where the court stated, a notice of appeal was served on the respondent out of time and without leave of the court, upon being asked to strike it out, the Court of Appeal (Omolo, Bosire and Nyamu JJA) observed that:-

> "The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice…
>
> In the days long gone, the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time, regardless of the length of delay. The enactment of Sections 3A and 3B of the *Appellate Jurisdiction Act*, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that

procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion." (emphasis added).

22. On whether the Notice of Motion of application dated 20th September 2024 has been overtaken by events, hence existing in a vacuum, I note from the court record that parties went silent until 18th March 2025, when the application herein came up. However, from the Judiciary Case Tracking System, it is evident that the parties prosecuted the application by filing the necessary responses and submissions. The application is pending the court's direction on the ruling.

23. Under the circumstances, I find and hold that the applicant has not substantiated the claim that the Notice of Motion has been overtaken by events.

24. On whether this court should issue orders evicting the respondent from property known as Plot No.9546 (Original 5800/56), it is my view that with an application for stay against the judgment of the court pending before this court, it would not be prudent for the court to deal with the same at this stage. This court will, however, issue its ruling on the pending application upon giving the parties notice. I am guided by the case of *Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited* [2020] KECA 361 (KLR), where the court stated that:-

> "Turning to the request to allow the applicant to exercise his now undoubted constitutionally, underpinned right of appeal, the position in as crystalized by case is as was set in the case of *Richard Nchapi Leiyagu v IEBC & 2 Others* (*supra*); *Mbaki & Others v Macharia & Another* [2005] 2EA 206; and the Tanzanian case of *Abbas Sherally & Another v Abdul Fazaiboy*, Civil Application No. 33 of 2003; for the holding *inter alia* that:
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> i. the right to a hearing is not only constitutionally entrenched, but it is also the cornerstone of the Rule of law;
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> ii. the right to be heard is a valued right; and
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> iii. that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice."

25. Flowing from the foregoing, it is my view that the Notice of Motion application dated 27th February 2025 lacks merit. The same is dismissed.

26. Due to the nature of the matter, I order that the parties bear their costs.

27. It is so ordered.

DATED AND SIGNED IN MOMBASA THIS 21ST DAY OF JULY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Ms Kemunto, for the Appellant/Applicant;

Mr Omagwa, for the Respondent; and

Arthur - Court Assistant.