



**DRA v ISD (Civil Appeal E041 of 2024)
[2024] KEHC 12133 (KLR) (Family) (8 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12133 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY
CIVIL APPEAL E041 OF 2024**

MA OTIENO, J

OCTOBER 8, 2024

BETWEEN

DRA APPELLANT

AND

ISD RESPONDENT

RULING

Introduction

1. This Ruling determines the issues raised in the Respondent’s application dated 6th June 2024 in which he seeks an order striking out of the Appellant’s memorandum of appeal dated 29th March 2024 on the basis that the same was filed outside the timelines authorized in law and that no leave was obtained by the Appellant prior to the filing of the appeal.
2. The background of the matter is that the Appellant is the plaintiff in the Milimani Children Court Case No. E1460 of 2023: In the matter of IW and LW (minors suing thro’ their mother and next friend LNG v AWM) in which the Appellant is seeking custody and maintenance orders against the Respondent in respect of their three minor children. The matter is still pending hearing before the lower court.
3. On 12th January 2024, the trial court gave interim orders in which the Appellant was granted actual custody of the minors with the Respondent having access of the minors on alternate weekends pending hearing and determination of the main suit.
4. Dissatisfied with the interim orders, the Appellant filed an application at the trial court on 8th February 2024 seeking that the interim orders of 12th January 2024 granting the Respondent access rights to the minors on alternate weekends be reversed. The Appellant also prayed that a fresh Children’s Report to be filed in the matter.



5. On 20th February 2024, the magistrate after considering the Children Report of even date filed in the matter, found no reason to depart from its orders 12th January 2024. The court therefore dismissed the Appellant's application dated 8th February 2024, thereby sustaining its earlier orders granting the Respondent interim access rights on alternate weekends.

The Appeal

6. Aggrieved by the lower court's said Ruling of 20th February 2024, the Appellant, vide his memorandum of appeal dated 29th March 2024 lodged this appeal, raising the following five (5) grounds of appeal; -
 - i. That the learned magistrate erred in law and in fact by dismissing the Appellant's application dated 8th February 2024.
 - ii. That the learned magistrate erred in law and in fact by relying upon a falsified Children officer's Report that contradicted the actual Children's Officer's report dated 15th February 2024.
 - iii. That the learned magistrate erred in law and in fact by failing to set aside the visitation orders that were granted on 12th January 2024 on picking up of the children from school by the Defendant.
 - iv. That the learned magistrate erred in fact by arriving at the conclusion that the Appellant is manipulating one of the minors so as to advance her narrative.
 - v. That in the circumstances of the case, the learned magistrate failed to accord justice to the Appellant.

Application for Striking out of the Appeal

7. Following the filing of this appeal, the Respondent filed an application dated 6th June 2024 seeking the striking out of the instant appeal. The application was premised on the grounds that the appeal was filed outside time and without leave of the court. Additionally, it was the Respondent's position that the appeal is predicated on documents that did not form part of the record of appeal at the trial court and consequently, were not referred to by that court in its decision the subject of appeal.
8. The Appellant vide her replying affidavit sworn on 17th July 2024 opposed the Respondent's application for striking out arguing that the appeal was filed by her following the discovery of a falsified Children's Report which came to her attention well after the delivery of the court's Ruling of 20th February 2024, the subject of this appeal.
9. The appeal was canvassed by way of written submissions. The Appellant's submissions are dated 26th July, 2024 whilst that of the Respondent is dated 25th July 2024.

Respondent/Applicant's 's submissions

10. In support of his notice of motion application seeking the striking out the Appellant's appeal, the Respondent submitted that the appeal has been filed outside the timelines permitted in law.
11. Referring to the provisions of section 79G of the *Civil Procedure Act*, the Applicant asserted that the Ruling the subject of appeal having been delivered on 20th February 2024, the thirty days prescribed in law expired long before 29th March 2024 when this appeal was filed. For this reason, the Respondent argued that the appeal is no legally competent.



12. The Respondent further submitted that no leave was obtained by the Appellant prior to filing of the late appeal as required under the law. That in any event no good reason has been shown to warrant the appeal being sustained despite having been filed late.
13. In support of his position, the Respondent referred to a number of cases including that of *Micro Mobile Limited v Marquee Imports Limited (Civil Appeal E691 of 2021)* [2022] KEHC 16768 (KLR) (Civ) (22 December 2022) where an appeal was struck out for having been filed late and without leave of the court.
14. The Respondent therefore urged this court to allow his Notice of Motion Application dated 6th June 2024 and strike out the Appellant's Memorandum of Appeal dated 29th March 2024 and the Amended Memorandum of Appeal dated 19th April 2024.

Appellant/Respondent's submissions

15. The Appellant responded to the application for dismissal vide her replying affidavit of 17th July 2024. The Appellant while admitting that the appeal was filed late, took the position that the same was filed late following the discovery by her of a falsified Children's Report which contradicted the one of 15th March 2024 upon which the trial court had based its Ruling of 20th February 2024, which is the subject of this appeal.
16. The Appellant submitted that she only discovered the falsified report a month after the delivery of the Ruling of 20th February 2024 and therefore according to her, it was only from the date of discovery of the falsified report that the thirty days prescribed under section 79G of the *Civil Procedure Act* ought to have started running.
17. The Appellant urged this court not to strike out the Respondent's application on the basis that it is in the best interest of the minors that the appeal be heard on merits. That the falsified Children's report is a critical issue which undermines the administration of justice and therefore this court needs to address and deal with substantively.
18. Relying on Article 159(d) of *the Constitution* and Sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act*, the Appellant implored this court to administer substantive justice without paying undue regard to procedural technicalities. The cases of *Trust Bank Ltd v Amalo Co. Ltd* [2009] eKLR and that of *Raila Odinga v IEBC & Others* [2013] eKLR were cited by the Appellant in support of this argument.
19. In the premises, the Appellant prayed that the Respondent's application dated 6th June 2024 be dismissed and the appeal be allowed to proceed to full hearing.

Analysis and Determination

20. The only issue for determination in this case is whether the appeal should be struck out for having been filed outside the statutory timelines, and without leave of the court.
21. Section 79G of the *Civil Procedure Act* is clear in its provisions and states that: -

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.



22. From the wording of section 79G of the *Civil Procedure Act* it is clear that an appeal from the lower court to this court shall be filed within a period of 30 days from the date of the delivery of the decision appealed against. It is evident that time starts running from the date of the delivery of the judgment of the decision appealed against (excluding the period certified by the lower court to be necessary for the preparation and delivery of the decree or order).
23. In the instant appeal, there is no dispute that the decision appealed against was rendered on 20th February 2024. The memorandum of appeal was lodged by the Appellant on 29th March 2024 and amended on 19th April 2024. A simple counting of the days reveals that the 30 days' statutory period provided under Section 79G lapsed long before the Appellant lodged her memorandum of appeal. No leave was sought and obtained by the Appellant prior to filing of the appeal.
24. The Appellant's argument that she subsequently discovered a falsified Children's Report is not material in this case. Even assuming for a moment that that allegation is true, the proper recourse for her would be still an application for review of the trial court's ruling and not an appeal. The discovery of new material or evidence as alleged by the appellant is not a ground for filing an appeal, leave alone a late appeal.
25. Further no good cause has been shown by the Appellant to warrant sustaining of the appeal. This is a matter involving children and it is in the interest of justice that the trial be expedited by having the main suit heard and determined as opposed to filing multiple applications.
26. The best interest of the minors requires that the substantive issues in the primary suit be disposed of expeditiously. Multiple applications and appeals on those applications will not obviously serve the best interest of the children.

Disposition

27. Accordingly, I find that the appeal was filed out of time and without leave of the court. The same is hereby struck out.
28. This being a matter involving children, I make no orders as to costs.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 8TH DAY OF OCTOBER 2024

ADO MOSES

JUDGE

In the presence of:

Moses Court Assistant

..... for the Appellant

..... for the Respondent

