



**VFM v AW (Divorce Appeal E130 of 2022)
[2024] KEHC 11742 (KLR) (Family) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11742 (KLR)

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

FAMILY

DIVORCE APPEAL E130 OF 2022

BM MUSYOKI, J

OCTOBER 3, 2024

BETWEEN

VFM APPELLANT

AND

AW RESPONDENT

RULING

1. There are two applications to which this ruling relates. One is by the respondent dated 9-02-2023 which seeks that this appeal be struck out for being incompetent on account of having been filed out of time without the leave of the court. The application is opposed through affidavit of Gerald Kiti, advocate for the appellant which was sworn on 20th February 2023. The 2nd application is by the respondent dated 6th April 2023 which seeks leave of this court to file a notice of appeal out of time. The application is opposed through a replying affidavit sworn by the respondent on 5th May 2023 and grounds of opposition dated the same day.
2. The two applications were argued through written submissions. The appellant filed two sets of submissions, one dated 30-03-2023 which is in respect of the application dated 9th February 2023 and the other dated 14th June 2024 which appears to be in respect of application dated 6th April 2023 but interestingly the submissions are bespeaking of an application to reinstate a suit. I find them to be irrelevant to these proceedings and I will disregard them in my ruling. The respondent filed submissions dated 21st March 2023 which are in respect of application dated 9th February 2023 and others dated 9th July 2024 in respect of the same application.
3. I will start with the application dated 6th April 2023 for the sole reason that if I allow the same, the respondent’s application dated 9th February 2023 will become moot. The prayers in the application are as follows;



1. This Honourable court be pleased to grant an extension of time within which the applicant/appellant can file and serve its notice of appeal against the ruling delivered on 28th October 2022 in divorce cause number 1056 of 2019 delivered by Hon M W Murage.
2. The cost of this application be in the cause.
4. In support of the application, the appellant has claimed that she was not able to file the appeal in time because she did not secure the proceedings and the ruling from the lower court in time until on an undisclosed date in December 2022. She has attached a letter dated 8-11-2022 through which her advocate was applying for the ruling and WhatsApp communications between the advocate and two people shown as Henry Kitimo and one Lydia Clerk Obura. She claims that the two were the clerks to the Honourable Magistrate.
5. In opposing the application, the respondent avers and submits that the application has been brought under inapplicable rules. The application is shown to be brought under the Court of Appeal Rules which are not applicable to matters before this court. The respondent argues that the appeals to this court should be through a memorandum of appeal and not a notice of appeal. The respondent adds that there are no good reasons shown to justify or explain filing of the appeal out of time.
6. Order 42 of the Civil Procedure Rules governs filing and prosecution of appeals. Rule 1 thereof provides that every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. I agree with the respondent that an appeal to this court is not commenced by way of a notice of appeal. That is a process applicable in filing of appeals from the High Court to the Court of Appeal. The application before me asks that the applicant be granted leave to file a notice of appeal out of time. Even if I were to grant this application, the same will not cure the incompetence of this appeal as there is no requirement that a notice of appeal be lodged by a party desiring to appeal to this court. The appellant has not asked this court to admit the appeal out of time and I am not inclined to grant a prayer which has not been sought. A party appearing before a court of law must be specific and particular in what they want from the court. It should not be left to the court to make assumptions of what an applicant intended to get out of their pleadings and litigation. In *Lamba vs National Social Security Fund & Another (2023) KECA 124 (KLR)*, the Court of Appeal held as follows;

‘It is trite law that courts can only grant orders that have been prayed for in the pleadings, or make appropriate orders as it deems fit if need arises in the cause of a trial. Indeed, where a court has proceeded to grant a relief not contained in prayers in the pleadings or not regularly sought by a party expressly or by implication, appellate courts have had no hesitation in annulling or overturning orders granting such reliefs.’

7. The appellant has invoked Article 159(2)(d) of *the Constitution*. The habit of parties to court proceedings hibernating under the umbrella of this Article should of necessity be restricted to what was intended by *the Constitution* and should not be let loose to override, overturn or circumvent application of clear provisions of the law. The law on appeals to this court has provided a clear procedure through which the parties should approach the court. We cannot throw out of the window clear provisions of the same law that we seek to enforce through the courts. That would open up courts to all manner of proceedings and make administration of justice complicated and convoluted. I see nothing technical about a requirement of the law that directs parties to approach the seat of justice in a particular manner. In *Esther Anyango Ochieng vs Tramara Sugar Company Ltd (2020) eKLR*, the court held that;

“We have said on numerous occasions that Rules of the court exist for the purpose of orderly administration of justice before this court. The timelines for doing certain things and taking



certain steps are indispensable to the proper adjudication of appeals before us. The rules are expressed in clear and unambiguous terms and they command obedience."

8. According to the applicant, the lapse in filing the appeal late is a procedural technicality which the court should ignore and allow the appeal to proceed to hearing on merits. The issue of statutory time bar is a jurisdictional issue. A jurisdictional issue cannot be a technicality. Any pleadings filed outside the time limited by the law are incompetent and the court has no jurisdiction to entertain the same until and unless they are regularised by an order of the court extending time.
9. In view of the above, I agree with the respondent, find and hold that the application dated 6th of April 2023 is incurably defective and incompetent. For that reason, the same is dismissed with costs to the respondent.
10. I now turn to the respondent's application dated 9th February 2023. The main prayer in that application is that the court be pleased to strike out and expunge from the court record the memorandum of appeal, notice of appeal and record of appeal dated 13th December 2022 and filed on 19th December 2022 for having been filed out of time without the leave of the court. The grounds of the application appear on the face of it but they all revolve around the fact that the appeal was filed out of the statutory period of thirty days. It is supported by affidavit of the respondent sworn on 9th February 2023.
11. Section 79G of the Civil Procedure Act provides that appeal from the subordinate court to this court shall be filed within thirty days. The same section excludes time required for obtaining decree or order from the lower court from the computation of time. In my opinion, the purport of this section is that an appellant does not need to make an application for leave to file appeal out of time if he is able to demonstrate that there was delay in obtain the decree or order which ate into the appeal window. I hold the position that all that the applicant would be required to do is to exhibit a certificate of delay or similar document certifying the period it took the lower court to supply the appellant with its decree or order.
12. In reply to the application, the appellant has admitted that the appeal was filed out of time but avers that the delay in filing the appeal was caused by factors beyond her control. In the replying affidavit dated 20th February 2023 which is in opposition to the respondent's application to strike out the appeal, the appellant claims that the delay in filing the appeal was caused by delay by the lower court in supplying her with ruling and proceedings. The affidavit does not contain any annexures explaining the alleged delays but in the interest of satisfying myself of this position, I have discretionarily chosen to go through the annexures to her supporting affidavit dated 6th April 2023 which was in support of her application for extension of time.
13. The respondent through her advocate narrates that she applied for proceedings and the ruling on 8-11-2022 which was within the time allowed by the law to file appeal but the proceedings and ruling were not supplied to the advocates until on undisclosed date in December 2022. I have looked at the letter purportedly applying for the ruling. The same is imprinted with a filing date of 7-04-2023. This is the date the letter was uploaded to the court's system which is clearly after the respondent had filed the application to strike out the appeal.
14. I have also seen WhatsApp communication said to be between the appellant's advocates and the lower court clerks. There is a communication which appears to have been made on either 9-11-2022 or 10-11-2022 where the letter dated 8-11-2022 is attached although it is not clear whether it is the same letter which was applying for ruling. There is no evidence of payment for the proceedings and the ruling. In any event, there is a post showing that the ruling was sent to the advocate or whoever was following up on 16-11-2022 which was within time, a fact the appellant confirms. It is claimed that the



appellant's advocate could not file the memorandum of appeal without the lower court's proceedings and ruling. There is no requirement in law that the proceedings or the decision of the lower court must accompany the memorandum of appeal when being filed. Since the appellant had the ruling in her hands on 16th November 2022, she should have filed the memorandum of appeal before the expiry of the statutory period or at least have a different satisfactory explanation why she could not beat the time.

15. I think it is important to mention that the path the appellant took in the alleged efforts to get the ruling and proceedings of the lower court is detestable. Instead of the appellant applying for proceedings through the official and formal procedure, she chose short cuts which must be discouraged at all costs. I need not reproduce the WhatsApp communication between her advocate and the court clerks in this ruling as according to me, they are inappropriate and it is shameful that they were used as exhibits in the application. The conduct is unprofessional and obviously compromises smooth administration of justice. A party who uses such methods of operation should not expect to get equitable orders from a court of law.
16. In place of a certificate of delay or proper explanation, the appellant exhibited unreliable communication which I decline to accept. There is a reason why the certificate in proof of the period taken for typing of proceedings and availing the decision or order should emanate from the court and not the parties. It is only the court which should give a certificate because it is in charge of the preparation and delivery of the records and proceedings. This will prevent the kind of conduct and games the appellant has exposed in this appeal. This court refuses to accept the explanation for delay given by the appellant as in doing so would be tantamount to endorsing the detestable conduct.
17. Delay in obtaining decree or order of the lower court is not the only reason allowed in law for the court to admit appeals out of time. The law allows the court to admit an appeal out of time if the appellant shows that there were good and sufficient reasons for failing to file the appeal in time. That is the purport and spirit of the proviso to section 79G of the *Civil Procedure Act*. The appellant has not made any attempt to show any other reason except the delay of the proceedings and the ruling of the lower court.
18. I hold the appeal herein was filed out of time without leave of the court. It is therefore incompetent. I am guided by the holding of the Supreme Court in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others* (2014) eKLR thus;

‘However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.

By filing an appeal out of time before seeking extension of time, and subsequently seeking the court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.

To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court.’

19. It is my conclusion that the application dated 9th February 2023 is merited. The appeal herein is incompetent for having been filed out of time and without the leave of the court. In the circumstances, the appeal is struck out in its entirety. The costs of the appeal are awarded to the respondent.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2024.



B.M. MUSYOKI

JUDGE OF THE HIGH COURT

Ruling delivered in presence of Miss Lumumba for Mr. Kiti for the appellant and in absence of the counsel for the respondents.

