



REPUBLIC OF KENYA



**KENYA LAW**  
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**MWM v CAD (Civil Application E049 of 2025)  
[2025] KECA 1478 (KLR) (12 September 2025) (Ruling)**

Neutral citation: [2025] KECA 1478 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E049 OF 2025  
W KARANJA, F TUIYOT'T & P NYAMWEYA, JJA  
SEPTEMBER 12, 2025**

**BETWEEN**

**MWM ..... APPLICANT**

**AND**

**CAD ..... RESPONDENT**

*(Being an application for stay of execution of the Ruling of the High Court of Kenya – Family division (Chemitei, J.) dated 30th January 2025 in High Court Family Appeal No. E063 of 2024)*

**RULING**

1. The application before us dated 31<sup>st</sup> January, 2025 faces an insurmountable hurdle. It is an application brought under rule 5(2)(b) of the [Court of Appeal Rules](#), 2022 seeking the following orders:
  - i. spent
  - ii. That pending the hearing and determination of this application, a stay of execution of any orders flowing from any proceedings taken subsequent and consequential to the ruling issued on the 30<sup>th</sup> January 2025 in High Court of Kenya Family Appeal No. E063 of 2024 be granted.
  - iii. That pending the hearing and determination of the appeal herein a stay of execution of any orders flowing from any proceedings taken subsequent and consequential to the ruling issued on the 17<sup>th</sup> August 2022 in High Court of Kenya Family Appeal No. E063 of 2024 be granted.
  - iv. That pending the hearing and determination of this application and appeal herein, an order be made that the child namely RJLD not be removed from this Court’s jurisdiction.”
2. It is common learning that jurisdiction of this Court to entertain a rule 5(2)(b) application is triggered by the filing of a notice of appeal evincing an intention to appeal or the appeal itself (see amongst many decisions of this [Court Safaricom Limited v Ocean View Beach Hotel Limited & 2 others](#) [2010] KECA



346 (KLR)). Right from the outset, the respondent, through the replying affidavit sworn on 11<sup>th</sup> February 2025, contended that we lack jurisdiction to issue the orders sought because of the absence of a filed and served notice of appeal.

3. In reaction to the replying affidavit, the applicant swore a further affidavit on 26<sup>th</sup> February 2025 where she would have been expected to decisively confront the respondent’s jurisdictional contention. Instead there was this response:

“That I have been informed by my advocates on record which information I believe that indeed they did file a notice of appeal and it is the basis upon which the respondent filed his notice of address of service.”

4. Without going into any detail regarding the notice of address of service dated 13<sup>th</sup> February 2025 filed by the firm of Hamilton Harrison & Mathews Advocates we simply observe that, as declared in the notice, it was the respondent’s address in respect to the application now before us.
5. At plenary hearing, we raised this matter with Ms. M’Mbetsa, learned counsel appearing for the applicant, to which she responded that there was a notice of appeal dated 31<sup>st</sup> January, 2025. The only notice of appeal before us is annexed to the affidavit in support of the notice of motion. The trouble with it is that, although dated 31<sup>st</sup> January 2025, there is nothing to show that it was lodged before the High Court as it is not duly stamped by that court nor bears any endorsement of that court. In addition, we do not have any evidence that it was paid for or served upon the respondent.
6. Generally, the hearing of a rule 5(2)(b) application is not the forum to make a final call on the propriety or absence of a notice of appeal and where the matter is arguable, the Court will reserve it for determination in a striking out motion. In that event the Court assumes jurisdiction to entertain the rule 5(2)(b) application on the basis of the contested notice of appeal.
7. However, there will be occasion when the impropriety or absence is so glaring and unanswerable that it would be injudicious to assume jurisdiction when there is obviously none. This is one such occasion. The applicant had sufficient opportunity to satisfy us that there existed, in the very least, a properly lodged or paid for notice of appeal. In the circumstances, we do not have to await a striking out application to hold that, this far, it has not been demonstrated that the applicant has properly filed a notice of appeal so as to actuate our jurisdiction to entertain the rule 5(2)(b) motion before us. See for example *KCB Bank Limited v Inyangu* (Civil Application E460 of 2022) [2023] KECA 913 (KLR).
8. We accordingly do not have jurisdiction to determine the notice of motion dated 31<sup>st</sup> January 2025 and strike it out with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

.....

**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR.**

