Masha v RKC & another (Suing thro' mother and next friend Mercy Ndembo Mwapagha) (Civil Appeal (Application) E020 of 2022) [2025] KECA 923 (KLR) (7 March 2025) (Ruling)

Neutral citation: [2025] KECA 923 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL (APPLICATION) E020 OF 2022

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

MARCH 7, 2025

BETWEEN

CHRISPUS CHENGO MASHA ..... APPELLANT

AND

RKC & VDC (SUING THRO' MOTHER AND NEXT FRIEND MERCY NDEMBO MWAPAGHA) ..... RESPONDENT

(Being an application to strike out the Notice of Appeal lodged on 22ndNovember 2021 from the Judgement of the High Court of Kenya at Malindi (Nyakundi, J.) dated 5th November 2021inHCCA No. 38 of 2021)

RULING

1. On 5th November 2021, the High Court sitting at Malindi (Nyakundi, J.) delivered a judgement in favour of RKC and VDC (suing through their mother and next friend, Mercy Ndemo Mwapagha) (the applicants).

2. Dissatisfied with the decision of the trial court, Chrispus Chengo Masha (the respondent) invoked this Court's jurisdiction by filing a Notice of Appeal dated 22nd November 2021 under rule 75 of the Court of Appeal Rules, 2010 (now rule 77 (2) of the Court's Rules, 2022).

3. Before the main appeal could be set down for hearing, the applicants filed the instant application dated 28th July 2022, which seeks to have both the Notice of Appeal lodged on 22nd November 2021 and the Certificate of Delay issued on 31st May 2022 struck out for being incompetent.

4. The application is premised on the grounds on its face, and which are replicated in the Supporting Affidavit of Mercy Ndemo Mwapagha sworn on even date. She deposed that she is the former spouse of the respondent and the biological mother of the minors, namely RKC, VDC and SKC; and that, on 5th November 2021, the High Court (Nyakundi, J.) delivered a judgement in her favour, thereby

setting aside the orders emanating from the ruling of Hon. Dr. Julie Oseko, CM delivered on 20th April 2021 in Malindi CMCC No.

3 of 2016; that the respondent was dissatisfied with the Judgment of the High Court and, as a result, she lodged a Notice of Appeal on 22nd November 2021 seeking to appeal against the said decision to this Court; that the Notice of Appeal is incompetent as it was not lodged within the prescribed time as provided under rule 75 (2) of the Court of Appeal Rules, 2010, now rule 77 (2) of the Court of Appeal Rules, 2022.

5. It is also deposed that the Notice of Appeal is incompetent for: failure to serve it within the prescribed time as required under rule 77(1) of the 2010 Rules (now rule 79(1) of the 2022 Rules); and failure to comply with the now rule 82(1) and (2) of this Court's Rules with respect to service of his application for a copy of the court proceedings.

6. It was urged that, having failed to comply with this Court's Rules on the lodging of the Notice of Appeal, service of the Notice of Appeal and application to the Deputy Registrar for a copy of proceedings from the superior court, the appeal and the Certificate of Delay are a non-starter, incompetent, vexatious and an abuse of the court process, and ought to be struck out.

7. Opposing the application, the respondent filed a replying affidavit sworn on 3rd November 2023. He deposed that the applicants were formerly represented by the firm of Oduor & Simiyu Advocates but that the advocates were later replaced by the firm of Mwakireti & Asige Advocates, who conducted the appeal in the High Court on their (applicants) behalf; that his counsel was never notified of the change of advocates; and that, since Mr. Asige advocate would always appear in court as holding brief for Mr. Oduor, the assumption was that it was the firm of Odour & Simiyu Advocates who were still on record for the applicants in the High Court.

8. The respondent deposed that, since the impugned Judgment was delivered on 5th November 2022, the 14 days within which the Notice of Appeal ought to have been filed lapsed on 19th November 2022, and that his counsel filed the Notice of Appeal on 18th November 2022; that when his counsel went to serve the firm of Oduor & Simiyu Advocates, he was informed that they no longer represented the applicants; and that that is when counsel opted to serve the applicants in person.

9. According to the respondent, there was confusion on the service between the firm of Oduor Simiyu Advocates and the applicant's current advocates and, therefore, the same was not fatal since service was effected upon the right person, after all; and that, it should not be lost in mind that the applicant (we think referring to the first applicant) works in the office of her advocates on record.

10. The respondent urged us to dismiss the application for want of merit.

11. At the plenary hearing of this application on 30th October 2024, learned counsel Mr. Asige appeared for the applicants while learned counsel Mr. Atiang appeared for the respondent. Mr. Asige told us that he had filed submissions on behalf of the applicants on 29th October 2024. At that time, we were not seized of the applicants' submissions. Before writing this ruling, we called the registry to confirm if the submissions were filed, but received a negative response. We shall, in the circumstances, consider the brief oral submissions made by Mr. Asige as well as the contents in the Motion and the Supporting Affidavit. We also bear in mind that submissions are only intended to emphasise what is in the pleadings, but are not evidence per se.

12. On the part of the respondent, Mr. Atiang relied on written submissions dated 23rd October 2024 which we confirm are on record.

13. On behalf of the applicants, Mr. Asige submitted that the respondent's submissions from paragraph *10* are irrelevant since they attempted to delve into the merits of the appeal as opposed to addressing the issue in question; and that, on this ground, the applicants' application should be allowed with the result being that the Notice of Appeal and all subsequent filings be struck out.

14. On the other hand, Mr. Atiang's submitted that the Notice of Appeal was presented to the High Court registry at Malindi on 19th November 2021; and that it was stamped by the registry as a testament that it was lodged within the proper timelines. Whilst referring to the affidavit of service marked as annexture 'CM2' to the replying affidavit, counsel urged us to take into account that the circumstances under which the Notice of Appeal was served have been sufficiently explained.

15. It was submitted that this being a matter involving children, the appeal should not be struck out for want of form, and for this proposition, counsel relied on this Court's decision in MZM v JMM & 3 Others (Civil Appeal (Application) E024 of 2022 [2023] KECA 982 (KLR) (28 July 2023) (Ruling) (to which we shall shortly return); and that, instead, we should set down the appeal for hearing on a priority basis.

16. We have considered the Motion, the grounds in support thereof, the respective affidavits in support of, and in opposition to, the application, the oral and written submissions and the law.

17. It is common ground that Judgement in the superior court was delivered on 5th November 2021. Rule 77(2) of this Court's Rules, 2022 requires that a person who desires to lodge an appeal against a decision should do so within 14 days after the date of the decision. Rule 79(1) requires that within or before the lapse of 7 days after lodging of the Notice of Appeal, the appellant shall serve copies of the Notice on all persons directly affected by the appeal. Rules 84(1) and (2) further require that the application for proceedings should be made within 30 days after the date of the decision and served upon the respondent.

18. At the outset, we wish to highlight that in the heading of this application and, by extension, the appeal, the applicants are indicated as being two in number. The first applicant is the one who swore the supporting affidavit. Throughout her depositions in the affidavit, she refers to herself as the applicant, thus excluding the second applicant in the application. The respondent has not made things better for us. He refers to a single applicant as opposed to the two who are captioned in the heading. Indeed, even in the purported service of the Notice of Appeal and the letter bespeaking the proceedings, it is insinuated that only the 1st applicant was being served. For this reason, and for the tidiness of this ruling, we shall refer to the applicant as one person where need be, but bear in mind that the two applicants as captioned in the heading of the Motion shall be affected by the outcome of the ruling. This calls on us to caution counsel that they should be keen when drafting pleadings. Appropriate description of parties in the pleadings is necessary so as to assist the court. It aids the court in focusing on the proper party to whom it shall address, and finally issue the order(s) for or against.

19. The applicant complains that the Notice of Appeal and the letter requesting for proceedings were not filed and served timeously upon her.

20. We have perused the Notice of Appeal annexed to the applicant's Motion marked as "MNM - 1." It is dated 18th November 2021. We note that it was lodged at the High Court at Malindi on 22nd November 2021. Under rule 77(1), the Notice of Appeal ought to have been filed within 14 days after the decision. The decision having been rendered on 5th November 2021 means that the 14 days lapsed on 19th November 2021. The Notice of Appeal having been lodged at the Malindi High Court on 22nd November 2021, ultimately means that it was filed 3 days late, thereby ousting this Court's jurisdiction to be seized of the appeal.

21. Counsel for the respondent asserts that he served the Notice of Appeal upon the former counsel for the applicants on 19th November 2021. In our view, this is illogical because, service could not be effected before the lodgement of the Notice of Appeal. This discounts the argument that there was confusion on which counsel was on record for the applicants, which we find and hold is disingenuous.

22. That notwithstanding, the filing of the Notice of Appeal out of time was not explained by the respondent's counsel. The Supreme Court of Kenya in Salat v Independent Electoral and Boundaries Commission & 7 others [2014] KESC 12 (KLR) reiterated that, where a law provides for the time within which something ought to be done, if the time lapses, one must seek extension of time. Therefore, even assuming that there was confusion as regards which counsel was on record for the applicant counsel for the respondent ought to have moved the Court for extension of time within which to file the Notice upon realizing that time had lapsed for filing the Notice of Appeal. Unfortunately, we have nothing on record to show that the respondent took this step to remedy the situation.

23. Another issue is the service of the letter bespeaking the proceedings as mandated by rule 84(1) and (2) in the following words:

    1. Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged-

        a. a memorandum of appeal, in four copies;

        b. the record of appeal, in four copies;

        c. the prescribed fee; and

        d. security for the costs of the appeal: Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with subrule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

    2. An appellant shall not be entitled to rely on the proviso to subrule (1) unless the appellant's application for such copy was in writing and a copy of the application was served upon the respondent.

24. Interestingly, the respondent's counsel steered clear from addressing this particular issue in both his oral and written submissions. The Rules make it mandatory that the letter bespeaking the proceedings be served within a prescribed timeframe. In the absence of proof of compliance with the rule, it is completely impossible for the parties in the appeal to compute the days for delay under the Certificate of Delay as envisaged in the proviso to rule 84(1). It then follows that the Notice of Appeal and the Letter requesting for the proceedings are both incompetent for want of filing and service within the prescribed time respectively.

25. What then should we do? Should we dismiss the application on the basis that the subject matter involves minors whose interest is of utmost importance as urged by counsel for the respondent? Counsel for the respondent urged us to consider the finding by this Court in *MZM vs JMM & 3 Others* (supra) (Nyamweya, Lesiit and Odunga JJA) where the Court declined to strike out an appeal

for the sake of doing substantive justice. The respondent referred us to the following two paragraphs from the decision, which we hereby replicate:

> "23. The power to strike out a notice of appeal or a record of appeal for want of form or failure to follow the rules of procedure is discretionary. It is settled law that it is a power that requires to be exercised carefully. As was mentioned by this Court in Mukenye Ndunda v Crater Automobiles Limited [2015] eKLR, "We take the view that the rules of procedure are designed to serve as the hand maidens of justice not to defeat it."
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> 24. In our view, we do not consider that the 1st respondent has raised any grounds to warrant us to strike the appellant's memorandum and record of appeal. We find that the complaints raised are of form, and not of the content of the two impugned documents that could go the substance. The appeal should proceed to hearing and determination on the merits."

26. Having read the entire ruling in that decision, we have arrived at the conclusion that the issues raised therein are distinguishable from the instant application. The applicant therein filed an application to strike out the Memorandum and Record of Appeal for the reasons that the grounds of appeal raised issues of fact as opposed to matters of law. The competency of the Record and Memorandum of Appeal, and we dare add, the Notice of Appeal, was not an issue for determination.

27. We cannot over-emphasise the fact that the rules of this Court were formulated for a purpose. They are intended to inject order in the manner in which the conduct of the Court is administered, and to facilitate just, efficient and effective administration of justice. Where a rule is couched in mandatory terms, a party has no room for bending its letter and spirit, otherwise there would have been no need of writing it in the first instance. Rules cannot also be interpreted merely to favour the circumstances of a party. They must be read and interpreted for the purpose for which they were made. In this case, the respondent being alive to the fact that the matter involved minor children should have prompted counsel to adhere to the Rules. Our reasoning has on several occasions been restated by this Court in numerous decisions. In *Municipal Council of Mavoko v Aristocrats Concrete Company Limited* [2015] eKLR, the Court stated:

> "We find that the filing of a Rule 84 application outside the stipulated thirty [30] days renders the application incompetent. The rules serve the role of ensuring the just expeditious and efficient dispensation of justice and should be complied with. Accordingly, in the circumstances of this application, we find that the motion before us that seeks to strike out the notice of appeal on account of default is itself incompetent."

28. Further, in *Kobiro & 2 others v Orina* (Civil Appeal (Application) E203 of 2022) [2024] KECA 705 (KLR) (21 June 2024) (Ruling), the Court delivered itself thus:

> 19. This Court has, on numerous occasions, stated that the Rules of this Court exist for the purpose of orderly administration of justice before the court. The timelines for doing of certain things and taking of certain steps are indispensable in the proper adjudication of the appeal before this Court. The rules are expressed in clear and unambiguous terms and as per Kiage, J, Esther Anyango Ochieng v Transmara Sugar Company [2020] eKLR.
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> 20. Kiage J, as per this court's reasoning in Mae Properties Limited v Josephine Kibe & Another [2017] eKLR, goes further to state that where a record of appeal has not been filed, then without further ado, the court ought to deem the notice of appeal as having been withdrawn.

28. We think we have sufficiently addressed ourselves on this application. It is clear that the respondent failed to comply with mandatory provisions of the Rules of this Court. In the circumstances, we find merit in the application.

28. The final orders that commend for us to give are that the Notice of Motion dated 28th July 2022 is hereby allowed. We find that the Notice of Appeal lodged on 22nd November 2021 and the Certificate of Delay issued on 31st May 2022 are both incompetent and are hereby struck out. The respondent shall bear the costs of this application.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MARCH, 2025.

A. K. MURGOR

JUDGE OF APPEAL

.....

DR. K. I. LAIBUTA CArb, FCIArb.

JUDGE OF APPEAL

.....

G. W. NGENYE-MACHARIA

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR