



**JMM v MNN (Civil Appeal (Application) E753 of 2022)
[2024] KECA 591 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 591 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E753 OF 2022
K M'INOTI, HA OMONDI & KI LAIBUTA, JJA
MAY 24, 2024**

BETWEEN

JMM APPELLANT

AND

MNN RESPONDENT

(Being an application to strike out the Record of Appeal against the Ruling and Orders of the High Court of Kenya at Nairobi (Odero, J) dated 2nd September 2021 in Family Division Misc. App. No. E024 of 2021)

RULING

1. The genesis of the appeal and Motion before us was the suit in the Children’s Court at Nairobi in Children’s Court Case No. 126 of 2019 in which the respondent, MNN, sued the appellant, JMM, seeking, *inter alia*, legal custody, care and control of MM (the minor), maintenance, comprehensive medical cover, as well as school fees and related expenses.
2. Pending hearing and determination of the suit in which the paternity of the minor was contested, the court made ex parte orders on 6th March 2019 directing the appellant to submit to a DNA test, take out a comprehensive medical cover for the minor, provide school fees, food at KShs. 30,000 per month, shelter and clothing.
3. Consequent upon the appellant’s refusal, failure or neglect to comply with the orders aforesaid, the respondent took out a Notice to Show Cause dated 10th June 2019 in relation to the accrued arrears on account of the minor’s maintenance, school fees and related expenses.
4. Upon payment by the appellant on 13th November 2020 of KShs. 75,000 on account of the sums then due, the court lifted the warrants of arrest previously issued in enforcement of the ruling on the Notice to Show Cause aforesaid.



5. Dissatisfied with the court's directions given at a pre-trial conference on 5th February 2021 lifting the warrants of arrest, the respondent successfully sought leave to appeal the court's decision. In addition to granting leave to appeal, the court, of its own motion, stayed proceedings pending hearing and determination of the then intended appeal.
6. Subsequently, the respondent moved on appeal to the High Court of Kenya at Nairobi (Family Division) in Nairobi High Court Misc. App. No. E024 of 2021. In her Notice of Motion dated 15th February 2021, the respondent requested the High Court to: exercise its supervisory jurisdiction over the Children's Court and call for the record of proceedings, and of the court file in Children's Court Case No. 126 of 2019; set aside the order issued on 15th February 2021; and direct the Honourable Magistrate to expedite the adjudication and determination of the case aforesaid.
7. Upon hearing the respondent's Motion, the High Court (Maureen Odero, J.) gave interim orders on 5th March 2021 directing, inter alia: that the minor do remain at [Particulars Withheld] Academy; and that each parent (the appellant and the respondent) do cater for half of the school fees until such time as the respondent's Motion is heard and determined.
8. On 18th March 2021, the appellant applied for review requesting the court to set aside its orders of 5th March 2021, and to order the respondent to avail the minor for interview for admission at either [Particulars Withheld] Primary School, [Particulars Withheld] Primary School, [Particulars Withheld] School, [Particulars Withheld] Primary School or [Particulars Withheld] Primary School.
9. By a ruling dated 2nd September 2021, the court (Maureen Odero, J.) dismissed the appellant's Motion in its entirety with costs to the respondent. The learned Judge withheld her decision on the respondent's previous application to have the appellant cited for contempt of court orders of 5th March 2021, and advised the parties to "embrace dialogue"
10. Aggrieved by the ruling of Maureen Odero, J. dated 2nd September 2021, the appellant moved to this Court on Appeal and lodged his notice of appeal dated 2nd September 2021 and lodged in this Court on 17th September 2021. His appeal is founded on 8 grounds set out in his memorandum of appeal dated 1st November 2022. He faults the learned Judge for, inter alia: making orders on a matter not before the court; failing to consider that the lower court had stayed orders relating to the minor's school fees; proceeding to hear the respondent's Motion while the same was sub judice; and for failing to properly evaluate the evidence on record.
11. Pending hearing and determination of his appeal, the appellant, by a Notice of Motion dated 1st November 2022, sought orders to stay proceedings in the High Court, and stay of execution of the order of Maureen Odero, J. The Motion is supported by the appellant's affidavit sworn on 1st November 2022 and is anchored on a whopping 23 grounds to which we need not address ourselves presently.
12. It is noteworthy that the record as put to us does not contain the appellant's letter bespeaking certified copies of the proceedings in the High Court to facilitate compilation of the record of appeal. Neither does the record contain a certificate of delay to assist the Court in ascertaining compliance with the Court's Rules relating to the prescribed timelines for lodging appeals. Suffice it to observe that the record dated 1st November 2022 was filed on 3rd November 2022, followed by an amended record dated 18th November 2022. The original record was served on the respondent on 4th November 2022.
13. By a Notice of Motion dated 14th November 2022 and supported by her affidavit sworn on even date, the respondent requests this Court to order that the appellant's notice of appeal be deemed as having been withdrawn. According to the respondent, the appellant failed to take the mandatory procedural



- steps required by rule 82(1) of the *Court of Appeal Rules*, 2010 (Now rule 84(1) of the 2022 Rules) to lodge the record of appeal within sixty (60) days from the date the notice of appeal was lodged. The respondent's Motion was opposed vide the appellant's replying affidavit sworn on 22nd February 2023. In addition to the affidavits in support and in opposition to the Motion, learned counsel for the parties filed written submissions, all of which we need not interrogate, and for good reason.
14. We take to mind the fact that the respondent's Motion dated 14th November 2022 seeking orders to strike out the appellant's notice of appeal was filed on 2nd September 2021 and served on 3rd September 2021. We hasten to observe that the proviso to rule 86 of this *Court's Rules* requires that an application to strike out a notice of appeal be made within thirty (30) days from the date the notice is served on the applicant. It is clear that the respondent's Motion comes twelve-and-a-half months later. In the circumstances, we find that the respondents Motion dated 14th November 2022 is incompetent and, accordingly, the same is hereby struck out with costs to the appellant.
 15. We now turn to the respondent's second Motion dated 2nd December 2022 made pursuant to rule 84 of this Court's 2010 Rules (now Rule 86 of the 2022 Rules) seeking to have the record of appeal dated 1st November 2022 and filed on 3rd November 2022, and the amended record of appeal dated 18th November 2022, struck out. The respondent's Motion is supported by her annexed affidavit sworn on 2nd December 2022, and is anchored on 13 grounds, which we need not replicate here. Suffice it to observe that the respondent's application is essentially made on the grounds, inter alia: that the appellant failed to lodge his record of appeal within 60 days as mandated by rule 84(1) of this Court's Rules; that the appellant failed to serve upon the respondent his letters dated 3rd September 2021, 28th September 2021 and 1st December 2021, all bespeaking certified copies of proceedings as required under the proviso to rule 84(1); that, apart from his letter dated 30th May 2022, the appellant has failed to obtain a certificate of delay to aid the Court in ascertaining compliance with the procedural rules relating to timelines for filing appeals; and that, in any event, the appellant has not applied for extension of time to lodge his appeal as contemplated in rule 4 of this Court's Rules.
 16. In reply vide his affidavit sworn on 22nd February 2023 the appellant avers, among other things: that the delay in filing the record of appeal was occasioned by delay in obtaining the certified ruling, certified and typed proceedings, and the certificate of delay; that despite the typed and certified copies of the proceedings having been certified on 10th December 2021, the same were collected by his counsel on 26th October 2022; that he has requested for the certificate of delay, which is yet to be supplied; that he has already filed and served the record of appeal upon the respondent; and that it would not be fair for him to be punished and suffer on account of mistakes by his advocates, a familiar plea to which we will shortly return.
 17. In her further affidavit sworn on 13th March 2023, the respondent reiterates the factual background as set out in her supporting affidavit, and no purpose would be served in replicating them here.
 18. In support of the respondent's Motion, her advocates, M/s Andrew & Steve, filed written submissions, list of authorities and case digest dated 20th February 2023 citing 3 judicial authorities, including: Patrick Kiruja Kithinji v Victor Mugira Marete [2015] eKLR highlighting the principle that whether or not an appeal is filed on time goes to the jurisdiction of this Court; and *African Service Maintenance Limited v Comarco Supply Base (EPZ) Limited & Another* [2022] KECA 613 (KLR) highlighting the mandatory nature of the proviso to rule 84 of the *2010 Rules* (now rule 86 of the *2022 Rules of this Court*).
 19. On their part, the appellant's advocates, M/s. Kinaro & Associates, filed their written submissions and a case summary dated 22nd February 2023 citing 4 authorities, including: John Mutai Mwangi & 26



Others v Mwenja Ngure & 4 Others [2016] eKLR drawing the Court’s attention to the strict timelines prescribed in the proviso to rule 82 of the 2010 Rules (now rule 84 of the [2022 Rules](#)); and [Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others](#) [2013] eKLR where the Court observed that striking out pleadings is a draconian measure which ought to be employed only as a last resort and, even then, only in the clearest of cases.

20. Three questions arise as to whether the appellant failed to comply with the mandatory provisions of rule 84(1) of the [Rules of this Court](#); whether failure to do so would justify the draconian order sought by the respondent to strike out the appeal; and whether the delay is excusable on account of the appellant’s contention that he should not be punished or suffer on account of mistake of counsel.
21. The provision of rule 84(1) is mandatory in terms to the effect that a party desiring to move this Court on appeal is obligated to file his or her record of appeal within 60 days of lodging their notice of appeal. The exception to this mandatory requirement is where the court, on application by the appellant, extends time, or where the record of appeal includes a certificate of delay issued pursuant to the proviso to that rule, which assists in computing time within which an appeal is to be instituted. As contemplated in the certificate, 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 copies of the proceedings would be excluded in computing those mandatory timelines.
22. No such certificate is provided and, even if it were, the appellant would be precluded from relying thereon by virtue of rule 84(2). Rule 84 provides:

84. (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 sub-rule (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 in sub-rule (1) unless the appellant’s application for such copy was in writing and a copy of the application was served upon the respondents.

23. The timelines prescribed in rule 84 are intentional and purposeful. Sitting in Nakuru, this Court in [John Mutai Mwangi & 26 Others v Mwenja Ngure & 4 Others](#) [2016] eKLR emphasised the need to comply with the strict timelines within which an appellant is mandated to lodge the record of appeal

“The filing of a record of appeal is required to be done within 60 days of the lodgment of the notice of appeal by dint of Rule 82 [now Rule 84] of the Court of Appeal Rules. That timeline is strict and is meant to achieve the constitutional, statutory and rule-based



objective of ensuring that the Court processes dispense justice in a timely, just, efficient and cost-effective manner. “

24. We find nothing on record to suggest that the appellant applied for copies of the proceedings within thirty (30) days as required under the proviso to rule 84(1). Neither has he shown that he served a copy or copies of his written application for proceedings on the respondent in compliance with rule 84(2). In the circumstances, he cannot salvage his record of appeal by asserting that he had made a request for the proceedings in writing as required under rule 84. We find that he has failed to satisfy the mandatory requirements of rule 84(2) of this Court’s Rules.

25. The second question is what fate befalls the appellant’s record of appeal filed twelve-and-a-half months late, and without extension of time by an order of this Court or, at the very least, a valid certificate of delay on the basis of which delay may be excused. That record cannot escape the fateful decision to strike it out.

26. This Court in *Muzaffer Musafee Essajee & Another v Anne Njeri Mwangi* [2021] eKLR had this to say on a similar matter:

“

“15. This Court has time without number emphasised the importance of compliance with the rules of Court. In *Joyce Bochere Nyamweya v. Jemima Nyaboke Nyamweya & Another* [2016] eKLR, this Court held that parties are bound by the mandatory nature of the proviso to Rule 82 and failure to comply with the same renders an appeal defective.”

This Court in *Mae Properties Limited v Joseph Kibe & Another* [2017] eKLR, reiterated its position as follows:-

“We have said on numerous occasions that the rules of court exist for the purpose of orderly administration of justice before this court. The timelines for the doing of certain things and takings of certain steps are indispensable to the proper adjudication of the appeals that come before us. The rules are expressed in clear and unambiguous terms and they command obedience

...”

27. Clearly, the appellant failed to comply with rule 84 of the rules of this Court and, consequently, rules 85 and 86 come into play. The mandatory nature of those rules cannot be wished away by placing blame on counsel. The appellant’s plea is that he should not be made to suffer the consequences of non-compliance on account of mistake of his counsel. If that were

the case, the Rules of this Court would count for little, and would be relegated to an ensemble of hollow aspirations as opposed to the statutory commands that they are, and were meant to be.

28. In *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR, this Court had this to say on a litigant’s plea of mistake of counsel:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

29. We need not over-emphasise the fact that the responsibility to comply with the rules of this Court rests on the litigants, whose case it is that counsel conduct as mere handlers, and as the handmaidens so to speak, whose technical skills are employed at a price to advance their principal’s goals and desires.



Accordingly, in the circumstances of this case, non-compliance with the Court's Rules is not excusable on account of negligent mistake of counsel.

30. The only other questions that are left lingering in our minds, and for which we do not have answers, are these: for how long, and what must it take in time and money, in emotional distress and strife, for such legal battles waged by couples whose dependent minor waits day after day in limbo for their loving care? Can there really be a winner and a loser in such endless battles? And what of the child who watches from the sidelines with no one to turn to for answers to such questions? Suffice it to say that this Court does not supply answers to such questions, and that only the appellant and the respondent have honest answers thereto and to similar questions. The only thing this Court can humbly do is to discharge our judicial duties with utmost impartiality, as we hereby do, and always in the hope that less and less of such battles find their way in our arena of justice, all in vain.
31. Finally, we note that the instant application to strike out the record of appeal was made in good time and within 30 days of service of the record on 4th November 2022 as required under the Rules. In view of the foregoing, we reach the inescapable conclusion that the respondent's Motion dated 2nd December 2022 succeeds and is hereby allowed with orders that the appeal herein is deemed as withdrawn pursuant to rule 85 of the *Court of Appeal Rules*. The costs of the Motion and of the appeal shall be borne by the appellant. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MAY 2024.

K. M'INOTI

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JUDGE OF APPEAL

H. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

