



REPUBLIC OF KENYA



KENYA LAW
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**SMM v RNM (Civil Appeal (Application) E173 of 2023)
[2024] KECA 754 (KLR) (21 June 2024) (Ruling)**

Neutral citation: [2024] KECA 754 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E173 OF 2023
KI LAIBUTA, JA
JUNE 21, 2024**

BETWEEN

SMM APPLICANT

AND

RNM RESPONDENT

(Being an application for extension of time to file and serve the Notice and Record of Appeal out of time from the Judgment and Decree of the High Court of Kenya at Mombasa (G. Mutai, J.) delivered on 26th June 2023 in Matrimonial Cause No. E011 of 2021)

RULING

1. Before me is a Notice of Motion dated 16th November 2023 in which the applicant, SMM, seeks extension of time pursuant to rule 4 of the *Court of Appeal Rules* to file and serve a notice and record of appeal out of time from the Judgment and Decree of the High Court of Kenya at Mombasa (G. Mutai, J.) delivered on 26th June 2023 in Matrimonial Cause No. E011 of 2021.
2. The applicant's Motion is supported by his annexed affidavit sworn on 16th November 2023 and is made on 10 grounds set out on the face of the Motion, but to which I need not address myself in extenso, save to take note of the salient grounds on which the application is made, namely: that the impugned judgment was delivered on 26th June 2023 declaring certain assets as matrimonial property and determining the manner in which they were to be shared between the applicant and the respondent, Rose Nthambi Mutuku; that the applicant lodged a notice of appeal on 10th July 2023, but that it was endorsed by the Deputy Registrar on 19th July 2023, 9 days after filing, and the period stipulated for lodging pursuant to rule 77(2) of the *Court of Appeal Rules*; that he served the notice of appeal on the respondent within the prescribed period of 7 days on 24th July 2023; that he applied and paid for certified copies of the proceedings on 19th July 2023, which were ready for collection on 25th September 2023; that the certificate of delay was issued on 3rd October 2023; that he filed the record



of appeal on 25th October 2023; and that the record of appeal was served on the respondent's counsel then on record, M/s. M. K. Mulei Advocates,) on the 25th day of October 2023, the same day on which it was filed.

3. In support of the applicant's Motion, learned counsel, M/s. Munyao, Muthama & Kashindi, Advocates, filed written submissions, case digest and list of authorities dated 29th May 2023, which Mr. Kithome highlighted orally when the Motion came for hearing on the GoTo Meeting virtual platform. Counsel urged me to allow the Motion as prayed.
4. It is noteworthy that the respondent did not file any replying affidavit or submissions in response to the applicant's Motion. Neither was there any appearance for the respondent at the hearing on the virtual platform despite due service on her counsel on record with the Notice of Motion on 20th November 2023 conspicuously endorsed with today's hearing date and, subsequently, with the hearing notice via email on 27th May 2023 at 9:01 am.
5. To my mind, the notice of appeal having been filed on 10th July 2023 and endorsed by the Deputy Registrar on 19th July 2023 before release to the applicant for service, which was effected 5 days later on 24th July 2024, I find nothing to suggest that the notice of appeal was filed, lodged or served out of time to warrant extension of time as prayed.
6. With regard to the record of appeal, the request for proceedings having been made in time on 19th July 2023; the certificate of delay having been issued on 3rd October 2023; and the record of appeal having been filed and served on 25th October 2023, I find that the record of appeal was likewise filed and served within the time prescribed under rules 84(1) and 92(1) of the [Court of Appeal Rules](#).
7. In view of the foregoing, I find that the applicant's Notice of Motion dated 16th November 2023 is superfluous and does not call for the orders sought pursuant to rule 4 of the [Rules of this Court](#). Accordingly, the Motion is hereby struck out with no orders as to costs.

DATED AND DELIVERED AT MALINDI THIS 21ST DAY OF JUNE, 2024.

DR. K. I. LAIBUTA C.Arb, FCI Arb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

