



ARM v NWS (Civil Application E053 of 2023) [2024] KECA 632 (KLR) (7 June 2024) (Ruling)

Neutral citation: [2024] KECA 632 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E053 OF 2023
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA**

JUNE 7, 2024

BETWEEN

ARM APPLICANT

AND

NWS RESPONDENT

(Being an Application to strike out the Notice of Appeal dated 18th May 2023 and filed on 18th May 2023 against the Judgment and Decree of the High Court of Kenya at Mombasa (G. Mutai, J.) delivered on 28th April 2023 in Family Appeal No. E015 of 2022)

RULING

1. From the scanty record placed before us in this application, we are unable to discern the background to the dispute the subject of this application, which was brought by way of a Notice of Motion dated June 16, 2023. It was taken out by ARM, the applicant, and was expressed to be brought under rules 44, 45, 47, 77(2), 79 and 86(b) of the Court of Appeal Rules. It seeks to have the Notice of Appeal dated May 18, 2023 and filed the same day be struck out.
2. The Motion was supported by the applicant’s affidavit sworn on June 16, 2023. According to him, the impugned judgment in High Court Family Appeal No. E015 of 2022 was delivered on April 28, 2023 in his favour ; that on May 26, 2023, the respondent served him with a Notice of Appeal dated May 18, 2023 intending to appeal against the whole judgment; that the said Notice was filed outside the prescribed mandatory period of 14 days, and was not served within the 7 days; that the respondent has not demonstrated that she had requested for certified copies of the proceedings and judgment of the superior court; that the respondent has not sought extension of time to file and serve her Notice of Appeal and, hence, the Notice as filed is incompetent and should be struck out with costs.
3. In response to the application, the respondent filed her replying affidavit sworn on November 28, 2023 in which she averred that this matter is a family dispute touching mainly on issues of children and their maintenance; that it is true that she lodged the Notice of Appeal on May 18, 2023, 5 days after the



prescribed timelines had lapsed; that the reason for the delay was due to financial constraints resulting from hard economic times, and that she was not conversant with the requirement to file the said Notice within 14 days after the delivery of judgment; that it was an honest mistake and or error on her part caused by circumstances beyond her control; that this Court should exercise its discretion in retaining the Notice rather than striking it out, since allowing the application will cause harm and unnecessary prejudice to her and the children; and that the applicant will suffer no prejudice if the Notice of Appeal is retained as he will be afforded an opportunity to be heard in the Appeal.

4. We heard this application on February 26, 2024 on the Court's GoTo virtual platform when learned counsel, Mr. Collins Ondeng, appeared for the applicant while the respondent, Ms. NWS, appeared in person. They both relied on their written submissions, which they briefly highlighted.
5. The applicant, through submissions dated November 2, 2023 filed by M/s. Mutisya, Mwanzia and Ondeng Advocates, reiterated the averments in the supporting affidavit and cited the case of *Mae Properties Ltd v Joseph Kibe & Another* [2017] eKLR, stressing the need to comply with the prescribed timelines. It was contended that the respondent has no real or serious intention to lodge a proper appeal since she has not demonstrated that she requested for certified copies of proceedings and the judgment of the superior court. It was the applicant's case that the Notice of Appeal is irregular and defective as it was served outside the 7 days mandatory timelines prescribed in rule 79(1) of the *Court of Appeal Rules*. We were urged to allow the application.
6. The respondent relied on her written submissions dated November 28, 2023 in which she reiterated her averments in the replying affidavit and emphasised that this is a matter concerning the welfare of their children and their interest, and that, by striking out the Notice of Appeal, their interest will be curtailed. According to the respondent, the 5 days delay was not unreasonable given the proffered explanation. She cited Article 159(2) of the *Constitution* with regard to the need to dispose of matters on substantive justice rather than on procedural technicalities. We were urged to exercise the Court's wide discretionary powers in extending time to file the Notice of Appeal and, consequently, deem it as properly filed, served and duly on record. The respondent prayed that the Motion be dismissed.
7. We have considered the Motion, the affidavits in support of and in opposition to the Motion as well as the submissions made by and on behalf of the parties.
8. Rule 77(1) & (2) of the *Rules* of this Court provides that:
 1. A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court. Notice of appeal.
 2. Each notice under sub-rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.
9. Rule 79 (1) of the *Rules* provides:

An intended appellant shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal:

Provided that the Court may, on application which may be made ex parte, within seven days after the lodging of the notice of appeal, direct that service need not be effected on any person who did not take part in the proceedings in the superior court."
10. In this case, it is not contested that the Notice of Appeal was filed outside the prescribed period. Whereas the judgement sought to be appealed against was delivered on April 28, 2023, the Notice of Appeal is dated May 18, 2023. Under rule 77(2) of the *Rules*, the last day for lodging the Notice ought



to have been May 12, 2023. By filing the Notice on May 18, 2023, the respondent was 6 days late. Service having been effected on May 26, 2023, the same was similarly a day out of time.

11. This Court has on several occasions pronounced itself on the consequences of noncompliance with the timelines prescribed under the *Court's Rules*. In that regard, we adopt the position taken by the Court in *John Mutai Mwangi & 26 Others v Mwenja Ngure & 4 Others* [2016] eKLR in which it was appreciated that the strict timelines:

“...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.”

12. The Supreme Court in *Hamida Yaroi Shek Nuri v Faith Tumaini Kombe & 2 others* [2019] eKLR has had occasion to explain the importance of the Notice of Appeal by holding that:

“Being such an important document, the law provides on when it should be filed and served. We agree with the 3rd respondent that service of a Notice of Appeal is crucial as this Court noted in the case of *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others* [2014] eKLR thus:

“[37] Service of a notice of appeal is crucial. Kiage, JA in *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others* [2013] eKLR states:

‘... I am not in the least persuaded that Article 159 of the *Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...’

[38] We are persuaded by this *dictum* of the learned judge. The notice of appeal ought to be served as provided by the law and all subsequent legal procedures followed.”

13. In our view, a person who runs/falls afoul of the law ought to speedily take remedial measures before the other party takes action to have the process nullified. A party who has defaulted in complying with the procedural stipulations should not merely tell the Court, when confronted with an application to strike out its processes, that no prejudice has been occasioned, and that its cause ought to be determined on merits. This Court in *Sukwinder Singh Jutley v Prudential Association Co. of Kenya Ltd & Another* Civil Appeal (Application) No. 62 of 2004 held that:

“In procedural rules that lack clarity, the Court is at liberty to lean on constructions which aid the course of justice but not in clear rules which have been interpreted many times



by the Court as to depart from the rule without changing it would be an aberration that would confound and confuse litigants and should not be countenanced even for a solitary unintentional omission.”

14. The rationale for strict adherence to rules of practice and procedure was likewise explained in *Chelashaw v Attorney General & Another* [2005] 1 EA 33, where it was held that without rules of practice and procedure, the application and enforcement of the law and the administration of justice would be chaotic and impossible, and their absence or non-adherence would lead to uncertainty of the law and total confusion since laws serve a purpose and they enhance the rule of law. That enforcement of such rules is imperative was emphasized by this Court in *Onjula Enterprises Ltd v Sumaria* [1986] KLR 651, where it was held that:

“The rules of the court must be adhered to strictly and if hardship or inconvenience is thereby caused, it would be that easier to seek an amendment to the particular rule. It would be wrong to regard the rules of the court as of no substance. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to disregard of the principle involved. See *London Association for the Protection of Trade & Another v Greenlands Limited* [1916] 2 AC 15 at 38.”

15. This Court in *Taracisio Githaiga Ruithibo v Mbutia Nyingi* [1984] KLR 505, cautioned that no court, particularly this one, should wish away the rules of court so ignobly.

16. It is therefore clear that both the filing and service of the Notice of Appeal were out of time. The respondent’s response to the application in light of failure to take any remedial step cannot cure the omission. While the reasons advanced may have been considered in an application for extension of time under rule 4 of the *Court of Appeal Rules*, they are of no assistance to the respondent in this application. The respondent, may be out of her ignorance of the *Rules*, urged us to deem the Notice of Appeal as having been duly filed and served. Without an application seeking regularization of the Notice of Appeal, we cannot do so in an application of this nature. Without an application seeking to extend time, the respondent’s inaction is inexcusable, especially when this Court has consistently held that its rules of procedure are not for cosmetic value, but meant to aid the Court in exercise of its mandate under the *Rules* in not only an orderly, but also in a predictable manner. [See *The Board of Trustees of Local Authorities Provident Fund & another v Kenya County Government Workers Union & 67 others* Nrb Civil Application No. E248 of 2020].

17. In conclusion, we find that the Notice of Appeal dated May 18, 2023 and filed the same day against the decision in Mombasa High Court in Family Appeal No. E015 of 2022 made on 28th April 2023 is incompetent and is hereby struck out.

18. We make no order as to costs in light of the unchallenged disclosure by the respondent that the dispute concerns the welfare of children.

19. Orders accordingly

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JUNE, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

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

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JUDGE OF APPEAL

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G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

