



REPUBLIC OF KENYA



KENYA LAW
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FNM v EMP (Civil Application 49 of 2020) [2023] KECA 307 (KLR) (17 March 2023) (Ruling)

Neutral citation: [2023] KECA 307 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 49 OF 2020
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MARCH 17, 2023

BETWEEN

FNM APPLICANT

AND

EMP RESPONDENT

(Being an application to strike out the notice of appeal dated 28th May 2020 and lodged in court on 28th May 2020 in an intended appeal against the judgment delivered by Mugure Thande, J on 5th May 2020 in Mombasa Divorce Cause No. 31 of 2015)

RULING

1. FNM, herein after the applicant, has filed the notice of motion application dated June 29, 2020 brought pursuant to rule 84 of the *Court of Appeal Rules*, 2010, [now rule 86 of the Court of Appeal Rules 2022], [hereinafter the Rules]. The application seeks orders, that the notice of appeal lodged by EMP (hereinafter the respondent) in this Court on May 28, 2020, and served on June 16, 2020 be struck out.
2. The background to the appeal stems from a divorce suit between the parties, where in addition to dissolution of the marriage, the respondent sought an injunction against the applicant restraining him from interfering with matrimonial properties, as well as a declaration that the properties listed in the Originating summons be declared as matrimonial properties. The applicant in his cross-petition sought that the list of properties be enlarged to included properties that the respondent had left out in her petition. Also sought was an order for accounts, an order for injunction restraining the respondent from transferring the named properties, a declaration that any such transfer would be null and void, and an order that the respondent be compelled to sign transfer forms in favour of the applicant.
3. The court found no merit in the applicant's cross-petition and found partial merit in the respondent's petition. Vide judgement rendered on May 5, 2020, the presumed marriage was ordered dissolved, and



- a declaration made that the respondent was not entitled to the properties listed in the petition. It was also ordered that the applicant was not entitled to a share in the properties listed in the cross-petition.
4. The respondent was dissatisfied with the said decision and filed a notice of appeal dated May 28, 2020 and lodged in court on May 28, 2020.
 5. The grounds of the application are that the Notice of Appeal dated May 28, 2020 and lodged in court on May 28, 2020 was served on June 8, 2020 via email and on June 16, 2020 in person; that the filing and service of the Notice of Appeal was outside the prescribed time. It has been contended that the Notice of Appeal is incompetent; that the delay in filing and service of the same is prejudicial to the applicant and is contrary to the overriding principles under Sections 3A and 3B of the [Appellate Jurisdiction Act](#).
 6. The affidavit in support of the application reiterated the grounds contained in the Notice of Motion and added that the pendency of the notice prevents the applicant from enjoying the fruits of his judgment as the respondent has applied for stay pending appeal.
 7. Submissions dated December 17, 2020 in support of the application were filed by P.A. Osino & Co Advocates. Learned Counsel while placing reliance on the case of [Martin Kabaya v David Mungania Kiambi](#) (2015) eKLR argued that in the absence of an application for extension of time, the instant application has merit. Counsel also relied on the doctrine of laches and the case of [Government of Mombasa v Kooba Kenya Limited](#) (2019) eKLR for the proposition that the unexplained delay, the lack of a letter bespeaking proceedings and the belated application for extension of time are reason enough to allow the application. It was lamented that the notice of appeal prevented the applicant from using the property that the court awarded to him and yet the applicant has been enjoying the same without paying rent, and at the same time, enjoying the properties awarded to her by the court.
 8. The application is opposed. The respondent has sworn a replying affidavit in which she explains that she recently appointed new advocates to take over from her previous advocates after she discovered her erstwhile advocates made a mistake in the Civil Application No. 55 of 2020 by, resulting in the filing of the Civil Application No. E035 of 2022 between the same parties. She deposed that this court directed that the application in Civil Application No. E035 of 2022 be heard first, therefore urged that the same be heard before the instant application.
 9. Mutisya & Associates advocates filed Submissions dated September 23, 2022 in opposition to the instant application. Counsel urged that the respondent had filed an application, Civil Application No. E056 of 2020, for extension of time to file the Memorandum of Appeal and the Record of Appeal out of time. It was urged that the application went before a single Judge of this Court, who directed a fresh application be filed due to a mistake in the application. That it necessitated the respondent to file a second application, No. E056 of 2022 which went before a single Judge of this Court, who directed that the instant application be heard first. That application, which is for extension of time to file the two records, is still pending.
 10. Counsel attributed the delay to the court that did not supply proceedings in time, as well as the Covid-19 that had adverse effects on court operations. It was explained that the Notice of Appeal was only 9 days outside the required time, that the delay is not inordinate; that by dint of Article 159(2) (d) of the [Constitution](#), the meritorious appeal ought not to be sacrificed on the altar of technicalities. It was maintained that the mistake of counsel ought not to be visited on a litigant.
 11. The application was heard virtually on the October 3, 2022.

At the hearing, learning counsel Ms. Osino was present for the applicant, while learned counsel Mr. Mutisya was present for the respondent. Both counsel had filed their submissions, dated June 29, 2020 and September 23, 2022, respectively. An application was made by Mr. Mutisya for the respondent, to



have the respondent's application in E056 of 2022 heard first, but in light of the applicant's objection, and in light of the fact the applicant's application had been filed first in time, the application was declined.

12. Ms. Osino urged that the respondent filed the Notice of Appeal 9 days late, and that they had not given sufficient explanation for the delay. It was urged that the excuse that Covid-19 affected court processes, counsel urged that the applicant in the further affidavit had contested that as cases continued to be filed electronically. Further that the respondent has had sufficient legal advice to guide in filling of her processes.

13. Mr. Mutisya started by admitting the late filing of the Notice of Appeal, urging the delay was only 9 days, and therefore not inordinate or unreasonable, and was not proof of an indolent party. Further that the applicant stood to suffer no prejudice.

He urged that the respondent had made efforts to rectify and make amend through its application where extension of time to file the application was sought, and that all the mistakes in issue were mistakes of counsel which ought not to be visited on the respondent.

14. We have considered the application, the affidavits by both parties and the submissions, both oral and written and lists and bundles of authorities. The applicant has invoked Rule 86 of the Rules to invite us to strike out the respondent's Notice of Appeal for being filed out of time without leave. Rule 79 gives the timelines on filing and service of the Notice of Appeal and provides:

79.(1) 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.

15. In this case the respondent lodged the Notice of Appeal on the May 28, 2020, and served electronically on June 5, 2020, and in person on 16th June 2020. There was delay in the service of the Notice.

16. Rule 86 speaks to the action that can be taken in case of delay in filing or service or failure to take an essential step, and it provides:

“86. A person affected by an appeal may, at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground—

- a. that no appeal lies; or
- b. that some essential step in the proceedings has not been taken or has not been taken within the prescribed time:

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days after the date of service of the notice of appeal or record of appeal, as the case may be.”

17. This being an application for striking out the Notice of Appeal, for it to succeed the applicant has an obligation to demonstrate that the application for striking out was filed within thirty (30) days from the date of service upon them of the notice. It is common ground that the applicant was served on



June 6, 2020 through email and on June 16, 2020 in person. The applicant filed this application on June 29, 2020, that is twenty-nine days after service upon it of the record of appeal which in our view is within the thirty-day statutory period provided for in the above Rule. We are, therefore, properly seized of the application.

18. The respondent filed two affidavits, one by the respondent and the other by his counsel. The two delved into explanation for the delay occasioned in filing the Notice, has addressed the length of the delay involved, has urged that delay is not inordinate, and whether there has been any steps taken to redress. With due respect to the respondent's counsel, these grounds will be very useful in an application for extension of time to file the impugned Notice, but not in an application for striking out. (See *Wakaba Ndegwa & Another v Lucy Nyaguthii* [2017] eKLR and *Government of Mombasa v Kooba Kenya Limited* (2019) eKLR)
19. It is common ground that the Notice of Appeal was served out of time, on the ninth day after it was 'filed.' Though the respondent has urged us to disregard his blatant flouting of the Rules of procedure, urging that we should allow the appeal to be heard on the merits. Rule 86 of the Rules is couched in mandatory terms. Procedural rules are equally important and should be adhered with in order not to impede dispensation of justice, which is the very reason why they were formulated.
20. As to the principles that should be applied to guide the Court in such an application? The law on the principles applicable is now settled. This is answered in the case we cite below, which also gives the purpose for the service and the need to adhere to the timelines given in the Rules, and the seriousness of noncompliance with the timelines within which to serve a Notice of Appeal. In *Daniel Nkirimpa Monirei v Sayialele ole Koilel & 4 Others* [2016] eKLR, this Court stated:

“Whichever way, one looks at it, there was no service of the Notice of Appeal on the applicant. The purpose of service of a Notice of Appeal is to alert the parties being served that the case in question has not been concluded yet, as the same has been escalated to another level. This enables the party to prepare and get ready for another fight, be it by way of gathering resources or just getting mentally prepared for defending the intended appeal. Failure to serve a party with a Notice of Appeal within the time prescribed by law gives a party false belief that the matter has been concluded, only to be ambushed later with the record of appeal in which the said notice is tucked away somewhere in the record. That occasions prejudice to the ambushed party, and it is in our view a habit that should not be countenanced in any fair and just process. That would explain why Rule 77 (1) of the Court of Appeal Rules is couched in mandatory terms.”

21. We cannot say more. The Notice of Appeal filed by the respondent, dated and filed on May 28, 2020 is fatally defective for being filed out of time and without leave. It can only face one fate, which is to strike it out, which we hereby do.
22. The respondent will also pay the costs of this application.

DATED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MARCH 2023

S. GATEMBU KAIRU (FCI Arb.)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

