



**MZM v JMM & 3 others (Civil Appeal (Application)  
E024 of 2022) [2023] KECA 982 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 982 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) E024 OF 2022  
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA  
JULY 28, 2023**

**BETWEEN**

**MZM ..... APPELLANT**

**AND**

**JMM ..... 1<sup>ST</sup> RESPONDENT**

**CMP ..... 2<sup>ND</sup> RESPONDENT**

**TRUSTEES OF THE ASSOCIATION OF JEHOVA'S WITNESS  
(EA) ..... 3<sup>RD</sup> RESPONDENT**

**LANDS REGISTRAR- WUNDANYI ..... 4<sup>TH</sup> RESPONDENT**

*(Being an application to strike out the appellant's appeal against the judgement of J.N. Onyiego, J. rendered on 23rd December 2021 in Mombasa Family Appeal No E011 of 2021)*

**RULING**

1. JMM, hereinafter the 1<sup>st</sup> respondent is the applicant in this Notice of Motion application dated March 23, 2022. He seeks only one prayer, to have the appellant's appeal against the judgement of J. Onyiego, J. rendered on December 23, 2021 struck out in its entirety.
2. It is brought under Rule 84, 86 (1) and 87 (5) of the *Court of Appeal Rules* [now 86, 88(1) and 89 (5) of the 2022 Rules] hereinafter the Rules. The grounds for the application are on the face of the application and the supporting affidavit. In brief the 1<sup>st</sup> respondent faults the appellant's memorandum of appeal dated March 7, 2022 of being incompetent for raising matters of fact on a second appeal contrary to section 79D as read with section 72 (1) of the *Civil Procedure Code*; that ground 6 of the memorandum of appeal is doubly incompetent for lacking certainty and specificity as required under Rule 88(1) of the Rules; and that the record of appeal has altered and uncertified documents in contravention of Rule 89(2) as read with Rule 89 (5) of the Rules.



3. The background to the dispute is that MZM the appellant in the appeal, filed a suit against CMP, the 2<sup>nd</sup> respondent herein, claiming she was his first wife, and that he had three other wives and children. In her plaint before the SRM Court Taveta, filed on September 3, 2019, the appellant challenged the 2<sup>nd</sup> respondent for the sale, without her consent and that of the entire family, of part of the family land known as Taita/Taveta/Kimala Mata/xxx.Trustees of the Association of Jehova’s Witness (EA), the 3<sup>rd</sup> respondent, was sued as the party that bought the property Taita/Taveta/Kimala Mata/xxx from the 2<sup>nd</sup> respondent, while the Lands Registrar- Wundanyi, the 4<sup>th</sup> respondent was sued for removing the caution the appellant placed against the said land, without notice to her.
4. The appellant sought a declaratory order that the suit property formed part of matrimonial property and injunctive relief restraining the respondents from transferring, constructing, selling, charging, sub-dividing, taking possession, or otherwise dealing in any manner with the suit property. The 2<sup>nd</sup> respondent in his response stated that he was separated from the appellant for 30 years, that the suit property was acquired after they had separated and therefore could not qualify to be matrimonial property. The 4<sup>th</sup> respondent’s defence on the other hand was that the caution lodged by the appellant was procedurally removed, after the 2<sup>nd</sup> respondent’s letter requesting for its removal and the appellant’s failure to respond to the notice issued by the Registrar to file any objection.
5. On August 25, 2020, the appellant amended her plaint to include more properties, pleading that the 2<sup>nd</sup> respondent was in the process of disposing of more family properties being; Taita Taveta,/ Kimala Mata/xxxx, Kimorigo/Mboghoni/xxx and Starehe Kamili/Mwanza Ngombe Allotment no.xx without spousal and family consent. She sought two orders; one, a declaratory order that the specified properties formed part of matrimonial property and two, injunctive relief restraining any disposal and or dealings with the said properties.
6. The trial magistrate vide judgement rendered on November 11, 2020, found that the suit properties constituted matrimonial property with the plaintiff having an equitable beneficial interest thereof hence an overriding interest. The appellant’s suit was allowed and a decree issued on November 11, 2020. JMM, the 1<sup>st</sup> respondent, who is the applicant herein, thereupon filed a notice of motion dated December 10, 2020, before the SRM’s Court Taveta. He sought an interim order of stay of execution of the decree issued on November 11, 2020; leave to be joined as a party to the suit; review of the impugned judgement of the court and the setting aside of the orders issued thereto. He also sought leave to file pleadings as well as any such documents that he deemed fit to support his claim over the suit property. He applied to have the suit heard denovo. His case was that he was the registered owner of L.R. No. Kimorigo/Mboghoni/xxx, one of the properties the subject of the appellant’s suit, having bought it from the 2<sup>nd</sup> respondent.
7. In her response, the appellant averred that there was a dispute over the suit land; that the 1<sup>st</sup> respondent would be better served by claiming a refund of his money from the 2<sup>nd</sup> respondent. The trial magistrate dismissed the application on the grounds the court was functus officio and that the 1<sup>st</sup> respondent did not qualify as an interested party as the suit land was sold to him lis pendens.
8. Aggrieved by the said ruling, the 1<sup>st</sup> respondent filed his first appeal to the High Court on grounds he was denied a right to be heard; that a judgment altering a title deed No. Kimorigo /Mboghoni/xxx was rendered without requiring its production, that there was erroneous introduction of an amended plaint after close of the pleadings without leave of the court; that the suit title was inherited land and not matrimonial property; and, that the law or evidence did not support the ruling by the trial Magistrate.
9. The High Court was convinced that the 1<sup>st</sup> respondent was kept in the dark with regard to the proceedings on the suit land, and therefore he was not aware of the said proceedings. The High Court



found that the 1<sup>st</sup> respondent was entitled to a hearing as an interested party, being the registered owner of the suit property. It was concluded that there was greater prejudice in denying the 1<sup>st</sup> respondent the right to be heard as compared to the prejudice of starting the suit de novo. The High Court substituted the Magistrate's ruling dated April 15, 2021 with the order allowing the applicant's Motion dated December 10, 2020 in its entirety, and ordered the hearing of the suit de novo.

10. The appellant was aggrieved by the High Court decision allowing the applicant's quest to be enjoined in the suit and for the suit to be heard de novo. and so filed the appeal, the subject matter of this application. The memorandum of appeal took issue with allowing the 1<sup>st</sup> respondent's application and for his joinder in the suit as an interested party. It was sought that the impugned judgement of the High Court be set aside.
11. The application was heard before us on the February 6, 2023. Learned counsel present were Mr. Masore for the 1<sup>st</sup> respondent/ applicant, and holding brief for Mr. Angima for the 2<sup>nd</sup> respondent, Mr. Nyange for the appellant and Mr. Mwandeje for the 3<sup>rd</sup> respondent. There was no appearance for the 4<sup>th</sup> respondent. Mr. Mwandeje informed us that the 3<sup>rd</sup> respondent was not opposed to the application, while Mr. Masore informed us that the 2<sup>nd</sup> respondent was not opposed to the application and that the 4<sup>th</sup> respondent did not participate in the trial before the High Court neither did they file any papers before that court.
12. Mr. Masore in his submissions urged that the appellant coached all six grounds of appeal in the stock phrase "The learned Judge erred in law and fact". He urged that there is statutory exclusion of matters of fact from consideration by this court on a second appeal by dint of sections 79 D as read with 72 (1) of the *Civil Procedure Act*. That in determining the appellate decree of the High Court this court is restricted to determining points of law, and that it must resist delving into matters of fact. For that proposition, he placed reliance on *Mbugua & 4 others v M.O.M Al Amin Transporters Ltd & another* Civil Appeal 9 & 10 of 2020. He also relied on the concurring judgment of Chesoni J. as he then was in *Stephen Murungia & another v Rep* (1982-1988)1 KAR 360 for the proposition that in an appeal confined to questions of fact only, the appellate court should resist delving into findings of fact as a holding in law or mixed findings of fact and law. He implored us to follow our own decisions on the issue raised and allow the application.
13. Mr. Nyange for the appellant opposed the application. The appellant swore a replying affidavit dated January 16, 2023 in response to the application and the supporting affidavit of the 1<sup>st</sup> respondent. In her affidavit, the appellant deposed that contrary to the averments by the 1<sup>st</sup> respondent, the record of appeal filed was paginated. She also deposed that the appeal raised points of law, including seeking a definition of who an interested party is, and whether they can be enjoined in a suit where they claim the suit property.
14. Mr, Nyange in his submissions urged that the application has no merit. He urged that the 1<sup>st</sup> respondent was participating in the proceedings as an interested party, and as such was legally incapable of filing an application for striking out the appeal, as he was not a substantive party in the suit. For that proposition he placed reliance on *Mumo Mutema Trusted Society of Human Rights v Mumo Matemu* (2014) eKLR where the court held :

"a suit is a 'solemn' process solely 'owned' by the parties...Consequently, where a person is enjoined as an Interested Party ...cannot be heard to seek to strike out the suit, on the grounds of defective pleadings."



15. Urging that the rules are meant to assist in the administration of justice, Mr. Nyange placed reliance on this court's case of *Mukenya Ndunda v Crater Automobiles Limited* (2015) eKLR where this court emphasized:

“The power to strike out an appeal or notice of appeal on account of failure by an appellant to follow the rules of procedure requires to be exercised carefully and only in cases where it is shown that the party at fault flagrantly or deliberately or flippantly or recklessly Filed to follow the rules.”

16. He also relied on *Autoports Freight Terminal Limited v Kenya Ports Authority* (2019) eKLR where this court dismissed an application for the striking out of the appeal for failure to include a certified copy of decree of the Superior Court, on the ground the applicant had demonstrated diligence in remedying the situation.

17. We have considered this application, and the question that falls for our determination is whether the appellant's appeal should be struck out for being incompetent or for procedural lapses complained of. The 1<sup>st</sup> respondent has invoked Rules 88 (1) and 89(5) of the Rules. Rule 89(2) of the Rules, in relation to an appeal from a Superior Court in its appellate jurisdiction, provides that the record shall contain documents relating to the proceedings in the trial court corresponding as nearly as may be to those set out in Rule 89(1). In addition, the record should contain documents relating to the appeal to the first appellate court.

18. Rule 88 (1) of the Rules provides:

Contents of Memorandum of Appeal

“A memorandum of appeal shall concisely set forth under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying—

- a. the points which are alleged to have been wrongly decided; and
- b. the nature of the order which it is proposed to ask the Court to make.”

19. Rule 89 (2) of the Rules provides:

Contents of record of appeal

2. For the purposes of an appeal from a decision of superior court in exercise of its appellate jurisdiction, the record of appeal shall contain documents relating to the proceedings in the trial court corresponding as nearly as may be to those set out in sub-rule (1) and the following documents relating to the first appellate court-
  - (a) the order ,if any,giving leave to appeal;
  - (b) the memorandum of appeal
  - (c) the record of proceedings; and
  - (d) the certified decree or order



(5) Each copy of the record of appeal shall be certified to be correct by the appellant or by any person entitled under rule 22 to appear on the appellant's behalf.

20. The 1<sup>st</sup> respondent invoked Rules that speak to contents of the memorandum of appeal and the record of appeal, as shown above. He does not contend that the content of the two records fall short of the Rules relied upon. They are not afoul of content; rather that they are challenged for lack of form. Regarding the memorandum of appeal, it has been contended that in the manner in which it is framed, it is lacking in specificity and certainty; and in addition, it invites this court to interrogate matters of both law and fact, which this court cannot interrogate, it being a second appeal.
21. The appellant has contested this and has explained that sometimes facts must be applied in reaching conclusions of the law and that findings on law may be drawn from facts. The 1<sup>st</sup> respondent did not respond to this averment by the appellant, which means the explanation is not contested.
22. Regarding the record of appeal, the 1<sup>st</sup> respondent based his application on documents he annexed to the supporting affidavit, to demonstrate that the record of appeal had alterations, that some documents were not certified, and that the record was not paginated. The appellant has contested these allegations and has referred to the record of appeal she filed as proof that what was complained of was not the reality. The annexures in the 1<sup>st</sup> respondent's affidavit are not the record of appeal and so we are unable to understand the logic of using annexures to challenge what is contained in a different record. Besides, what the 1<sup>st</sup> respondent is complaining of is lack of form. What he should do is to apply to strike out the offending documents in the record of appeal, rather than affecting a whole record of appeal, which may not have any issues.
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 *Mukenya 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".
24. In our view we do not consider that the 1<sup>st</sup> 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 to the substance. The appeal should proceed to hearing and determination on the merits.
25. In the result, we find no merit in the 1<sup>st</sup> respondent's application dated March 23, 2022, which is hereby dismissed with costs to the appellant.
26. Those are our orders.

**DATED AND DELIVERED IN MOMBASA THIS 28<sup>TH</sup> DAY OF JULY, 2023**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

**G.V. ODUNGA**



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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

