



**PAK & another v Kenya Christian Professional Forum & 6 others (Civil Appeal (Application) E020 of 2022) [2023] KECA 1226 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1226 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPEAL (APPLICATION) E020 OF 2022  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
OCTOBER 6, 2023**

**BETWEEN**

**PAK ..... 1<sup>ST</sup> APPLICANT**

**SALIM MOHAMED ..... 2<sup>ND</sup> APPLICANT**

**AND**

**KENYA CHRISTIAN PROFESSIONAL FORUM ..... 1<sup>ST</sup> RESPONDENT**

**ANNE KIOKO ..... 2<sup>ND</sup> RESPONDENT**

**CATHERINE NYAMBURA KAGENI ..... 3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 5<sup>TH</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE ..... 6<sup>TH</sup> RESPONDENT**

**THE SENIOR PRINCIPAL MAGISTRATE KILIFI ..... 7<sup>TH</sup> RESPONDENT**

*(An application for striking out the Appeal from the Judgment and Decree of the High Court of Kenya at Malindi (R. Nyakundi J.) delivered on 24<sup>th</sup> March 2022 in High Court Petition No. E009 of 2020)*

**RULING**

1. Pak and Salim Mohamed (hereinafter the “1<sup>st</sup> Applicant” and “2<sup>nd</sup> Applicant” respectively) seek orders in an application dated 7<sup>th</sup> October 2022 that the Record of Appeal dated 5<sup>th</sup> September 2022 filed herein by Kenya Christian Professional Forum, Anne Kioko and Catherine Nyambura Kageni, the Appellants in this appeal and 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in the application, be struck out. The action by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents of filing the present appeal has aggrieved the Applicants, who aver in the



- affidavit in support of their application that no appeal by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents lies, as the said Respondents are strangers to the dispute in Malindi High Court Petition No. E009 of 2020 from which the appeal arises as they were not parties therein, and hence lack standing to proffer the said appeal.
2. The Applicants further aver that they filed Malindi High Court Petition No. E009 of 2020 against the Attorney General, the Director of Public Prosecution, the Inspector General of Police and the Senior Resident Magistrate, Kilifi, who are the 4<sup>th</sup> to 7<sup>th</sup> Respondents herein, which Respondents have already filed an appeal against the decision delivered in Malindi High Court Petition No. E009 of 2020, being Malindi Civil Appeal No E030 of 2022, by way of Notices of Appeal filed by the Attorney General on 31<sup>st</sup> March 2022 and by the Director of Public Prosecution on 5<sup>th</sup> April 2022. The Applicants urge that Rule 82 of the Court of Appeal Rules of 2022 requires that where two or more parties have given Notice of Appeal from the same decision, the second and subsequent notices to be lodged shall be deemed to be Notices of Address for service. Therefore, that the Notice of Appeal by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents filed on 7<sup>th</sup> April 2022 amounts to a Notice of Address of service and did not qualify them to lodge an appeal.
  3. Further, that the Memorandum of Appeal filed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent raise new issues which were never tried before the High Court and should therefore not be presented for appeal. Lastly that the 1<sup>st</sup> to 3<sup>rd</sup> Respondents have filed a similar appeal before the Court of Appeal in Nairobi in Civil Appeal No 594 of 2019 seeking materially the same outcome. As such, that the present appeal is fatally defective, incompetent and an abuse of the Court process.
  4. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on their part filed a Replying Affidavit sworn on 15<sup>th</sup> January 2023 by Ann Kioko, the 2<sup>nd</sup> Respondent herein. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents avers that the 1<sup>st</sup> Respondent is an ecumenical organisation and enjoys affiliation with umbrella church organizations in Kenya including the National Council of Churches of Kenya (NCCCK), the Kenya Conference of Catholic Bishops (KCCB) and Evangelical Alliance of Kenya (EAK), and has been instrumentals in assisting the Court in arriving at just decisions by being joined in various court cases involving issues of life and family. Likewise, that the 2<sup>nd</sup> Respondent works as a Campaigns Director at CitizenGo Africa, an organization that advocates for family values, promotion of life and religious beliefs, while the 3<sup>rd</sup> Respondent is an apostle at Sozo Church of God. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents state that they were aggrieved by the trial Court's decision since the judgment touched on the right to life and family under the Constitution, and was filed in public interest pursuant to Article 22 of the Constitution.
  5. According to the 1<sup>st</sup> to 3<sup>rd</sup> Respondents, their Notice of Appeal dated 6<sup>th</sup> April 2022 and the Record of Appeal dated 5<sup>th</sup> September 2022 are properly filed in accordance with the Court of Appeal Rules, 2022 and should not be struck out for any want of form. Additionally, Article 3 (1) of the Constitution obligates the 1<sup>st</sup> to 3<sup>rd</sup> Respondent to uphold and defend the Constitution, thus the Respondents should intervene in the proceedings of a constitutional nature similar to the one before Court and were therefore clothed with the requisite locus standi in their own right pursuant to Article 22 (1) and 258 (1) of the Constitution to file the instant appeal by dint of rule 77 of the Court of Appeal Rules, 2022. Further, the Court of Appeal Rules, 2022 provides that any person can file a Notice of Appeal as long as they conformed to the Rules of this Court.
  6. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents also urge that the instant application is in breach of the mandatory provisions of Rule 86 of the Court of Appeal Rules which provides that an application to strike out a Notice of Appeal or Record of Appeal should not be brought after the expiry of thirty days after the date of service of the Notice of Appeal, and that the Applicants were throwing a spanner on the Notice of Appeal filed and served in April 2022 and sought locus standi as the basis of seeking it struck out.



- That it is trite law that a person who is not a party to the proceedings at the trial Court, is properly seized with capacity to institute an appeal to this Court where, the said person has an interest and that the Applicants argued the substantive appeal in their ground in the Notice of Motion on an interlocutory and preliminary application and thus the grounds could not be raised at this stage since it is premature.
7. We heard the application on this Court's virtual platform on 3<sup>rd</sup> May 2023, and learned counsels Mr. Martin Onyango together with Mr. Timothy Thondu appeared for the Applicants and highlighted their written submissions dated 9<sup>th</sup> January 2023, while, learned counsels Mr. Charles Kanjama, SC, appeared together with Ms. Rachael Wambui, for the 1<sup>st</sup> to 3<sup>rd</sup> Respondents and similarly highlighted written submissions dated 25<sup>th</sup> January 2023. Learned counsel Mr Mkala appeared for the 4<sup>th</sup> to 7<sup>th</sup> Respondents, and indicated that he had not filed any submissions and would rely on, and was supporting the pleadings and submissions by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents.
  8. The learned counsel for the Applicants urged that the 1<sup>st</sup> to 3<sup>rd</sup> Respondents lack locus to file the notice of appeal dated 6<sup>th</sup> April 2022 or to prosecute the subject filed appeal by the 4<sup>th</sup> to 7<sup>th</sup> respondents as they were not parties in, nor participants in the trial Court, and while citing the decisions by the Supreme Court of Kenya in *Francis Karioko Muruatetu & Another v R & 5 Others* (2016) eKLR and *Methodist Church in Kenya v Mohammed Fugucha & 3 others* [2019] eKLR, submitted that Article 22 of the *Constitution* cannot be the basis for admission of an interested party to any existing proceedings, where such a party has not shown a personal stake of interest in the matter, and only seeks to champion the public interest. Therefore, that Article 22 is not a formula for a person to file an appeal where he or she never participated as a principal party before the trial court.
  9. Furthermore, that under the *Constitution* or the *Court of Appeal rules*, it is doubtful whether a person who is not joined in a suit as a party or is not a necessary party can transform the suit into one in which they become the principal party, appeal the suit and seek substantive relief. Counsel reiterated that the issues raised by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents were new issues that were not tried before the High Court and have previously filed a similar appeal, and the instant appeal is therefore in abuse of the process of Court as held in the case of *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 Others* (2009) KLR.
  10. Learned counsel for the 1<sup>st</sup> to 3<sup>rd</sup> Respondents, while citing Articles 3 (1), 22 (1), 164 and 258 (1) of the *Constitution*, Rule 77 of the *Court of Appeal Rules* and the decision of this Court in *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others* (2017) eKLR, submitted that the 1<sup>st</sup> to 3<sup>rd</sup> Respondents have locus to file an appeal, despite not being parties to the proceedings in the trial court as such can intervene in the proceedings of a constitutional nature similar to the one before this Honourable Court at any stage including the appellate stage.
  11. The counsel further reiterated that the Applicants had not met the threshold to warrant striking out of the appeal under Rule 86 of the *Court of Appeal Rules* of this court, as it was many months since the Notice of Appeal was filed and served upon the Applicants, who had not sought leave of Court to institute the application out of time. Lastly, that the issue as to whether the 1<sup>st</sup> to 3<sup>rd</sup> Respondents' appeal raises new issues could not be dealt with at this stage, and in any event the allegations are not supported by evidence as the specific issues are not pointed out in the application. They argue that the application is an abuse of Court process since the Applicant premised it on non-existent points of law and grounds that are untenable in law.
  12. The law on striking out of an appeal as set out in Rule 86 is settled. Any person affected by an appeal may apply to strike out a Notice of Appeal or Appeal on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. The provision to Rule 86 requires such an application to be brought before the expiry of thirty (30)



days from the date of service of the Notice of Appeal or record of appeal as the case may be. The Applicants seek to strike out the record of appeal dated 5<sup>th</sup> September 2022, and during the hearing, the Applicants' learned counsel alleged that the said Record of Appeal was served on the Applicants on 11<sup>th</sup> September 2022, and that there was no delay in filing the instant application, which was lodged on 12<sup>th</sup> October 2022.

13. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents' counsel submitted that service of the Record of Appeal was effected on 6<sup>th</sup> September 2022. It is notable that the Applicants did not provide any evidence of the said Record of Appeal nor of the date it was lodged in Court. The counsel for the 1<sup>st</sup> to the 3<sup>rd</sup> Respondents provided evidence of the date of service of the said Record of Appeal to support their assertions, by way of an affidavit of service sworn on 3<sup>rd</sup> May 2023 by one Racheal Purity Wambui, an advocate practicing in the firm of Muma & Kanjama Advocates, who are on record for the 1<sup>st</sup> to 3<sup>rd</sup> Respondents. The said advocate deponed that she served the Applicants and their advocates with the Record of Appeal and Memorandum of Appeal by email on 6<sup>th</sup> September 2022, using the same address by which they had served the Notice of Appeal on 6<sup>th</sup> April 2022, and annexed a copy of the email print.
14. Rule 92 of the *Court of Appeal Rules* of 2022 in this respect requires the Record of Appeal to be served within seven days of its lodging, and it is evident that the service was within time. Therefore for purposes of the provision to Rule 86, the thirty days for filing an application to strike out the Record of Appeal started to run on 7<sup>th</sup> September 2022, and the deadline for lodging the application was therefore 7<sup>th</sup> October 2022. The instant application, though dated 7<sup>th</sup> October 2022, was lodged on 12<sup>th</sup> October 2022 and was therefore lodged out of time. In the absence of any evidence of extension of time to file the application, it is therefore incompetently before us.
15. We are therefore constrained to strike out the Applicants' application dated 7<sup>th</sup> October 2022, with costs to the 1<sup>st</sup> to 3<sup>rd</sup> Respondents.
16. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 6<sup>TH</sup> DAY OF OCTOBER, 2023.**

**S. GATEMBU KAIRU FCIArb**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

