



**Njuguna v Hotpoint Appliances & another (Civil Appeal E134 of 2024)
[2025] KEHC 6575 (KLR) (Commercial and Tax) (16 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6575 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E134 OF 2024**

RC RUTTO, J

MAY 16, 2025

BETWEEN

DAVID NJUGUNA PETITIONER

AND

HOTPOINT APPLIANCES 1ST RESPONDENT

SIVARAJ PILLAI 2ND RESPONDENT

RULING

1. The Respondents moved court by way of an application under certificate of urgency seeking the following prayers;
 - a. ...(Spent)
 - b. The Honourable Court be pleased to grant leave to the Respondents to file their submissions in opposition to the appeal.
 - c. The Honourable Court to admit the draft annexed submissions as duly filed.
 - d. In the alternative this Honourable Court be pleased to strike out the instant appeal for being filed out of time.
 - e. The High Court be pleased to issue any such orders as it may deem just and expedient.
 - f. The costs of this application be in the cause.
2. The application is supported by the affidavit of Zachary Gichiri, sworn on 5th March, 2025 and is based on grounds that: the case progressed ex-parte as the Respondents were operating under the assumption that the parties were negotiating with a view of reaching settlement; judgment was delivered on 22nd



December 2023 and the appeal instituted on 17th May 2024 way past the stipulated timelines for lodging an appeal; the Respondents were made aware of the appeal sometime in October 2024 after being served with the Record of Appeal; the Respondents are desirous of ventilating their case against the Appellant; no prejudice will be occasioned to the appellant; and that it is in the interest of justice that they be granted an opportunity to be heard.

3. In response to the application the Appellant filed a Replying Affidavit sworn on 22nd February 2024 by Dennis Mwangongo Njuguna. He opposed the application and deponed that they have never been invited to negotiate the matter, and if a formal approach is taken, they would be willing to consider. Further that they have twice served the Respondents with the pleadings but the Respondents have not been keen.
4. In response to the issue of delay in filing the appeal, the Appellant deponed that the Notice of Appeal is dated 22nd February 2024, and an appeal process begins vide a notice of appeal hence there was no inordinate delay since the Judgment was delivered on 22nd December 2023 when his advocates were on Christmas holiday.
5. Upon the directions of the Court, this application was canvassed by way of submissions. The Applicant/Respondents' submissions are dated 30th April, 2025. As at the time of writing this Ruling the Appellant/Respondent had not file its submissions.
6. The Applicants set out two issues for determination namely: whether the Applicants should be granted leave to file their submissions out of time; and whether the Appellant's Replying affidavit is fatally defective.
7. As to whether they should be granted leave to file their submissions, the Applicants place reliance on the overriding objective principle and Article 159 of Constitution to submit that the delay in filing submissions should not preclude them from being granted leave to file. They explained that the delay was occasioned by the Applicants' attempt to resolve the dispute out of court. They relied on the case of Richard Ncharpi Leiyangu Versus Independent Electoral Boundaries Commission & 2 others (2013) eKLR to buttress this point.
8. They further urged that no prejudice will be occasioned to the Appellant as he has already prosecuted the appeal and may still be granted leave to file supplementary submissions if need be. Reference was made to the case of Nicholas Kiptoo Arap Korir Salat versus IEBC & 6 others [2013] eKLR. They urged the Court to exercise its inherent discretion to admit the late filing of the submissions, as denying such admission would unjustly penalize the Applicants.
9. On the second issue, namely whether the Appellant's Replying affidavit is fatally defective, the Applicants submitted that the Appellant/Respondent replying affidavit dated 22nd April 2025 is not executed by the deponent, hence fatally defective and should be struck out. It was submitted that the Replying affidavit does not conform to the required standards for it to be admitted as a legal document as it it not executed by the deponent, the Appellant herein.
10. That the defect, according to the Applicants, cannot be remedied by Order 19 Rule 7 of the Civil Procedure Rules or Article 159(2) of *the Constitution* because the defect affects the veracity and probative value of the arguments which goes to the substance of the reply. The applicant prayed that the replying affidavit be struck out, which then leaves the application as unopposed. They urged the Court to thus allow the application as prayed.



11. From the above, two issues arise for determination; whether the Appellant/Respondent’s replying affidavit sworn on 22nd April 2025 is defective and whether the application dated 5th March 2025 should be allowed.
12. On the first issue, I have perused the Replying Affidavit sworn on 22nd April, 2025 by Dennis Mwangongo Njuguna and noted that albeit it being commissioned and dated by a Commissioner for Oaths, the same was not executed and/or signed by the deponent. Notably, no explanation has been provided for his omission.
13. In the Supreme Court case of Gideon Sitelu Konchella v Julius Lekaney Ole Sunkuli & 2 Others [2018] eKLR the apex Court while addressing itself on the import of section 5 of the Oath and Statutory Declaration Act, held as follows;
 - (7) The making of affidavits is governed by the *Oaths and Statutory Declarations Act*, Cap 15 Laws of Kenya. Section 5 of the Act provides, thus:

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

Further, Section 8 states:

“A magistrate or commissioner for oaths may take the declaration of any person voluntarily making and subscribing it before him in the form in the Schedule.”

Hence, an affidavit must clearly state the place and date where it was made and it must be made before a Magistrate or a Commissioner for oaths.
 - (8) We have no hesitation in finding that the purported Replying Affidavit filed by the 1st Respondent is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence it has no legal value in the matter before us. We have checked all the eight copies of the Replying Affidavit as filed in the Court Registry and confirmed that none of the copies was signed, commissioned and dated. Consequently, as the same is defective, it is deemed that there is no Replying Affidavit on record filed by the 1st Respondent.”
14. Guided by the above, failing to sign an affidavit goes to the substratum of the affidavit as it raises doubt as to the authenticity of the person said to have deponed the affidavit and on the veracity of the contents therein. By definition, an affidavit is "A voluntary declaration of facts written down and sworn to by a declarant before an officer authorised to administer oaths." (See Otieno & another *v Independent Electoral and Boundaries Commission (IEBC) & 2 others (Petition E002 of 2022)* [2022] KEHC 10054 (KLR) (6 July 2022) (Judgment)). Thus an “affidavit” that has not been signed by the declarant lacks the veracity and authority of being facts stated on oath. As the ‘purported’ declarant has not appended his/her signature, it suffices it to find that the document remains a compilation of statements of facts, with no force of an affidavit. The same is fatal defective and amounts to no affidavit. It therefore follows that the Appellant/Respondent’s replying affidavit allegedly sworn on 22nd April 2025 is for striking out for being fatally defective.
15. Having struck out the Replying Affidavit, it then follows that Respondents/Applicants application remains unopposed. Despite the application being unopposed this Court will examine and determine on its merits the prayers sought.



16. The first prayer being sought is that leave be granted to the Respondents for them to file their submissions opposing the appeal. In the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR, the Court of Appeal held that;

“Submissions are generally parties marketing languages; each side endeavoring to convince the court that its case is the better one. Submissions we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence.”

17. Considering that the judgment has not yet been written, and recognizing that submissions serve to assist parties in articulating and emphasizing arguments already present in the the record of appeal, I find no prejudice that would be caused or occasioned to the Appellant if the Respondents are allowed to file their submissions. Accordingly, this prayer is for granting.

18. The 2nd prayer being sought is that this Court proceeds to strike out the appeal for being file out of time. It is not in dispute that judgment subject of the appeal was delivered on 22nd December 2023. From the Court Filing System, the appeal was lodged on 17th May 2024 when the Appellant lodged a Notice of Appeal “under Rule 75 of the Court of Appeal Rules dated 22nd February 2024 as well as a memorandum of appeal of even date”.

19. Order 42 of the Civil procedure Rules provides for Appeals. It provides that every appeal to the High Court shall be in the form of a Memorandum of Appeal. Thus it was irregular for the Appellant herein to file the Notice of Appeal dated 22nd February 2024 under Rule 75 of the Court of Appeal Rules as these Rules are applicable only when appealing to the Court of Appeal.

20. Further Section 79G of the *Civil Procedure Act* provides that appeals from a subordinate court to the High Court shall be filed within a period of 30 days from the date of decree or order appealed against. In this instance therefore, the Memorandum of Appeal having been filed on 17th May 2024, was filed out of time.

21. The Supreme Court of Kenya in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR . (Nick Salat Case) in addressing the issue of an appeal being filed out of time and on extension of time, held as follows:

“No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court’s Registry. This is irregular as that document is unknown in law and the same should be struck out.”

22. Consequently, being guided by the above holding of the Supreme Court, and for which I am bound, I do find that the appeal herein having been filed out of time and without leave of court is due for striking out. The upshot of the above is that the application dated March 5, 2025 is allowed to the extent that the appeal herein is struck out with costs to the Respondents for being filed out of time without leave of court.

23. Orders accordingly

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 16TH DAY OF MAY, 2025.

RHODA RUTTO



JUDGE

In the presence of;

.....for Petitioner

.....for Respondent

Sam Court Assistant

