



**IN THE COURT OF APPEAL OF KENYA**

**AT NAIROBI**

**CIVIL APPLICATION NO 29 OF 1987**

**WAIHENYA .....APPELLANT**

**VERSUS**

**KANINU.....RESPONDENT**

**RULING**

November 6, 1987, **Apaloo JA** delivered the following Ruling.

On March 2, 1987 the applicant filed in this court, a notice of motion and prayed for certain reliefs. It is not necessary to reproduce the orders the applicant sought on the motion. The application came for hearing before Masime Ag JA on October 13, 1987. During the hearing, some defects of a procedural nature were discovered on the motion paper.

So the applicant prayed for leave to amend. The court acceded to the prayer in these words:

“Leave to applicant to amend”

Had the applicant asked the court for a reasonable time to make the amendment, it seems very likely that the court would have acceded to it. This is a benefit jurisdiction, which is normally exercised to put an application in proper form. But counsel for the applicant appeared to have been content with the grant of the leave in that form.

He apparently took advantage of the court’s indulgence and filed the amended version of the motion on October 28, 1987, that is fifteen days after he was granted leave.

When the matter came before the hearing on November 3, 1987, counsel for the respondent objected to its competency. She said since the learned judge did not specify when the amended version of the motion should be lodged, rule 44(2) of the Court of Appeal rules operates to oblige the applicant to lodge the amendment within 48 hours of the giving of leave. In other words, the amended version should have been filed not later than October 15, 1987. Counsel submitted that as there has been a failure to comply with this subrule, the present application is incompetent and fails in limine.

Counsel for the respondent had no answer to that contention. He said he was unaware of that rule and that it would have been impracticable to have complied with it since his client, an old man lives in a rural area, and it would not have been possible to get in an affidavit from him within the 48 hours prescribed by the rule. He said he lodged the application promptly the day after receiving his affidavit.

Had this matter been one entirely for the exercise of my discretion, I would have exercised it in the applicant’s favour and entertained the motion. But rule 44(2) provides in mandatory terms that:

“Failure to comply with the requirements of the subrule, the leave so given shall determine.”

The position then is that the applicant did not set on foot proper application and as the leave granted him to regularise it, is deemed by the force of the subrule to have been withdrawn. I cannot entertain the application.

I cannot help feeling some sympathy for the applicant, as he is being driven from the judgment seat

without a hearing. But this court is governed by rules of law not the hardship of any individual case.

Sorry though I am, I must accede to the respondent's contention and dismiss this application with costs.

**November 6, 1987**

**APALOO JA**