IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MURGOR, LAIBUTA & NGENYE, JJ.A.)

CIVIL APPEAL NO. E052 OF 2023

BETWEEN

THISTLE LIMITED, FORMERLY

T/A SAI ROCK BEACH HOTEL.....APPELLANT

AND

THE CHIEF MAGISTRATE, MOMBASA
.....
RESPONDENT

PETER MWAKUNJE KOMBE.....INTERESTED PARTY

(Being an appeal from the whole Judgment of the Employment and Labour Relations Court at Mombasa (Ongaya, J.) delivered on 1st April 2022

in

Mombasa ELRC Judicial Review Appl. No. E008 Of 2021)

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JUDGMENT OF THE COURT

The Appellant, Thistle Limited, (formerly trading as Sai

Rock Beach Hotel and Spa), applied for Judicial Review by way of a Notice of Motion dated 15th October 2021, and subsequently an Amended Notice of Motion on 18th

November 2021, brought under ***Articles 10, 23, 25(c), 40, 47, 48 and 50(1)*** of the

Constitution, Section 8(2) of the ***Law Reform Act, Sections 7, 8, 9, 11*** and ***12*** of the ***Fair Administrative Action Act,*** and ***Order 53 Rules 1*** and ***2*** of the ***Civil Procedure Rules.***

In the Motion, the Appellant sought the following substantive orders:

> *a)An order of certiorari to bring into the Court and quash the Judgment dated 9th July 2021, together with the decree and certificate of stated costs dated 31st August 2021, issued by the Chief Magistrate, Mombasa, in CMCC No. 119 of 2018 (Peter Mwalukunje Kombe v. Sai Rock Beach Hotel).*
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> *b) An order of prohibition to restrain the Chief Magistrate, Mombasa, from executing or otherwise enforcing the said judgment, decree and certificate of costs.*
>
> *c) Costs of the application.*

Leave to file the application was granted on 14th October 2021 and was supported by a Statement dated 13th September 2021 and a Verifying Affidavit sworn by ***Amunullah Shamshudin Rashid.***

It was the Appellant's case that when it formerly operated a hotel enterprise at Bamburi, Mombasa, known as Sai Rock Beach

Hotel and Spa, it was sued by the ***Interested Party, Peter Mwalukunje Kombe***, in *ELRC Case No. 550 of 2017*, which was later transferred to the Chief Magistrate's Court at Mombasa

and registered as *CMELRC No. 119 of 2018.* In that suit, the Interested Party claimed:

1. Two months' salary in lieu of notice — Kshs. 42,769.00;
2. Underpayment as per the Minimum Wage Order — Kshs. 69,586.10 and Kshs. 114,921.00;
3. Days worked but unpaid — Kshs. 21,384.50;
4. Refund of NSSF deductions for 16 months — Kshs. 3,200.00;
5. Refund of NHIF deductions for 16 months — Kshs. 5,120.00;
6. Fine for unlawful deduction and non-remittance — Kshs. 100,000.00;
7. Accrued leave for two years (48 days) — Kshs. 59,876.60; and
8. Maximum compensation for unfair termination — Kshs. 256,614.00, The total claimed was Kshs. 673,471.20, together with costs and interest.

The Appellant stated that the suit was fully heard in the lower court, both parties filed submissions, and the matter was mentioned before Hon. Kyambia, Chief Magistrate, on 31st March 2021 when judgment was fixed for 4th June 2021. Thereafter, it was claimed that there was no record of what transpired next.

The Appellant annexed its Verifying Affidavit together with copies of the proceedings for 2nd March 2021 and 31st March 2021, which showed no record of what transpired thereafter. It contended that no further date for delivery of a

judgment was given, and no notice was issued by the court. The Appellant also

averred that its advocates only became aware of the Judgment upon receipt of a letter dated 11th August 2021, which it received on 12th August 2021 from the Interested Party's advocates, informing them that Judgment was delivered on 9th July 2021 and demanding payment. Until then, no notice of delivery of the Judgment had been received either from the court or from the opposing advocates.

The Appellant further claimed that the Judgment showed that both parties and their advocates were absent when it was dated, signed, and delivered, which it contended was contrary to ***Sections 22*** and ***65*** of the ***Civil Procedure Act*** and ***Order 21 Rules 1, 3(1)*** and ***7*** of the ***Civil Procedure Rules***, as a Judgment must be pronounced in open court; and that, since none of the parties was present and no notice was served, its advocate could not have attended court. It argued further that a Judgment must be signed at the time of delivery and, if not properly delivered, any signature appended would be of no legal consequence; and that it was entitled to appeal under ***Section 12*** of the ***Employment and Labour Relations Court Act*** as read with ***Section 65*** of the ***Civil Procedure Act,*** but that it was

denied that right as the Judgment only came to its attention after expiry of the 30-day period allowed for appeal period. It added that the trial court ought to have notified parties by email consistent with Covid-19 protocols then in force; that the delivery of the Judgment in the absence of both parties and without

notification was unreasonable and contrary to legitimate expectation, and in breach of the Fair Administrative Action Act.

On his part, the Interested Party, through a Replying Affidavit sworn on 3rd November 2021, admitted having sued the Applicant in *CMELRC No. 119 of 2018,* which was fixed for judgment on 4th June 2021. On that date, the judgment was not ready, and the parties were advised to check on 11th June 2021, and thereafter on every Friday; that, upon receiving the Judgment, his counsel wrote to the Appellant's counsel on 11th August 2021 pursuant to ***Order 21 Rule 9(1)*** *of the* ***Civil Procedure Rules, 2010*** informing them of the Judgment. The letter was duly served and received on 12th August 2021; and that the Appellant's advocates did not respond, whereupon the Interested Party's counsel applied for the decree and certificate of costs, which were issued on 31st August 2021 and served on 3rd September 2021. He claimed that, when the Appellant failed to satisfy the decree, execution ensued and, on 15th September 2021, M/s Ndutumi Auctioneers proclaimed the Appellant's property; and that the Appellant subsequently sought leave to file these Judicial Review proceedings, which were served on 17th September 2021. The

Interested Party maintained that the application was a ploy to delay execution since the Applicant had not taken any steps to appeal out of time.

The Respondent did not file a replying affidavit but filed written submissions opposing the application. In the submissions, the Respondent supported the position taken by the Interested Party, contending that the *ex parte* Applicant's motion lacked merit; that the Chief Magistrate's Court acted within its jurisdiction in delivering judgment and issuing the decree and certificate of costs in *CMELRC No. 119 of 2018;* that the Appellant had an alternative remedy of the right to appeal, which it failed to pursue within the statutory timelines; that Judicial review was not designed to substitute an appeal or to correct alleged errors of law or fact committed by a subordinate court; and that the application was therefore misconceived, an abuse of process, and intended only to delay execution of a valid Judgment. The Respondent urged that the application was without merit and that it be dismissed with costs to the Interested Party and the Respondent.

Considering the application, the trial Judge ascertained that the central issue for determination was whether the delivery of Judgment by the Chief Magistrate's Court without notice to the parties rendered that Judgment invalid, and whether Judicial

Review was the appropriate remedy in the circumstances. The Judge found that, although the Appellant was not notified of the specific date for delivery of the lower court's Judgment, this omission did not render it a nullity; that, once a judgment has been duly written, signed and dated by a

judicial officer with proper jurisdiction, it remains valid even if it is delivered in the absence of the parties. The Judge took the view that the law does not make it a requirement for parties to be physically present for the pronouncement of a judgment in order for it to take effect.

On the question of the right to a fair hearing, the court held that the Appellant was heard in full before the Chief Magistrate's court; that the proceedings had been completed and written submissions filed; that the only complaint raised related to the lack of notice of the Judgment's delivery which, in the Judge's view, did not amount to a violation of the right to be heard under the Constitution or under the Fair Administrative Action Act; and that the Appellant's claim was not one of denial of a fair hearing, but rather of lack of timely notification of the date for delivery of the Judgment. The Judge also opined that the Appellant's proper recourse was to pursue an appeal, and not a Judicial review. The court restated the well-established principle that judicial review is concerned only with the decision-making process — whether it was lawful, rational, and procedurally fair. Since the Appellant's grievances concerned the correctness of the lower court's

Judgment and the subsequent execution process, those were appropriate issues for appeal.

The Judge further observed that the Appellant had not made any attempt

to apply for leave to appeal out of time despite being aware that the Judgment

was delivered. In his view, the decision to bring judicial review proceedings instead of an appeal against the decision suggested an intention to delay the lawful execution of the lower court's decree.

Having considered all these factors, the Judge found that the Appellant had failed to demonstrate any illegality, irrationality, or procedural impropriety on the part of the Chief Magistrate's Court in the handling of *CMELRC No. 119 of 2018.* As a result, there was no basis for granting the orders of certiorari or prohibition sought.

Aggrieved, the Appellant has filed an appeal to this Court on grounds that: the learned Judge was in error in basing the decision on the absence of a certified record of proceedings when none of the parties had disputed the proceedings for the relevant date; in assuming without evidence that the trial magistrate had requested the parties to be checking for delivery of the Judgment every Friday; in failing to hold that, when a court is uncertain of the date it will deliver a judgment, the court directs that it will be delivered on notice; in failing to hold that it is not an obligation for parties to attend court every Friday to enquire whether the judgment was ready, but that it is the obligation of judicial officers

to inform parties when judgments are expected to be delivered; in applying different standards of proof to the parties; in holding that certified proceedings

for prerogative orders was necessary; in holding that the judgment of the trial

magistrate was dated, signed and delivered in accordance with the law, and was delivered to all the parties; in holding that no decree and certificate of costs was exhibited; in basing his decision on procedural technicalities; and in holding that the Appellant had not established legality, irrationality or procedural impropriety so as to justify the reliefs sought.

Subsequent to the appeal, the 1st Respondent lodged a Notice affirming the decision of the Employment and Labour Relations Court dated 12th May 2025.

When the appeal came up for hearing, learned counsel ***Mr. Kinyua Kamundi*** appeared for the Appellant and learned counsel ***Ms. Kagoi*** appeared for the 1st Respondent. Though served with the hearing notice, there was no appearance for the Interested Party who, in any event, had filed written submissions.

Prior to the hearing of the appeal, Ms. Kagoi sought leave of the Court to withdraw the Notice affirming the decision dated 12th May 2025. Since Mr. Kinyua did not have any objection to its withdrawal, the grounds affirming the appeal were marked as having been withdrawn.

Submitting orally, Mr. Kinyua stated that the Judicial Review proceedings sought to remove Employment and Labour Relations Court and quash the

Judgment of the trial magistrate's court for the reason that it was delivered without due notice to the parties; that the Judgment was to have been delivered on specific dates, but was not; that the parties were to check for delivery of the Judgment every Friday as this was at the height of the Covid-19 pandemic; and that no order or directions were issued for counsel to check when the Judgment would be delivered. It was further submitted that the parties were in agreement that the Judgment was delivered in their absence, which was a violation of their constitutional right to be informed; that no harm would have been occasioned by deferring the Judgment, and nothing prevented the court from stating that it would deliver the Judgment on notice; and that no such directions were issued and, furthermore, though judgments would ordinarily be emailed to the parties, it was not done in this case.

In response to the appeal, the Interested Party submitted that the appeal lacked merit and was incompetent as under ***Rule 8(4)*** of the ***Employment and Labour Relations Court (Procedure) Rules, 2016*** the filing of the trial court's proceedings and all documentary evidence relied upon was not

optional but mandatory for any appeal; that the rule expressly requires that a Memorandum of appeal be accompanied by copies of the proceedings, evidence, and the Judgment from the case being appealed; and that, where these documents are

not filed with the memorandum, the Appellant is required to file them as soon as possible and within a reasonable time.

On behalf of the 1st Respondent, counsel submitted on three issues: first, whether the learned Judge found that the proceedings and decree required to be annexed to the appeal; secondly, whether the grounds for questioning of the Judgment of the trial magistrate's court were proved; and, thirdly, whether the orders sought should be granted. On the first issue, counsel submitted that, it was common ground that the Appellant did not attach the decree, and that no affidavit verifying the decree was attached; that there was considerable time for the Appellant to lodge the decree and the proceedings, but that it had failed to do so; and that, on this ground alone, the appeal should fail.

On the second issue as to whether the Appellant proved that the Judgment should be quashed, ***Section 7*** of the ***Fair Administrative Actions Act*** specifies that, in the Judicial Review application, the Appellant pleaded that the Judgment should be set aside on grounds of illegality, irrationality and procedural impropriety, yet the Appellant did not point to any act in support of the allegations, but merely relied on suspicion.

As to whether the order should be granted and the Judgment set aside, it was submitted that it could only be set aside if there was evidence of illegality or

procedural impropriety; and that, as this was not demonstrated, the Appellant was not entitled to the orders sought.

For its part, the Interested Party relied on the written submission and, likewise, submitted on three issues, namely: the failure of the Appellant to supply or annex the proceedings of the trial court, the decree and the statement of costs all of which are a mandatory requirements as they enable a court to appreciate what had transpired during the trial court; and that the Appellant's refusal, neglect or failure to file and serve certified copies of the trial court's proceedings effectively deprived both the appellate court and the Judge of the material necessary to determine the issues in contention. Counsel maintained that the Appellant could not properly appeal against a decision whilst at the same time withholding the very records that formed the basis of that decision.

The Interested Party therefore submitted that the learned Judge was correct in holding that the certified proceedings should have been supplied for the determination of the Judicial Review application. Such compliance, they argued, was consistent with the law and mandatory provisions of ***Rule 8(4).*** Counsel further

pointed out that, even before this Court, the Appellant’s record of appeal still lacked certified copies of the trial court proceedings. Consequently, the appeal before the court was incompetent and incapable of

being determined on its merits.

In support of this proposition, counsel relied on the case of ***Salim Mramba Omar vs Omar Katar & Another, Employment Appeal No. E012 of 2020*** where the court held that a first appellate court cannot consider or determine an appeal in the absence of the trial court's proceedings, and that such an appeal is incompetent and liable to be struck out. The case of ***Frodak Kenya Limited vs Makunda, ELRC Appeal No. E005 of 2023 [2024] KEELRC*** 820, which cited the Supreme Court decision in the case of ***Bwana Mohamed Bwana vs Silvano Buko Bonaya & 2 others [2015] eKLR***, was relied upon for the proposition that without a Record of appeal, a court cannot determine the cause before it; that an appeal lodged without inclusion of the requisite documents is defective and incompetent and, as such, divested the court of jurisdiction. On this basis, the Interested Party submitted that the Appellant's appeal was similarly incompetent and ought to be dismissed.

Regarding the delivery of the trial court's Judgment, counsel submitted that the Judgment in *Mombasa CMELRC No. 119 of*

2018 was delivered on 9th July 2021, a Friday, which was consistent with the trial court's earlier directions that the parties check for delivery of the Judgment on Fridays; that, having failed to file certified copies of the trial court proceedings, the court was in no position to confirm or dispute this fact. It was further submitted that the trial court's decision was rendered after both parties were heard and after they had filed their

written submissions in accordance with ***Rule 28(1)(a)*** of the ***Employment and Labour Relations Court (Procedure) Rules, 2016***; and that the rule empowers the court to deliver Judgment after considering all relevant facts and documents presented before it. It was submitted that the Judgment was properly in writing, contained a concise statement of facts and reasons, and was duly signed and dated by Hon. Francis N. Kyambia, Chief Magistrate, as required by ***Rule 28(2)*** and ***(3)*** of the same Rules. Counsel argued that the Appellant's claim that the Judgment was irregular was therefore unfounded.

On the issue of the decree and certificate of stated costs, the Interested Party pointed out that these were not supplied by the Appellant, but that they were filed and exhibited in the Interested Party's replying affidavit in *Judicial Review Cause No. E008 of 2021*; that the Judge was therefore correct in finding that it was the Interested Party, and not the Appellant, who had produced the documents.

Referring to the Record of appeal, counsel submitted that the Appellant was notified of the trial court's Judgment on 11th August 2021, but failed to express its dissatisfaction or requesting

for the proceedings; that, as a result, the Appellant had failed to comply with ***Rule 13(5)*** of the ***Court of Appeal Rules, 2010*** which requires every tenth line of each page of the record of appeal to be

numbered in the right-hand margin. Further, counsel referred to a prior ruling

of 17th March 2023 where the appellate court had granted the Appellant leave to file a competent appeal within 30 days, warning that failure to do so would result in the automatic lapse of the orders; that, despite this direction, the Appellant had not complied and, as a consequence, there was no competent appeal before this Court.

Responding to the 1st Respondent submissions, counsel for the Appellant doubted whether the Fair Administration Actions Act was applicable to judgements. It was submitted that the Judgment was supplied to the Employment and Labour Relations Court as it was annexed to the verifying affidavit; and that the Interested Party also annexed a copy of the Judgment to his replying affidavit. Counsel reiterated that rules should be adhered to, and that the court should have notified the parties the date of delivery of the Judgment.

This is a first appeal where the duty of this Court is to analyze and re- assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in the case of ***Selle vs Associated Motor Boat Co. Ltd [1968] EA 123*** thus:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should

always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)".

66 4:

This Court further stated in the case of ***Jabane vs Olenja, [1986] KLR 661,***

"More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial Judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi -vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870".

Having considered the Record of appeal and the parties' submissions, the issues that arise for determination are:

i) whether in a Judicial review application the Judgment or order was necessary for grant of prerogative orders, and whether they were made available to the court;

ii) whether a notice for delivery of the Judgment was

issued by the trial Magistrate;

iii) whether different standards of proof were applied to the Appellant, the Respondent and the Interested Party;

*iv) whether in failing to comply with **Order 2 rule 1** and **3** the Appellant proved illegality, irrationality or procedural impropriety in delivery of the Judgment by the trial Magistrate; and*

v) whether the Appellant established the elements of legality, irrationality or procedural impropriety to justify the reliefs sought.

Before addressing the main issues, it is observed that the issue concerning different standards of proof applied by the learned Judge were unsubstantiated and, as a result, we have no basis on which to address it.

Turning to the issue as to whether certified proceedings seeking prerogative orders were necessary for determination of the Judicial Review application, and whether such proceedings were made available to the court, it is instructive that the law on Judicial review as specified under ***Section 8*** and ***9*** of the ***Law Reform Act*** and ***Order 53*** of ***the Civil Procedure Rules*** are, by virtue of ***rule 7*** of the ***Employment and Labour Relations Rules 2016,*** applicable to matters of employment and labour relations.

Order 53 Rule 7 of the ***Civil Procedure Rules*** provides:

> ***"In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion***

he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court (including courts of equal status)".

The provision is clear that an applicant in an application for certiorari shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion a copy of such

document or documents verified by affidavit with the registrar, are made available to the court, or, if the document or documents are not provided, the reasons for failing to do so are explained to the satisfaction of the High Court.

In its Judicial Review application, the Appellant sought orders of certiorari to move the Employment and Labour Relations Court and quash the Judgment of the trial magistrate's court for the reason that it was not issued pursuant to a notice for delivery of the Judgment. The learned Judge found that, although the Judgment was made available to the court, the Appellant failed to provide the decree and the statement of costs which prejudiced the court's ability to determine whether or not the orders sought should be issued.

From a consideration of the Record, there is nothing that shows that the Appellant provided either the decree or the statement of costs. This is because the gravamen of the Appellant's application was that no Judgment was delivered and that, therefore, there was no judgment or decree to be lodged together with Judicial Review application. More specifically, paragraph 11 of the Judicial Review application reads:

"..as Judgment was not delivered, there cannot be a Decree. It is therefore necessary for the Judgment and the Decree to be quashed..."

This Court in the case of ***Biren Amritlal Shah & Another vs Republic & 30 others [2013] eKLR*** held thus:

"Judicial review is not concerned with reviewing the merits or otherwise, of a decision by a public entity, in respect of which the application for judicial review is made, but the decision-making process itself. It is important to note in every case, that the purpose of judicial review is to determine whether the applicant was accorded fair treatment by the concerned public body, and that it is not within the remit of the court to substitute its own opinion with that of the public entity charged by law to decide the matter in question."

The purview of Judicial review was clearly set out in the case of ***Municipal***

Council of Mombasa vs Republic & Umoja Consultants Ltd,

Civil Appeal No. 185 of 2001 thus:

"Judicial review is concerned with the decision-making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision. It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made,

it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but is a statutory body which can only do what is authorized by the statute creating it and in the manner authorized by statute."

In the case of ***Pastoli vs Kabale District Local Government Council & Others*** ***[2008] 2 EA 300*** it was held:

> ***"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ... Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality."***

In effect, the afore-cited authorities are explicit that Judicial review is mainly concerned with the decision- making process, and not with the merits of the decision itself. Since Judicial review seeks to determine whether the process by which the decision was arrived at was legal, rational and procedural, it was incumbent upon the Appellant to provide the impugned decision, in this case the Judgment or Decree, to enable the court to ascertain whether it was valid or deficient. Without it, there was no decision on which the Judicial review application was founded, and therefore no decision for the Judicial Review court to quash.

As a consequence, the Judicial Review application was incompetent and ought to have been struck out in the first instance.

But, having said that, the Record shows that,

notwithstanding the position taken by the Appellant that no Judgment was delivered and therefore there was no resultant decree, the learned Judge reached a finding that the trial magistrate delivered the Judgment on 9th July 2021. In so finding, the learned Judge held:

> ***"What is not in dispute is that there was a judgment dated, signed and delivered on 09.07.2021 by the trial court. It is also clear on the face of the Judgment and the verifying affidavit and the replying affidavit that both parties were absent at the date of delivery of the Judgment. In the circumstances, the Court returns that in view of the judgment on the record herein, the judgment was duly delivered in the absence of both parties…"***

An examination of the Record discloses that; indeed, the Judgment was to be delivered on 4th June 2021. It was not delivered on the date reserved but, according to the Interested Party's averments, parties were told to keep checking on each Friday to ascertain whether or not the Judgment had been delivered. The Judgment was subsequently delivered on Friday, 9th July 2021, in the absence of the parties. The Interested Party stated that he learnt of its delivery on 11th June 2021 and notified the Appellant on 11th August 2021. The Judgment, as acknowledged by the learned Judge, was annexed to the Interested Party's Replying Affidavit, which demonstrated that there was indeed a judgment in existence, contrary to the Appellant's contestation and notwithstanding that it failed to produce it. On this basis, as was the learned Judge, we too are

satisfied that the trial Magistrate delivered the Judgment on 9th July 2021, which then became the decision upon which the instant Judicial Review proceedings were premised.

> Having so found, we turn to the central issue for determination which is

whether the trial Magistrate was in breach of ***Order 21 Rules 1, 3 (1)*** and ***7*** of the

Civil Procedure Rules, which required a notice to be issued to the parties prior to pronouncement, signing and dating of the Judgment in open court.

In this regard, the learned Judge had this to say:

> ***"It is also clear on the face of the judgment and the verifying affidavit and the replying affidavit but both parties were absent at the delivery of the judgment. In the circumstances, the court returns that in view of the judgement on record herein, the judgement was duly delivered but in absence of both parties and on a balance of probabilities, the Court considers that it is not possible to find that the parties had no notice in view that the applicant has not disputed the interested party's assertion in the replying affidavit that on 04.06.2021 the judgment was not ready and parties were advised to check on 11.06.2021 when it was again not ready but parties were advised to be checking on every Friday. It appears that the parties had notice to be checking every Friday but they had failed to do so of their own accord. The judgment was delivered on 09.07.2021 and the court has checked to confirm that it was indeed a Friday".***

In effect, the learned Judge concluded that, since the trial magistrates' court had informed the parties that delivery of the Judgment was imminent and that they were to check every Friday on when it would be delivered, this served as sufficient notice to

the parties.

Order 21 rule 1 of the ***Civil Procedure Rules*** makes it a requirement that, the court, after hearing the parties to a suit, shall pronounce judgment in open court, either at once or within 60 days from the conclusion of the trial upon notice

given to the parties or the advocates. See ***University of Nairobi vs Devcon Group Limited [2016] KECA 49 (KLR).***

So, were the parties notified of the delivery of the Judgment? In the instant case, contrary to the conclusion reached by the learned Judge, our examination of the Record does not lead us to similarly conclude that the parties were notified of the date the Judgment was to be delivered. This is because both the Appellant's and the Interested party's pleadings do not disclose that they received a notice of delivery. Further, both parties' pleadings are clear that they were absent when the Judgment was eventually delivered on 9th July 2021 and that, they came to learn of its delivery thereafter. In our view, had the parties been notified, nothing would have been easier than for either party to have produced the notice for the benefit of the trial court. Given that the averments point to the Judgment as having been delivered without prior notice to the parties, we find that the learned Judge misdirected himself in concluding that the parties were notified of the delivery of the Judgment, when they were not, and we so find.

Next is the question of whether the Judgment delivered by the trial Magistrate was illegal or irrational or procedurally improper for failing to comply with ***Order 2 rules 1*** and ***3***.

To address this question, we return to ***Order 21 Rule 1,*** which specifies that a judgment must be pronounced in open court. ***Order 21 Rule 3*** goes on to provide that the judgment must be dated and signed at the time of delivery. A consideration of the Judgment annexed to the Interested Party's Replying Affidavit shows that it was signed by the trial Magistrate and dated 9th July 2021. Regarding its pronouncement, we take judicial notice that this was at the height of the Covid-19 pandemic when the Covid-19 prevention guidelines were in place and would have restricted access to the courts, and with it, the pronouncements of judgments. Given the circumstance prevailing at the time, we find that nothing turns on this. Then, in so far as the integrity of the Judgment itself is concern, it is instructive that the Appellant's case is not that its right to a fair hearing was violated during the trial, and there is nothing in the evidence that pointed to the delivery of an irregular or an unlawful Judgment. The evidence was that both parties were heard and had thereafter filed their written submissions. What was awaited was delivery of the Judgment.

So that, with the trial Magistrate's Judgment having largely

complied with the specific requirements of ***Order 21 Rules (1)*** and ***(3),*** it would follow that the Appellant did not prove any illegality or irrationality on the part of the trial Magistrate in so far as the proceedings at the hearing and the subsequent Judgment was concerned.

This would then leave the question as to whether failure to issue a notice of delivery gave rise to any procedural impropriety or irregularity.

Procedural impropriety encompassed two main aspects: a failure to adhere to statutory procedural rules and a breach of the common law duty of fairness, which includes the rules of natural justice. Procedural impropriety is concerned with improper or faulty procedure and occurs when rules or procedures are disregarded or overlooked. Such irregularities, as the name suggests, can arise at different stages and undermine the decision-making process.

In the instant case, the Appellant's complaint was that the failure to issue a notice as required by ***Order 21 rules (1) and (3)*** gave rise to a procedural irregularity in delivery of the Judgment which the Judicial Review application sought to quash. Indeed, we have found above that such notice was not issued to the parties prior to delivery of the Judgment. Yet, on further examination of the concerned provision, it cannot be disregarded that it is silent on the consequences of failure by the court to comply. More specifically, the provision does not expressly state

that a procedural lapse of this nature would render the Judgment liable to nullification or to be quashed. In our view, if it was intended that failure to issue a notice would render the Judgment a nullity, nothing would

have been easier than for the provision to have been expressly so stated. Given

that there is no sanction specified in that regard, it becomes clear that, where such cases arise, it will be left to the court to consider the circumstances of each case and exercise its discretion to determine whether or not to grant the orders sought.

Such was the position in the case of ***Tobias M. Wafubwa vs Ben Butali [2017] KECA 142 (KLR)*** where this Court similarly considered a party's noncompliance with ***Order 9 Rule 9*** of the ***Civil Procedure Code*** and observed:

> ***"…provided that where the failure to comply with the rule 9 did not undermine the jurisdiction of the court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then, Article 159 of the Constitution and the overriding principles could be called upon to aid the court to dispense substantive justice through just, efficient and timely disposal of proceedings. A similar approach was invoked in the case of Boniface Kiragu Waweru vs James K. Mulinge [2015] eKLR where in addressing the issue of non- compliance with order 9 rule 9 this Court observed thus:***
>
> > ***'All in all we are not persuaded that non-compliance with Order III rule 9A of the Civil Procedure Rules was meant to make the following proceedings incompetent or a nullity, efficacious as the provision was meant to be. Indeed all times, the set procedures ought to be***

followed or complied with. However, we find that non-compliance, in the present matter, did not go to the root of the proceedings. The non-compliance we may say, was procedural and not fundamental. It did not cause prejudice to the appellant at all…'"

In the same vein, given that ***Order 21 Rules (1)*** and ***(3)*** does not specify any consequences for non -compliance, it will be incumbent on a court faced with

such situation to consider, in exercise of its discretion, the particular circumstances of each case, and whether failure to comply undermined the court or went to the root of the proceedings and Judgment in question.

The Record is clear that both parties were not notified of the delivery date, and not just the Appellant. It is also evident that the notice was for the purposes of delivery of a judgment arising from proceedings in respect of which the Appellant did not point to any illegality, irrationality or procedural impropriety during the trial, and leading up to the impugned Judgment. Additionally, nothing in the Record showed that the procedural misstep undermined the court, or went to the root of the proceedings, or otherwise subjected the Appellant to irredeemable prejudice from which it had no other recourse. If anything, the avenues of instituting an appeal or a review against the Judgment always remained available to the Appellant. So that when all factors are considered, including the judicial environment prevailing during the Covid-19 pandemic, we come to the inextricable conclusion that the failure to issue the notice for delivery was a procedural lapse that did not go to the root or core of the parties' dispute or

the proceedings so as to affect the outcome of the Judgment one way or the other, or so as to constitute a viable reason to nullify or quash the trial magistrate’s Judgment. In point of fact, it is in instances of minor infractions such as this that ***Article 159*** of ***the Constitution,*** which mandates courts to

administer justice without undue regard to procedural technicalities, can be invoked to circumvent nullification of an otherwise valid and enforceable decision, all in the interest of justice.

The final issue is whether the Appellant established the elements of illegality, irrationality or procedural impropriety to justify the reliefs sought.

In the Judicial Review application, the Appellant sought orders of certiorari to bring into the Court and quash the Judgment dated 9th July 2021, together with the decree and certificate of stated costs dated 31st August 2021, issued by the Chief Magistrate, Mombasa, in *CMCC No. 119 of 2018 (Peter Mwalukunje Kombe vs Sai Rock Beach Hotel),* and an order of prohibition to restrain the Chief Magistrate, Mombasa, from executing or otherwise enforcing the Judgment, decree and certificate of costs. Given our foregoing conclusions, and as did the learned Judge, we find that the Appellant failed to prove the Judicial Review elements of illegality, irrationality or procedural impropriety so as to justify the reliefs of certiorari and prohibition sought. Accordingly, we uphold the learned Judge's decision in

declining to grant the orders prayed.

But for the procedural infraction of failure to give notice of the delivery of judgment, we find no basis on which the trial court's decision could be faulted. Consequently, we find that the appeal fails and is hereby dismissed.

Accordingly, we uphold the Judgment of the Employment and Labour

Relations Court at Mombasa dated 1st April 2022 that rightly dismissed the Appellant's Judicial review application dated 15th October 2021 with costs to the respondent.

It is so ordered.

Dated and delivered at Mombasa this 30th day of January, 2026.

A. K. MURGOR

…….
……. JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

……
JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

……
. JUDGE OF APPEAL

I certify that this is a
True copy of the

original Signed

DEPUTY REGISTRAR