

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPELLATE DIVISION

SMALL CLAIMS APPEAL CASE NO. E001 OF 2025

SKYSHIP COMPANY LIMITED & 2 OTHERS

APPELLANTS

VERSUS

KENYA CIVIL AVIATION AUTHORITY

1ST RESPONDENT

ISHARA AIR BALLOON SAFARIS LIMITED

2ND RESPONDENT/APPLICANT

RULING

1. This ruling is in respect to the 2nd Respondent/Applicant's Notice of Motion dated 22nd September 2025 seeking to strike out the Memorandum of Appeal dated 4th April 2025 together with the entire Record of Appeal on the ground that the appeal has been overtaken by events and is therefore moot. The Applicant also seeks the costs of the application.
2. The appeal in question challenges the judgment of the National Civil Aviation Administrative Review Tribunal delivered on 25th March 2025, arising from the issuance of an Air Service Licence to the 2nd Respondent by the 1st Respondent. It is common ground that the licence impugned in the Tribunal proceedings was in force from 18th May 2023 to 17th May 2024 and has since expired.

3. The Appellants opposed the application and contended that the appeal raises questions of great public interest, that the dispute is recurring, and that the Court ought to hear the appeal on merits notwithstanding expiry of the impugned licence.
4. The Application was canvassed by way of written submissions which I have considered.

Summary of the Parties' Submissions

The 2nd Respondent/Applicant's Case

5. The Applicant submitted that the appeal is moot since the licence that is the subject of the appeal expired on 17th May 2024, and that any determination by this Court would have no practical effect. The Applicant relied on the Black's Law Dictionary (9th Edition) definition of "moot case" as "***a matter in which a controversy no longer exists...***"
6. The Applicant cited the Supreme Court's articulation in ***Institute for Social Accountability & Another vs. National Assembly & 3 Others [2022] KESC 39 (KLR)***, for the argument that there has to be a live controversy between the parties.
7. Reference was also made to the decision in ***Kenya Railways Corporation & 2 others vs. Okoti & 3 others [2023] KESC 38 (KLR)*** where the Supreme Court set out the guiding principles in determining if a matter is

moot including that the decision of the court will have no practical effect.

8. The Applicant contended that the Court should not determine academic questions. Reliance was placed on ***Shah & 22 Others vs. Municipal Council of Nakuru & 3 Others* [2025] KECA 566 (KLR)** where it was held that a court of law should not act in vain.
9. The Applicant further relied on comparative jurisprudence and argued that mootness requires a two-step analysis, drawing from ***Borowski vs. Canada (Attorney General)* [1989] 1 SCR 342**, for the argument that determining whether an appeal is moot requires a two-step analysis.
10. The Applicant further submitted that the appeal should be struck out under Order 2 Rule 15(1) of the Civil Procedure Rules as it discloses no reasonable cause of action, is otherwise an abuse of the court process, and cannot resuscitate a spent licence.
11. On the cautionary threshold for striking out, the Applicant cited ***Uchumi Supermarkets Limited & another vs. Sidhi Investments Limited* [2019] KECA 851 (KLR)**, for the argument that striking out of pleadings is a draconian act which the court may only resort to in the clearest of cases.
12. The Applicant urged that the appeal be struck out with costs.

The Appellants' Case

13. The Appellants acknowledged the expiry of the impugned licence but submitted that the appeal falls within the public interest exception to mootness, and that the Court retains jurisdiction to hear it. They relied on ***Redhill Heights Investments Ltd vs. Suzanne Achieng Butler & 4 Others (2018) KECA 776 (KLR)***, and cited the definition that mootness refers to cases where judgment will have no practical effect and for the proposition that the Court has a discretion to decide cases, otherwise moot.
14. The Appellants argued that the dispute raises important issues relating to the 1st Respondent's exercise of statutory discretion in licensing air services, aviation safety, public participation, environmental protection, and compliance with Gazette publication requirements. They relied on Regulation 8 of the Civil Aviation (Licensing of Air Services) Regulations, 2018 which requires the Authority to have regard to coordination and development of air services and "*the interests of the public.*"
15. On mandatory statutory language, the Appellants cited ***Haji & 4 Others v Ali & 3 Others (2023) KECA 1120 (KLR)*** and relied on "the term 'shall' as a word of command."
16. On Gazette publication and statutory compliance by public bodies, the Appellants relied on ***Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd (2002) KECA 8 (KLR)***, for the argument that public bodies can only do that which is authorized by statute.

17. On public interest and the rule of law, they cited ***Republic vs. County Government of Mombasa Ex parte Outdoor Advertising Association of Kenya (2014) eKLR***, for the argument that there can never be public interest in breach of the law.
18. The Appellants further submitted that the matter is capable of recurrence and has in fact recurred, pointing to a later licence said to have been issued to the 2nd Respondent, and argued that without judicial determination, similar disputes may repeatedly evade review. They also invoked legitimate expectation to appellate review, relying on the case of ***Tunoi & another vs. Judicial Service Commission & another (2016) KECA 530 (KLR)***, where it was held that legitimate expectation involves a representation.
19. The Appellants urged the dismissal of the application and that the appeal proceeds to hearing on merits.

Issues for Determination

20. Having considered the parties' respective written submissions and authorities, I find that the main issues that fall for determination, at this interlocutory stage, are:
- a) Whether the appeal has been rendered moot by expiry of the impugned Air Service Licence;***
- b) If moot, whether the Court should nevertheless exercise discretion to hear the appeal;***

c) Whether the Memorandum of Appeal and Record of Appeal should be struck out under Order 2 Rule 15 of the Civil Procedure Rules;

Analysis and Determination

21. The doctrine of mootness is now firmly part of Kenyan jurisprudence. The Supreme Court in *Institute for Social Accountability & Another vs. National Assembly & 3 Others* [2022] KESC 39 (KLR) underscored that there has to be a live controversy between the parties.
22. Mootness was also defined in ***Redhill Heights Investments Ltd*** case (supra) KECA 776 (KLR) to refer to cases where judgment will have no practical effect.
23. Kenyan courts have however equally acknowledged that they may in appropriate circumstances, exercise discretion to determine a matter that is otherwise moot, particularly where the public interest so demands or where issues are capable of repetition yet likely to evade review. Indeed, in ***Redhill Heights*** (supra), the Court recognized that courts have discretion to decide cases which are otherwise moot.
24. Order 2 Rule 15(1) of the Civil Procedure Rules empowers the Court to strike out pleadings where, among other grounds, they disclose no reasonable cause of action or are otherwise an abuse of the process.
25. Courts have however taken the position that the power to strike out pleadings is drastic and must therefore be

exercised only in the most deserving and clearest of cases.

26. It was not in dispute that the impugned Air Service Licence expired on 17th May 2024. The memorandum of appeal seeks, among other reliefs, to set aside the Tribunal's judgment and to impugn the legality of the decision granting the licence.

27. The Applicant's contention is that since the licence is spent, there is no longer a live controversy and no practical relief can issue. The Supreme Court has emphasized the need for a live controversy in ***Institute for Social Accountability*** (supra).

28. On the material before me, it is clear that the particular licence that was the subject of the Tribunal proceedings has expired. To that extent, and in the narrow sense described in ***Redhill Heights*** (supra), the dispute concerning the continued operation of that specific licence is overtaken by effluxion/lapse of time. I am therefore in agreement that the expiry of the impugned licence introduces a serious mootness question.

29. On whether the Court should nevertheless exercise discretion to hear the appeal, I find that the mootness inquiry does not always end with the finding that the immediate subject matter has become spent. The Applicant cited ***Borowski*** (supra) for the two-step approach, where the Court stated that :

“determining whether an appeal is moot or not requires a two-step analysis. A court is first

required to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case.”

30. The second step concerns discretion and whether the Court should nonetheless determine the matter.

31. The Appellants’ case was that the licensing controversy is recurring, implicates statutory compliance in the issuance of air service licences, aviation safety, Gazette publication duties, and environmental governance in the context of the Masai Mara National Reserve. They further contended that similar disputes may repeatedly become moot before being determined on merits.

32. On the material placed before Court in the submissions, the Appellants assert that a further licence was subsequently issued and published. Whether or not that later licence is directly in issue in this appeal, the Appellants’ point is that the controversy is capable of repetition and may evade effective judicial scrutiny if treated as automatically moot whenever a licence period expires.

33. Additionally, I note that the memorandum of appeal challenges the legality of process and statutory compliance, matters that may carry significance beyond the lifecycle of a single licence. Courts have consistently stated that public bodies must act within the law. In ***Municipal Council of Mombasa vs. Republic & Umoja***

Consultants Ltd (supra), the Court held that a statutory body can only do that which is authorized by statute and, in the manner, authorized by statute.

34. The Appellants also anchored their arguments in constitutional values, including the rule of law and transparency. In **Republic vs. County Government of Mombasa Ex parte Outdoor Advertising Association of Kenya** (supra), the Court stated that there can never be public interest in breach of the law.

35. In the circumstances of this case, and at this interlocutory stage, I am satisfied that the Appellants have demonstrated an arguable basis for the Court to consider exercising discretion to hear the appeal on merits, notwithstanding the expiry of the impugned licence, for at least two reasons, namely; that the appeal raises questions of statutory compliance and legality in a regulated licensing regime that may recur and, secondly; that the Appellants assert a recurring controversy which, if left unaddressed, may repeatedly evade appellate review due to the limited lifespan of the licence.

36. I therefore decline to treat mootness, at this stage, as an automatic bar warranting striking out of the entire appeal.

37. On whether the appeal should be struck out under Order 2 Rule 15, I am alive to the fact that striking out is reserved for the clearest of cases. In **Uchumi Supermarkets** (supra) the Court of Appeal warned that striking out a pleading is a draconian act which may only be resorted to in plain cases and that pleadings may only

be struck out where they disclose no semblance of a cause of action.

38. In the present case, the appeal challenges the Tribunal's decision and raises questions that, on the face of the pleadings and submissions, cannot be said to be plainly hopeless or beyond argument. Whether the reliefs ultimately sought can be granted, and what remedies (if any) may be appropriate upon full hearing, are matters best determined on the merits of the appeal, not through summary termination.

39. In the end, I am not persuaded that the appeal is so plainly unsustainable as to warrant striking out under Order 2 Rule 15(1) at this stage.

40. Given the nature of the dispute and the fact that the application has not succeeded, costs shall abide the outcome of the appeal.

Disposition

41. For the foregoing reasons, I make the following final orders: -

a) *The 2nd Respondent/Applicant's application dated 22nd September 2025 seeking to strike out the Memorandum of Appeal dated 4th April 2025 and the Record of Appeal is dismissed.*

b) *Costs of the application shall abide the outcome of the appeal.*

c) *The appeal shall be listed for directions on hearing on a priority basis.*

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH
DAY OF MARCH, 2026.**

**HON. W. A. OKWANY
JUDGE**

5/03/2026

FOR RESPONDENT 2nd Cherop

FOR RESPONDENT 1st Ms Lumumba

FOR THE APPLICANT Ms Okumu

COURT ASSISTANT Ubah