



**Benjo Super Stores Limited v Kenya National Highway Limited (Civil Application E072 of 2021) [2025] KECA 290 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KECA 290 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E072 OF 2021  
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA  
FEBRUARY 21, 2025**

**BETWEEN**

**BENJO SUPER STORES LIMITED ..... APPLICANT**

**AND**

**KENYA NATIONAL HIGHWAY LIMITED ..... RESPONDENT**

*(Being an application to strike out the Memorandum and Record of Appeal for being in violation of rule 90 of the Court of Appeal Rules, 2010)*

**RULING**

1. The Notice of Motion filed by the applicant, Benjo Super Stores Limited dated 6<sup>th</sup> July 2023 is brought pursuant rule 92 of the Court of Appeal Rules 2022, (rule 90 of the Court of Appeal Rules, 2010 (repealed)) seeking to have this Court strike out the Memorandum and the Record of appeal filed by the respondent, Kenya National Highway Authority.
2. The applicant's Motion is brought on the grounds that the applicant has never been served with a copy of the Notice of appeal, which the respondent ought to have served on it within seven days of lodging the Notice of appeal;  
  
that, further, it had not been served with the Memorandum or the Record of appeal in accordance with the rules.
3. The application is supported by the affidavit of Peter Karuga Kariuki, the applicant's Director, in which he reiterates the grounds of the Motion and further deposes that he only became aware of the appeal when they received an email from this Court on 19<sup>th</sup> April, 2022 notifying them of the upcoming case management fixed for 10<sup>th</sup> May, 2022; that the respondent ought to have served them with a copy of the Memorandum and Record of appeal within seven days after filing.



4. As a brief background of the case, pursuant to an ex-parte chamber summons dated 22<sup>nd</sup> January 2021, leave to commence judicial review proceedings in the nature of certiorari and mandamus orders by the applicant (the ex-parte applicant in the lower court) against the respondent was granted on 25<sup>th</sup> January 2021. Consequently, the ex-parte applicant, by way of a Notice of Motion dated 3<sup>rd</sup> February 2021, sought the following orders:
  - a. an order of certiorari to remove into the High Court staying and/or quashing all the decision of the Kenya National Highway Authority (“the Respondent”) through his agents and/or employees to maliciously, unfairly and unlawfully impound the Applicant’s motor vehicle registration number KCH 386V and order the Applicant to pay Kshs. 283,886/= being the fees for overloading without an opportunity to be heard through a Court process and in the alternative Order the release of the Applicant’s motor vehicle registration number KCH 386V forthwith.
  - b. an Order of Mandamus do issue compelling the Respondents to allow for redistribution and re-weighing of the Applicant’s motor vehicle registration number KCH 386V to ascertain the weight and release of the said vehicle pending hearing and determination of this Application.
  - c. Costs of this Application.
5. It was the applicant’s case that it is the owner of the motor vehicle registration number KCH 386V, which was, impounded maliciously, unfairly and unlawfully by the respondent’s officers on or about 22<sup>nd</sup> December 2020. The applicant was ordered to pay Kshs. 283,886 being fees for overloading without affording it an opportunity to be heard through a court process, which was an utter violation of its rights and the rules of natural justice.
6. The applicant averred that the continued detention of the subject motor vehicle together with the merchandise belonging to a client greatly prejudiced its business which had resulted in huge losses. The applicant contended that there was imminent danger of the respondent disposing of the subject motor vehicle by way of a public auction to recover fees for overloading and other attendant expenses after the lapse of 60 days pursuant to section 17(8) of the East African Community Vehicle Load Control Act, 2016 (hereinafter the Act). The applicant’s case was that the respondent ought to have obtained its written consent as required by section 22 (2) of the Act before proceeding to issue an order for payment of a fine.
7. In a ruling dated 15<sup>th</sup> April 2021, the trial judge observed that the respondents had not filed any responses to the application and proceeded to allow the orders as prayed.
8. The respondent was aggrieved by the ruling and filed a Notice of Motion dated 23<sup>rd</sup> April, 2021 brought pursuant to Order 42 and 43 of the Civil Procedure Rules, Section 1A, 1B, 3A and 63 of the *Civil Procedure Act*, 2010 and Article 40 of *the Constitution* seeking orders for stay of execution of the ruling delivered on 15<sup>th</sup> April, 2021 and order dated 21<sup>st</sup> March, 2021 staying the orders of certiorari quashing the respondent’s decision to detain motor vehicle Reg. No. KCH 386 V, an order of mandamus for the reweighing and release of the vehicle, storage expenses, luggage expenses and costs of the application pending hearing and determination of this application and of the appeal.
9. It was the respondent’s case that the impugned ruling contained an error on the face of the record in that the court found that the substantive Motice of Motion was undefended; that, contrary to the court’s holding that the applicant did not oppose the Notice of Motion, they had duly filed copies of their notice of appointment, response and submissions bearing the Judicial Review Division court stamp and that during the pendency of the proceedings, the respondent’s counsel Mr. Nathaniel



Munga appeared in the various court sessions and also attended at the registry. It was also claimed that a Notice of appeal was filed, and that the intended appeal had high chances of success as it raises serious and pertinent issues.

10. The trial judge, upon considering the application by a ruling dated 28<sup>th</sup> May 2021, held that the intended appeal is frivolous and is an attempt to frustrate the ex-parte applicant whilst at the same time exposing government operations and its agencies into unnecessary litigation. In so concluding, the court dismissed the respondent's application. Hence, the appeal and this application.
11. The applicant filed written submissions and it is worthy of note that the respondent did not file any reply to the Motion. No annexures or record of appeal or rulings of the lower court were made available to us.
12. When the application came up for hearing on a virtual platform, learned counsel for the applicant Mr. Lisanza reiterated the grounds on the face of the application and submitted that the respondent had not served them with the Memorandum of appeal or the Record of appeal contrary to the provisions of rule 92 of this Court's rules and that, for this reason, the appeal should be struck out; that this Court cannot exercise its discretion to grant any indulgence to the respondent who has for the past 3 years failed to serve the applicant with the Notice of Appeal or the Record of Appeal.
13. Despite having been served with the hearing notice, there was no appearance for the respondent.
14. We have considered the applicant's Motion as well as the parties' submissions. What is before us is the applicant's Motion seeking to strike out the respondent's appeal.
15. Rule 86 of this Court's rules provides:

A person affected by an appeal may, at any time, either before or after the institution of an appeal apply to the Court to strike out the notice of appeal, as the case may be, on the ground—

- a. no appeal lies: or
- b. that some essential step in the proceedings has not been taken or has not been taken in the prescribed time:

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days after the date of service of the notice of appeal or record of appeal”.

16. The applicant has brought this Motion for the reason that the respondent had failed to serve it with a copy of the Memorandum and Record of Appeal contrary to the requirements of the rules of this Court.
17. Rule 77(1) and (2) of the rules of this Court provides that:
  1. A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.
  2. Each notice under sub-rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.



18. Rule 79 (1) of the rules further provides:

An intended appellant shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal:

Provided that the Court may, on application which may be made ex parte, within seven days after the lodging of the notice of appeal, direct that service need not be effected on any person who did not take part in the proceedings in the superior court.

19. Further, rule 92 stipulate that, within 7 days after lodging the memorandum of appeal and the record of appeal, the appellant shall serve the copies on the respondent.

20. In this case, it has not been demonstrated to us that the Notice of Appeal or the Memorandum or Record of Appeal were served on the applicant within the stipulated period. The applicant contends that that it only came to learn, during the Court's case management that the respondent had filed a Record of Appeal.

21. Given that there is no evidence that the applicant was served with the appeal in terms of the rules cited above, we find that there is no competent appeal before us. This is particularly since the proviso to rule 86, to the effect that an application to strike out shall not be brought after the expiry of thirty days of the date of service of the Notice of Appeal or Record of Appeal, is not applicable, since neither the Memorandum or Record of appeal were served on the applicant. The applicant merely moved the Court to strike out the appeal upon learning that a record of appeal had been filed.

22. In view of the above missteps on the part of the respondent, the applicant's Notice of Motion dated 6<sup>th</sup> July 2023 is merited. Consequently, the respondent's appeal against the rulings of the High Court dated 15<sup>th</sup> April 2021 and 28<sup>th</sup> May 2021 be and is hereby struck out with costs to the applicant.

It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 21<sup>ST</sup> DAY OF FEBRUARY 2025.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CARb, FCIArb.**

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**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

I certify that this is the true copy of the original

Signed

**DEPUTY REGISTRAR**

