



**Lochab Brothers Limited v Transport Workers Union (Civil Appeal
(Application) 46 of 2020) [2025] KECA 848 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KECA 848 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) 46 OF 2020
MA WARSAME, JM MATIVO & PM GACHOKA, JJA
MAY 9, 2025**

BETWEEN

LOCHAB BROTHERS LIMITED APPELLANT

AND

TRANSPORT WORKERS UNION RESPONDENT

(An Application to review the Judgment of Court of Appeal at Nakuru (Warsame, Ochieng & Mativo JAA) dated 26th July, 2024 in ELRC No. 414 of 2013)

RULING

1. Judgment was entered by this Court (Warsame, Ochieng & Mativo JJA) on 26th July 2024, allowing the appeal and setting aside in entirety the of the Employment and Labour Relations Court (ELRC) (Ongaya J) dated 28th March 2014, in ELRC Cause No. 414 of 2013 and all consequential orders therefore with costs to the appellant. Following the said judgment, the applicant, Transporters Workers Union, has now filed an application, within that appeal, for review and setting aside of the judgment, supported by the affidavit of by Dan Mihadi, the Secretary General of the applicant Union.
2. The gist of the application is that there is some mistake or error apparent on the face of the record, which the court did not notice. Specifically, the applicant contends that the appeal was filed out of time and without leave of this Honourable Court. It was argued that the judgment was delivered on 28th March 2014. Therefore, the notice of appeal should have been filed 14 days after the delivery of the judgment i.e on or before 14th April 2014, but was filed 32 days later, on 29th May 2014. The applicant states that it raised this issue during the appeal but the court did not make any finding on the same.
3. Each of the parties relied on the submissions filed, as indicated by Mr. Rakoro Advocate for applicant and Mr. Wambua, Advocate for the respondent when the matter was called out at the hearing.



4. The key issue for our determination is whether the application for review of the judgment is merited. The application is founded on Rule 75 of the Court of Appeal Rules and Article 159(2)(d) of the Constitution.
5. Rule 75 of the Court of Appeal Rules, deals with review in the context of the Criminal Procedure Code, which renders the section inapplicable in this case. However, Rule 37 of the Court of Appeal Rules provides a clear mechanism for the correction of orders in the following manner:
 - 37(1). A clerical or arithmetical mistake in any judgment of the Court or any error arising therein from an accidental slip or omission may, at any time, whether before or after the judgment has been embodied in an order, be corrected by the Court, either of its own motion or on the application of any interested person so as to give effect to the intention of the Court when judgment was given.
6. From the applicant's argument, it emerges that it seeks to invoke the "slip rule" in alluding to a mistake or error apparent on the face of the record. However, a careful examination of the Court's judgment reveals no clerical, typographical, or accidental omission that undermines the intent or substance of the Court's decision. What the applicant raises is not a simple oversight but a substantive question of jurisdiction. That cannot be dressed as a slip.
7. In addressing this Court's power to review, the Supreme Court of Kenya in *Menginya Salim Murgani v Kenya Revenue Authority [2014] KECA 718 (KLR)* in reaffirming the decision of this court in *Benjoh amalgamated Ltd. & Another v. Kenya Commercial Bank Ltd. 2014 eKLR* stated:

"In *Benjoh amalgamated Ltd. & Another v. Kenya Commercial Bank Ltd. 2014 eKLR*, the Court of Appeal comprehensively analysed the Court's jurisdiction to review its decisions before and after the date of promulgation of the 2010 Constitution. The Appellate Court held that prior to the promulgation of the new Constitution, it had no jurisdiction to review its decisions, except in the application of the slip rule under Rule 35 of the Court of Appeal Rules. As to the position after the promulgation of the 2010 Constitution, the Court held that as it was not the final Court in the land, it had a residual jurisdiction, where there was no appeal to the Supreme Court, to correct errors of law that had occasioned real injustice, or failure, or miscarriage of justice. Such a position notwithstanding, the Court held that it would not entertain applications for the review of decisions made before the 2010 Constitution came into being."
8. Nonetheless, the above developments did not do away with the principle of finality. It simply calls upon the Court to take account the principles of finality and justice in determining whether to exercise the abovementioned residual jurisdiction. It is common ground that the judgment against which the appeal was preferred was issued on 28th March 2014. The applicant's grievance is with the timing of the filing of the Notice of Appeal, which he alleges was filed out of time.
9. The Rule 86 of the Court of Appeal Rules provides as follows:
 86. A person affected by an appeal may, at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground—
 - a. that no appeal lies; or
 - b. that some essential step in the proceedings has not been taken or has not been taken within 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, as the case may be. (emphasis ours)

10. Accordingly, it was open for the applicant within the applicable timelines to move the Court appropriately, something he failed to do. To the contrary, the applicant, at paragraph 7 of the supporting affidavit states that it raised the challenge to the filing of the Notice of Appeal in its submissions, yet no determination was made on the same. In this regard, it is inescapable that by the time of filing submissions which are dated 23rd April 2024 it was already time-barred, and no formal application had been made. Needless to add, an application of this nature, seeking to challenge the validity of an entire appeal cannot be made through submissions. It is therefore no surprise that the Court in its judgment found no room to address itself on such submission.
11. Moreover, the applicant still had a further opportunity at the hearing of the appeal to raise any objection to the competence of the appeal. To this end, Rule 107(b) of the Court of Appeal Rules provides:
 - a. ...
 - b. a respondent shall not, without the leave of the Court, raise any objection to the competence of the appeal which might have been raised by application under rule 86
12. There is no evidence on record to suggest that the applicant sought leave or made such an attempt as contemplated by the above rule. The procedural route was clear. The applicant stood at a crossroads and chose the wrong path. This Court cannot now turn back the clock. There can be no justice without finality, and finality cannot be attained where litigants seek to reopen determined matters through the back door of review when the front door of objection stood open and unused.
13. In the end, the applicant has not demonstrated to our satisfaction the existence of any mistake or error apparent on the face of the record to warrant the review and setting aside of the judgment and orders of 26th July, 2024. We are disinclined to allow the application and find it unmerited. We dismiss the same with costs to the respondent.

DATED AND DELIVERED AT NAKURU THIS 9TH DAY OF MAY, 2025.

M. WARSAME

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JUDGE OF APPEAL J.MATIVO

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JUDGE OF APPEAL

M. GACHOKA CIARB., FCIARB

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JUDGE OF APPEAL

