Sirgoi Holdings Limited & another v Sitienei (Civil Application E188 of 2024) [2025] KECA 1287 (KLR) (11 July 2025) (Ruling)

Neutral citation: [2025] KECA 1287 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPLICATION E188 OF 2024

P NYAMWEYA, JA

JULY 11, 2025

BETWEEN

SIRGOI HOLDINGS LIMITED ..... 1ST APPLICANT

THE BOARD OF DIRECTORS OF SIRGOI HOLDINGS LIMITED ..... 2ND APPLICANT

AND

HOSEA SITIENEI ..... RESPONDENT

(An application for extension of time to file the Record of Appeal and stay of execution of the decree in the Judgment of the Employment and Labour Relations Court at Kisumu (C. Baari J.) delivered 5th October 2023 in ELRC Suit No. 26 of 2019)

RULING

1. In light of certain preliminary issues arising in this matter, it is necessary, at the outset, to set out the prayers made by the applicants herein in their application dated on 4th December 2024. The application is expressed as being brought pursuant to Article 59 of the *Constitution*, Section 3, 3A and 3B of the *Appellate Jurisdiction Act*, Rules 4, 5 (2) (b), 31, 39 (b), 41, 42, 43, 47 and 53 of the *Court of Appeal Rules*, 2010 and Section 79G of the *Civil Procedure Act*. The said prayers are as follows:

    "1. That this Honourable Court be pleased to certify this matter as urgent and the same be expeditiously heard and disposed off.

    2. That the Honorable Court be pleased to extend the time limited for the filing and service of the Record of Appeal, and that the filed and served Record of Appeal be deemed to have been properly filed and served.

    3. That the Honorable Court be pleased to extend the time limited for filing and serving the Appeal by 1 days or such time as the court may deem fit and just.

4. That this Honourable Court be pleased to stay the execution of decree in respect of the judgment entered on 5th October 2023 and any other orders that may be issued pursuant thereto, pending inter parties hearing and determination of this application.

5. That this Honourable Court be pleased to stay the execution of decree in respect of the judgment entered on 5th October 2023 and any other order that may be issued pursuant thereto, pending hearing and determination of the intended appeal.

6. That the costs of and incidental to this Application abide the results of the said Appeal."

2. The application is supported by an affidavit sworn on even date by Engineer Elnathan Chumo, a director of the 1st applicant and written submissions dated 24th April 2025 filed by the applicants' advocates on record. The application is opposed by the respondent by way of his replying affidavit sworn on 13th January 2025 and written submissions dated 6th May 2025 filed by his advocates on record.

3. The first preliminary issue that arises from the orders sought is that it is evident that the application is an omnibus application, in the sense that the applicants have sought multiple reliefs, some of which are not capable of being granted by this Court and at this stage. Ringera J. (as he then was) stated as follows as regards omnibus applications in the case of *Pyaralalmhandbheru Rajput v Barclays Bank and Other*s Civil Case No. 38 of 2004:

> "...An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, is also subject to long established and different judicial principles which counsel need to bring to the attention of, and the court needs to consider before granting the entire relief sought. This alone makes the plaintiff's application incurably defective, and a candidate for striking out.".

2. In the present application, prayers 4 and 5 seek orders of stay of execution of the judgment of the trial court, which prayers cannot be granted by a single Judge of the Court, and can only be granted by a full bench of this Court as provided by Rule 55 of the *Court of Appeal Rules* of 2022. This Court, sitting as a single Judge, therefore does not have jurisdiction to consider prayers 4 and 5 and cannot render a decision in respect of the same.

3. The second preliminary issue was raised by the respondent in his reply and submissions. The respondent asserts that the application by the applicants is a non-starter, fatally defective and incompetent, as it is brought under, and invokes irrelevant and repealed provisions of legislation. Further, that it is trite law that a Court of law has to be moved under the correct provisions of the law. He elaborated that the applicants invoked Article 59 of the *Constitution* which is irrelevant and the *Court of Appeal Rules*, 2010 which have since been repealed by the Court of Appeal, 2022. Lastly, the respondent stated that in principle, all litigants should be clear as to the terms of the jurisdiction and correct constitutional or statutory provisions they are invoking, and an omission in this regard is not a mere procedural technicality to be cured under Article 159 of the *Constitution* since it is substantive law. Reliance was placed on the decision by the Supreme Court in the case of *Michael Mungai v Housing Finance Company of Kenya & others* [2017] eKLR that no Court can be moved on the basis of a repealed law.

4. In reply, the applicants acknowledges that their erroneously cited Article 59 instead of Article 159 of the *Constitution* of Kenya and specifically Article 159 (2) (d). The applicants urge that this was typographical error which was inadvertent and requested this Court to treat the reference to Article 59 as a reference to Article 159 as intended. The applicants submitted that the minor citation error does not prejudice the respondent in any way since the nature and objective of the application remains clear and unchanged, and that the Courts have consistently held that such technical errors should not defeat substantive justice. The applicants therefore pleaded for the indulgence of the Court and reiterated that the principal relief sought is an extension of time to file the Record of Appeal, a remedy squarely within the Court's discretion pursuant to Rule 4 of the *Court of Appeal Rules*, 2022 and Section 3A and 3B of the *Appellate Jurisdiction Act*, and that the reference to the repealed 2010 rules was an inadvertent oversight.

5. It is notable that the applicants concede that they have cited wrong provisions of the *Constitution* and repealed rules. The Supreme Court of Kenya noted the reasons why the as follows:

> 23. In the case of *Hermanus Phillipus Steyn v. Giovanni Gnnechi-Ruscone*, Supreme Court, Application No. 4 of 2012, this Court was categorical that a Court has to be moved under a specific provision of the law. The Court stated that: it is trite law that a Court of law has to be moved under the correct provisions of the law. We reiterate that the only legal regime for the Supreme Court is the Constitution, the *Supreme Court Act* and the Supreme Court Rules, 2012 (as amended). Hence it is preposterous for the applicant to purport to bring his application under other statutory provisions that are not the *Supreme Court Act*. It is sadder that he has the audacity to even invoke provisions of repealed pieces of legislations. No court can be moved on the basis of a repealed law. What right if at all does a repealed law give? The answer is clear: none.

6. The importance of moving a Court under the correct provisions is therefore not merely procedural, it also has jurisdictional implications, and provides the substantive basis and validity for the decision made by a court. In the present application, the jurisdiction to extend time is granted to this Court by Rule 4 of the *Court of Appeal Rules* of 2022, and even though the said rule remained substantially the same after the repeal of the 2010 Rules, the applicants have also cited and relied on various other Rules in the 2010 Rules, many of which were amended and whose content has now changed, as well as a wrong Article of the Constitution. This Court cannot in the circumstances engage in a process of amending the applicants' pleadings by imputing the proper provisions, and without being moved by way of an application nor affording the respondent an opportunity to be heard in this regard.

7. I also note that the applicants have sought the exercise of this Court's discretion granted by section 3A and 3B of the *Appellate Jurisdiction Act* which underpin the overriding objective of just, expeditious, proportionate and affordable resolution of appeals, also known as "the oxygen principle". The circumstances when the principle applies was explained by this Court in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] KECA 208 (KLR)as follows:

> "On the applicability of the overriding objective principle in the appellate jurisdiction, we wish to draw guidance from case law. The principle confers on the courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made there under. (See the case of *City Chemist (NB1) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli v Orient Commercial Bank Limited* Civil Application No. Nai 302 of 2008 (UR.199/2008); The aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost

saving disposal of cases before it. (See the case of K*ariuki Network Limited & Another v Daly & Figgis Advocates* Civil Application No. Nai 293 of 2009); that the application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness (See the *case of Kariuki* (Supra); that in applying or interpreting the law or rules made there under, the Court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution of appeals (See the case of *Deepak Manlal Kamami and another v Kenya Anti-Corruption and 3 others* Civil Application No. 152 of 2009); that there is a mandatory requirement that the Court of Appeal rules of procedure should also be construed in a manner which facilitates the just, expeditious, proportionate or affordable resolution of appeals. (See the case of *Dorcas Indombi Wasike v Benson Wamalwa* Eldoret Civil Application No. 87 of 2004); that the overriding objective principle is intended to re-energize the process of the court, a encourage good management of cases and appeals, and ensure that interpretation of any of the provisions of the Act and the rules made there under are "02" compliant (see the case of *Hunter Trading Company limited v ELF Oil Kenya Limited* Civil Application No. Nai 6 of 2010 (UR3 (2010); that the principal aim of the overriding objective principle is to give the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective (See the case of *Caltex Oil Limited v Evanson Wanjihia* Civil Application No. Nai 190 of 2009 (UR). And, lastly, that the "O2" principle does not cover situations aimed at subverting the expeditious disposal of cases or appeals, mistakes or lapses of counsel, or negligent acts, or dilactory tactics or acts constituting abuse of the court process (See the case of *Kenya Commercial Bank v Kenya Planters Co- operative Union* Nai Civil Application No.85 of 2010 (UR)62 of 2010."

8. I am in agreement with these observations made by the Court that the oxygen principle cannot be used to excuse the negligent acts or inadvertent mistakes and lapses of counsel, who are required to be abreast with the applicable laws at all times.

9. I consequently find the application dated 4th December 2024 to be incompetent for the above reasons, and it is accordingly struck out with costs to the respondent. The applicants are however at liberty to file a fresh competent application.

10. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF JULY, 2025.

P. NYAMWEYA.

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JUDGE OF APPEAL

I certify that this is a true copy of original.

Signed

Deputy Registrar.