



**University of Nairobi v Ricatti Business College of East africa (Civil Appeal (Application) E566 of 2021) [2024] KECA 516 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KECA 516 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E566 OF 2021  
AK MURGOR, JA  
APRIL 26, 2024**

**BETWEEN**

**UNIVERSITY OF NAIROBI ..... APPLICANT**

**AND**

**RICATTI BUSINESS COLLEGE OF EAST AFRICA ..... RESPONDENT**

*(An Appeal against the entire judgment of the High Court, Commercial and Admiralty Division at Nairobi (F. Tuiyott, J. (as he then was)) delivered on 6th December, 2019 in HCCC No. 73 of 2015)*

**RULING**

1. By a Notice of Motion dated 5<sup>th</sup> May 2022, brought pursuant to rule 57 Court of Appeal Rules and section 3A of the *Appellate Jurisdiction Act* the applicant, University of Nairobi seeks that this Court rescind its orders issued on the 28<sup>th</sup> April 2022 and substitute it with orders allowing the applicant's application dated 8<sup>th</sup> November 2021.
2. The motion is brought pursuant to the grounds on its face and an affidavit in support sworn by Muema Kitulu, Advocate for the applicant sworn on 5<sup>th</sup> May 2022 where it was contended that the High Court's judgment was rendered on 6<sup>th</sup> December 2019 and consequently by virtue of rule 75 (2) of the Court of Appeal Rules, 2010, the applicant had 14 days thereafter to file and serve its Notice of appeal and apply for the proceedings; that both the Notice of appeal and the letter applying for certified copy of proceedings were filed on 13<sup>th</sup> December 2019 and served upon the respondent on the 18<sup>th</sup> December 2019, well within the 14 days stipulated period; that the notice and letter of request appear at pages 558A and 558B of the record of appeal.
3. It was further deponed that the certified copies of the proceedings were eventually supplied on or about the 24<sup>th</sup> August 2021 and, at paragraph 1 of the Record, the Registrar of the High Court declared that both the Notice of appeal as well as the letter applying for certified copy of proceedings, were filed



within the stipulated time; that the period between the delivery of judgment by the High Court, that is, 6<sup>th</sup> December 2019 and the date the Notice of appeal was lodged was 7 days, while the delivery of the proceedings, to the date the record of appeal was lodged was 1<sup>st</sup> October 2021 or 37 days, making it a total of 44 days for filing of the record after excluding the period between the date of the High Court's judgment, and the date of the Certificate of delay; that consequently the Record of appeal was lodged on time and was served upon the respondent on 8<sup>th</sup> November 2021, exactly one (1) month out of time, within the meaning of rule 90 of this Court's rules.

4. It was further contended that the cause for the delay in serving the record of appeal is captured in the grounds and an affidavit in support of Muema Kitulu, Advocate sworn on 8<sup>th</sup> November 2021 of the applicant's previous application; that, even though the delay is regretted, it was not inordinate as to be prejudice the respondent's case; that though the application dated 8<sup>th</sup> November 2021 was seeking extension of time to serve the Record of appeal and not the actual filing of the Record of appeal out of time, the omission to include the Notice of appeal and letter applying for certified copies of proceedings and judgment of the High Court was regretted.
5. Both the applicant and the respondent filed written submissions. Highlighting their submissions on a virtual platform, learned counsel for the applicant, Mr. Kitulu largely reiterated the contents of the motion and the affidavit in support that the application for extension dated 8<sup>th</sup> November 2021, sought to cure the delay in service of the Record of appeal on the respondent, and that security for the High Court's decree was deposited by the applicant in accordance with this Court's directions and the appeal is awaiting pretrial conference and fixing of hearing dates.
6. Learned counsel Mr. Amuga for the respondent also highlighted the respondent's submissions and submitted that the motion dated 5<sup>th</sup> May 2022 was brought under rule 57 of the Court's rules, which is only available for rescinding of orders for extension of time where no specific date to extend time is provided. Counsel submitted that in the instant application, the applicant is clearly dissatisfied with the merits of the ruling of 28<sup>th</sup> May, 2022 meaning that the applicant is asking the Court to sit on an appeal against its own decision.
7. Counsel submitted that the record of appeal was lodged out of time, and no explanation was provided for the delay in filing of the Record or for the delay in serving the Record of appeal; that this Court fully considered the applicant's application for extension of time to file and serve the record of appeal and rightly dismissed it.
8. Counsel further contended that the Certificate of delay at Page 616 of the record of appeal, clearly indicated that on 29<sup>th</sup> July 2021 the advocates were notified by the Registry that copies of proceedings and judgment were ready for collection upon payment of court fees; that this meant that the 60 days for lodging the Record of appeal started running from 30<sup>th</sup> July 2021, and not from 24<sup>th</sup> August 2021 as alleged by the applicant; that therefore the Court's finding and holding that the appeal was lodged out of time was correct. Counsel concluded that considering that the Record of appeal was itself lodged out of time, it is incompetent, and even if the prayer for extension of time for serving the appeal was merited, which is not the case, it would be futile to extend time for serving of an incompetent appeal.
9. Rule 57 (now rule 59 of the Court of Appeal Rules, 2022) deals with rescinding of orders states as follows:

“(1) Any order made on an application heard by a single judge may be varied or rescinded by that judge or in the absence of that judge, by any other judge or by the court on the application of any person affected thereby, if –



- a. The order was one extending the time for doing any act, otherwise than to a specific date; or
  - b. The order was one permitting the doing of some act without specifying the date by which the act was to be done and the person on whose application the order was made has failed to show reasonable diligence in the matter.
- (2) An order made on an application to the court may similarly be varied or rescinded by the court.”
10. In the case of *Pressmaster Limited v Elego (Civil Application 49 of 2019)* [2022] KECA 571 (KLR):
- “A reading of Rule 57 shows that it gives the Court discretion to vary or rescind an order that was made by the Court only in two specific situations. First, where the order sought to be varied relates to extension of time, and secondly, where the order sought to be varied seeks specification of the date by which an act is to be done.”
11. See also *Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suiting Division) Limited (Now Known as King Woollen Mills Limited & 2 others* [2016] eKLR.
12. And in the case of *Arale (Personal Representative of the Estate of Muda Arale Farah) vs Nur Olow Farah a.k.a. Olow Farah a.k.a. Diriye Mohamed Olow (Civil Appeal (Application) E080 of 2022)* [2023] KECA 111 (KLR) the single Judge in declining to hear a similar application held that:
- “Having carefully considered the applicant’s motion, the grounds on which it is anchored, the affidavits in support and in reply, and the relief sought, I find that the applicant’s Notice of Motion dated December 22, 2022 is not properly before me in view of the fact that the 1<sup>st</sup> prayer to set aside the impugned ruling of a single judge made under rule 4 of this Court’s Rules would be the subject of a reference to a full bench pursuant to rule 57(1) (b) before the relief sought under rule 58(3) can be considered by a single judge.”
13. In the case of *Ikumbi Estate Investment Limited vs Nyambura (Civil Application 150 of 2019)* [2023] KECA 833 (KLR) the single Judge held that:
- “From the prayers on the face of the motion, the order that is sought to be reviewed by the applicant is not one extending the time for doing any act or permitting the doing of any act without specifying the dates as provided under rule 57(1) (a) or (b). The order sought to be reviewed is one that dismissed the application for extension of time. The ruling can therefore only be referred to the full bench by way of reference under rule 57 of the Court of Appeal Rules, 2022 (formerly Rule 55 of the Court of Appeal Rules, 2010).”
14. The circumstances upon which this application is premised are similar to those set out in the above cited authorities. The applicant is seeking a review of an order that dismissed the application for extension of time to file and serve a Record of appeal out of time, and not one seeking to extend the time for doing any act or permitting the doing of any act where specific dates were not provided as required under rule 57(1) (a) or (b). The above cited authorities are unequivocal, that where the application for review of the ruling does not satisfy the criteria set out in rule 57, then the ruling should be referred to the full bench by way of reference under rule 55 (now rule 57 of the Court of Appeal Rules, 2022). On these premises, this Court lacks jurisdiction, and I decline the invitation to review the decision in the ruling of 28<sup>th</sup> May 2022.



15. In sum, Notice of Motion dated 5<sup>th</sup> May 2022 is lacking in merit and is accordingly dismissed with costs to the respondent

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL, 2024**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

