



REPUBLIC OF KENYA



**Ogutu & 24 others v Ita Marine Services Ltd & another (Civil
Application 99 of 2018) [2023] KECA 659 (KLR) (9 June 2023) (Ruling)**

Neutral citation: [2023] KECA 659 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION 99 OF 2018
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JUNE 9, 2023**

BETWEEN

JOSEPH OTIENO OGUTU	1ST APPLICANT
JOSEPH KIMWOYA OUMA	2ND APPLICANT
RICHARD AROGO OPAR	3RD APPLICANT
BERNARD OMONDI BONDO	4TH APPLICANT
SIMON MAKHULO KONGO	5TH APPLICANT
PATRICK ALWAL ODONGO	6TH APPLICANT
FESTO MASKINI SIVONA	7TH APPLICANT
PHILIP OMACH	8TH APPLICANT
RICHARD ISOMI NAMBWENYA	9TH APPLICANT
BENEDICT LUBONDI ODUNGA	10TH APPLICANT
CHRISTOPHER OKECH MUKHUMA	11TH APPLICANT
LUCAS ONYANGO AMIMO	12TH APPLICANT
MUSULI ANTHONY KEVOGO	13TH APPLICANT
GEDION OUMA OYIEKO	14TH APPLICANT
MWANZIA DAVID MUSYOKA	15TH APPLICANT
MAURICE OMONDI OKOTH	16TH APPLICANT
HAMADI HAMISI KOTENDA	17TH APPLICANT
FRED OWINO	18TH APPLICANT
GEORGE MUSIANO	19TH APPLICANT



LUCAS ONYANGO WANGE 20TH APPLICANT
NICHOLAS NAKAA ONYANGO 21ST APPLICANT
SAMSON OLWENY 22ND APPLICANT
EMMAUEL WASONGA ABANG 23RD APPLICANT
JULIUS OWINO AHOLO 24TH APPLICANT
EDWARD MUTAMBO 25TH APPLICANT

AND

ITA MARINE SERVICES LTD 1ST RESPONDENT
ALLIED WHARFAGE LIMITED 2ND RESPONDENT

*(Being an application for reinstatement of Civil Reference Application
No. 99 of 2018 which was dismissed for non-attendance by S.G.
Kairu, P. Nyamweya & J. Lesiit JJA on 15th February 2022)*

RULING

1. This is a Notice of Motion application dated July 20, 2022, brought under Article 50 and 159 (2) (d) of *the Constitution* and Rule 105 of the *Court of Appeal Rules*, hereinafter the Rules. It seeks to have this Court review, vary and/or set aside its orders of February 15, 2022. Secondly, that this Court do reinstate to hearing Civil Reference No 99 of 2018. Thirdly, that this Court be pleased to issue orders directing a fresh hearing and/or re-hearing of the matter as the case may be.
2. The application is supported by the grounds on the face of the Motion, and by the sworn affidavit of one, Samson Olweny, the 22nd Applicant, who is the Applicant prosecuting this application. He started by giving a chronology of the appeal case from the judgment of the Employment and Labour Relations Court and how through a litany of blunders by counsel on record, the appeal was struck out.
3. The Applicant averred that the reference application dated July 29, 2018 (we shall re-visit this date later in this ruling), the subject matter of this application, was coming up for hearing on February 15, 2022. That he learnt from the Applicants advocate on record, Bernnete Nzamba advocate that she had difficulties joining the platform for the virtual hearing of the application. That he made several visits to the advocate to find out what transpired to no avail. That he then resorted to follow-up with the Court Registry where he learnt that the Court dismissed the application on the same day of the hearing for non-attendance of parties. He averred that the dismissal order was made due to no fault of the Applicants; that the Applicants are desirous to prosecute their case, and that the 1st Respondent did not stand to suffer any prejudice if the application is reinstated. He seeks the Court's indulgence urging the Court not to visit mistakes of counsel on the Applicants.
4. The Respondents vehemently opposed the application. Mr. Ahmed Haji Abdulattif, the General Manager, Operations of the 1st Respondent, in his replying affidavit dated November 4, 2022 gave a chronology of the case between the Respondents and the Applicants. The deponent challenged the Applicant's capacity to represent himself as well as the other 24 Applicants for lack of consent or authority from the rest to represent them. He also faulted the Notice to Act in person filed by the Applicant, stating the notice was not binding on the rest of the Applicants. The deponent decried the



Applicants conduct of the proceedings, stating that there was indolence, recurring non-disclosure of material facts, and little or no explanation for delay at various stages.

5. The application was heard on the November 8, 2022 during which time, Mr. Samson Olweny, the 22nd Applicant (hereinafter the Applicant) was present relying on the Notice to Act in person dated July 2022. Learned counsel Ms. Baraza was present for the 1st Respondent. The 2nd Respondent was not present and both parties agreed that it did not enter appearance nor participate in the suit before the High Court, and was not affected by the application. The Applicant relied on his written submissions dated November 2, 2022, which rehashed the grounds for the application as stated on the face of the Motion and in the supporting affidavit.
6. Ms. Baraza relied on her written submissions dated July 20, 2022 and the replying affidavit sworn by the Director of the 1st Respondent dated November 2, 2022. Counsel relied on Rule 58 of the Rules and urged that the application is incompetent for being brought without leave (sic). Counsel relied on the case of *Charles Onyinge Abuso v Kenya Ports Authority & another* (2018) eKLR and *Habo Agencies Ltd v Wilfred Odhiambo Musingo* (2015) eKLR for the proposition that a Court lacks jurisdiction to hear an application filed out of time without leave.
7. We have considered the application and the rival submissions of the parties. The background of this application is that the Applicants filed an application dated July 31, 2018, seeking an extension of time to file a Notice of Appeal and Record of Appeal out of time. The Applicants intended to appeal the judgment of the Employment and Labour Relations Court, which dismissed their claim for compensation and other payments arising from unfair termination. The application for extension of time was heard by a single Judge (Kooome, JA, as she then was) and dismissed on April 4, 2019. The Applicants then filed a letter seeking reference of the dismissed application to a full bench of this Court, signed by Ms. Bernette Nzamba. That letter is annexure ASN1 at page 48 of the Respondent's replying affidavit and is dated November 24, 2020 and filed on February 23, 2021. That application was set down for hearing on the February 15, 2022. On the date scheduled for hearing, there was no appearance by the Applicants or the Respondents, and the application was dismissed under Rule 56(1) [now 58 (1)] of the Rules. The instant application arises out of the dismissal.
8. The application has been brought pursuant to Articles 50 and 159 (2) (d) of the Constitution which underpin the right to fair hearing and the need for a court of law to frown upon subservience to procedural technicalities in the dispensation of justice. It is also brought under Rule 105 of the Rules. However, the applicable rule is Rule 58 of the Rules. Guided by Article 159 of the Constitution, we shall consider the application as having been brought under the correct Rule. Rule 58 provides as follows:

Procedure on non-appearance

1. If on any day fixed for the hearing of an application, the applicant does not appear, the application may be dismissed, unless the Court sees fit to adjourn the hearing.
2. If the applicant appears and the respondent fails to appear, the application shall proceed in the absence of the respondent, unless the Court sees fit to adjourn the hearing.
3. Where an application has been dismissed under sub- rule (1) or allowed under sub- rule (2), the party in whose absence the application was determined may apply to the Court to restore the application for hearing or to re-hear it, as the case may be, if he can show that he was prevented by any sufficient cause from appearing when the application was called on for hearing.



4. An application made under sub-rule (3) shall be made within thirty days of the decision of the Court, or in the case of a party who would have been served with notice of the hearing but was not so served, within thirty days of his first hearing of that decision.

9. The application now sought to be re-instated was dismissed under Rule 58 (1) of the *Rules*. In this Court’s decision in *Director General, National Employment Authority v Al Hujra Agencies Limited* (Civil Application E185 of 2020) [2022] KECA 379 (KLR) [Nambuye. Okwengu & Mbogholi-Msagha JJA] set the principles that should be applied in an application of this nature as the following:

“On satisfaction of the law, we adopt the position taken by the court in the following cases among numerous others: *Kasturi Limited v Nyeri Wholesalers Limited* [2014] eKLR; *Wilson Cheboi Yego v Samuel Kipsang Cheboi* [2019] eKLR and *Joseph Kinyua v GO Ombachi* [2019] eKLR all which underscored the need for litigation to be brought to an end after all parties have been heard on merit and substantive justice met to all parties before the court. Secondly, when seeking the court’s intervention upon default and or non-compliance with a procedural step in litigation before the court, demonstration of existence of a reasonable explanation for the default would suffice as basis for the exercise of the court’s discretion in favour of the party seeking relief. Thirdly, consideration of the nature of the substratum of the litigation is also a primary consideration. Fourthly, that in an application of this nature there is need to balance the requirement as to whether reasonable grounds have been proffered for reinstatement and the prejudice to be suffered by the opposite party if such an order for reinstatement were to issue. Fifthly, dismissal is a draconian order which should only be employed sparingly.”

10. In order to succeed in this application, the Applicant is obligated to satisfy two prerequisites, namely, that the application was presented within the timeline set out in Rule 58(4) of the Court of Appeal Rules and which timeline is mandatory by the use of the word “shall” in sub-rule (4) of Rule 58 of this *Court’s Rules*. It is mandatory for the application to be filed within thirty (30) days of the impugned order. Secondly, that on the law, the application meets the threshold for granting the reliefs prayed for.

11. On the first prerequisite, the 1st Respondent raised issue with the application being filed late without leave as prescribed under Rule 58 (4) of the *Rules*. We note that the Applicant seeks to have his application that was dismissed by this Court for non- attendance on the February 15, 2022 re-instated to hearing. The instant application was filed on the July 20, 2022, which is five months down the line. Either by dint of Rule 58 (4) of the *Rules* he ought to have filed his application within 30 days from the date when the ruling was delivered, or 30 days from the date he became aware of it. Either way he would still be required to seek leave to bring the application now before us. We have not been informed whether the Applicant has obtained leave to file this application out of time, or whether there is such an application pending before this Court. This application is incompetent. We lack the jurisdiction to hear him.

12. In the circumstances, there is only one fate that can befall this application that is to strike it out for being incompetent, which we hereby do, with costs to the Respondent.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF JUNE 2023

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL



P, NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

