



REPUBLIC OF KENYA



**Heritage Investment Limited v Rimui (Civil Application  
E006 of 2023) [2023] KECA 1290 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1290 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E006 OF 2023  
SG KAIRU, JW LESSIT & GV ODUNGA, JJA  
OCTOBER 27, 2023**

**BETWEEN**

**HERITAGE INVESTMENT LIMITED ..... APPLICANT**

**AND**

**GEORGE MUCHAI RIMUI ..... RESPONDENT**

*(Being an application for to strike out the memorandum and record of appeal in Civil Appeal E137 of 2022 lodged in court on 16th December 2022, being an appeal from a judgement of the Employment and Labour Relations Court of Kenya at Mombasa by Justice L. Ndolo delivered on 21st May 2020 in ELRC Civil Appeal No 11 of 2018)*

**RULING**

1. Before us is the Notice of Motion dated 6<sup>th</sup> February, 2023 taken out by the applicant herein, Heritage Investment Limited expressed to be brought pursuant to Rules 86 and 92 of the Rules of this Court. The motion seeks the striking out of the memorandum and record of appeal filed in the Civil Appeal E137 of 2022 with costs.
2. The background to the application is that there was a road traffic accident on 24<sup>th</sup> February 2013, involving the respondent, who worked for the applicant as a driver. The respondent sued the applicant in Mombasa SPMCC 1485 of 2013 where he sought to recover compensation for injuries he sustained. The suit was dismissed vide judgement rendered on 7<sup>th</sup> September 2018 by Hon F. Kyambia. The respondent was dissatisfied with the judgement and appealed to the ELRC in Civil Appeal 11 of 2018. Ndolo, J, vide judgement rendered on 21<sup>st</sup> May 2020 found no merit in the appeal and dismissed the same.
3. Still dissatisfied, the respondent moved to this court on second appeal by filing Notice of Appeal dated 26<sup>th</sup> May 2020. He sought and was granted leave to file an appeal as a pauper and he filed the Memorandum and Record of Appeal on 16<sup>th</sup> December 2022.



4. The grounds of the application were that the respondent filed the Memorandum and Record of Appeal on 16<sup>th</sup> December, 2022 and was to serve the same within 7 days of filing. However, the same was not served on the applicant till 27<sup>th</sup> January, 2023 hence service was effected outside the prescribed period. The affidavit in support of the application reiterated the grounds on the face of the motion.
5. Submissions dated 25<sup>th</sup> April 2023 in support of the application were filed by Jengo Associates advocate for the applicant. In those submissions, the applicant cited Rules 86 and 92 of the Rules of this court as well as the case of Nzai & 57 others v Invesco Assurance Co Ltd (2022) KECA 66 for the proposition that the mandatory terms of Rule 92 of the Rules of this court offer the respondent no defence against the 42 days delay in service of the Memorandum and Record of Appeal. Similarly, it was submitted that Article 159 of the Constitution did not absolve the respondent of its obligation to comply with procedural imperatives. Cited was the case of Raila Odinga v IEBC & others [2013] eKLR.
6. The application was opposed vide the respondent's sworn affidavit where he explained the delay in service as being occasioned by the failure by the registry to automatically generate an appeal number.
7. Submissions dated 31<sup>st</sup> May 2023 were filed by Njoroge Mwangi & Co Advocates for the respondent. In those submissions, reliance was placed on Rule 81 of the Rules of this Court and the respondent took issue with the applicant's failure to file a notice of address for service. It was urged that the respondent filed the appeal as a pauper and was not given timelines, however by dint of Rule 84, he had 60 days to file and serve the record; that he had upto 3<sup>rd</sup> February 2023 to do so hence service on 27<sup>th</sup> January 2023 was well within time. The court was urged to exercise discretion in favour of a pauper who was unable to serve the memorandum and record within time because electronic filing of an appeal as a pauper proved a challenge to the registry.
8. We heard this application on the Court's virtual platform on 26<sup>th</sup> June, 2023 during which Learned Counsel Mr Jengo appeared for the applicant while Mr Njoroge appeared for the Respondent. Both counsel relied on their submissions on record in support of their respective positions in the application.
9. We have considered the application, the affidavits both in support of and in opposition to the application and the submissions made. Rule 81(1) of the Rules of this Court provide as follows:
  - (1) Each person on whom a notice of appeal is served shall—
    - a. Within fourteen days after service, lodge in the appropriate registry and serve on the intended appellant a notice of a full and sufficient address for service; and
    - (b) within a further fourteen days after service, serve a copy of such notice of address for service on every other person named in the notice of appeal as a person intended to be served.
10. In this case, the respondent contended that the applicant did not comply with the above provisions. The importance of complying with the Rules of this Court was emphasised by Kiage, JA in Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR in which he expressed himself as hereunder:
 

“... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost- effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and



determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned..."

11. This Court in *Sukwinder Singh Jutley v. Prudential Association Co. of Kenya Ltd & Another* Civil Appeal (Application) No. 62 of 2004 held that:

"In procedural rules that lack clarity, the Court is at liberty to lean on constructions which aid the course of justice but not in clear rules which have been interpreted many times by the Court as to depart from the rule without changing it would be an aberration that would confound and confuse litigants and should not be countenanced even for a solitary unintentional omission."

12. The rationale for strict adherence to rules of practice and procedure was explained in *Chelashaw v Attorney General & Another* [2005] 1 EA 33, where it was held that without rules of practice and procedure the application and enforcement of the law and the administration of justice would be chaotic and impossible and their absence or non-adherence would lead to uncertainty of the law and total confusion since laws serve a purpose and they enhance the rule of law. That enforcement of such rules is imperative was emphasized by this Court in *Onjula Enterprises Ltd vs. Sumaria* [1986] KLR 651, where it was held that:

"The rules of the court must be adhered to strictly and if hardship or inconvenience is thereby caused, it would be that easier to seek an amendment to the particular rule. It would be wrong to regard the rules of the court as of no substance. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to disregard of the principle involved. See *London Association for the Protection of Trade & Another v Greenlands Limited* [1916] 2 AC 15 at 38."

13. This Court in *Taracisio Gitthaiga Ruithibo v Mbutia Nyingi* Civil Appeal No. 21 of 1982; [1984] KLR 505, cautioned that no court, particularly this one, should wish away the Rules of Court so ignobly.

14. This Court, while referring to the then Rule 78(1)(a) [now Rule 81(1)(a)] of the *Court of Appeal Rules*, in *Taracisio Gitthaiga Ruithibo v Mbutia Nyingi* Civil Appeal No. 21 of 1982; [1984] KLR 505 held that:

"Rule 78(1)(a) imposes a duty upon a respondent, but only if he has been served with a notice of appeal, to lodge in appropriate registry and serve the intended appellant with notice of a full and sufficient address for service. The respondent is entitled to say that in the circumstances of this appeal there was no failure on his part to comply with rule 78(1)(a) but a respondent who fails to do so after he has been served with notice of appeal, however, runs the risk of having the appeal determined to his detriment without being heard. He incurs no such risk even if he becomes aware howsoever otherwise that an appeal has been filed or is intended to be filed."



15. We have said enough to explain the reason why the applicant ought to have complied with rule 81(1) (a) of the *Rules of this Court* if it expected to be served with the Memorandum and Record of Appeal. Having itself failed to do so, it cannot now be heard to complain that it was not served with the Memorandum and Record of Appeal and seek to obtain favourable orders whose effect would be to terminate the appeal. The applicant cannot be permitted to create an absurd situation and use it to its advantage.
16. Accordingly, we find no merit in this Motion which we hereby dismiss with costs.
17. It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 27<sup>TH</sup> DAY OF OCTOBER, 2023**

**S. GATEMBU KAIRU, FCIArb**

**JUDGE OF APPEAL**

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**J. LESIIT**

**JUDGE OF APPEAL**

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**G. V. ODUNGA**

**JUDGE OF APPEAL**

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I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

