



REPUBLIC OF KENYA



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**Orina v Kenya School of Law & 5 others; Migiro & 31 others (Interested Party)
(Civil Appeal E472 of 2021) [2022] KECA 101 (KLR) (4 February 2022) (Ruling)**

Neutral citation: [2022] KECA 101 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E472 OF 2021
MSA MAKHANDIA, KI LAIBUTA & S OLE KANTAI, JJA
FEBRUARY 4, 2022**

BETWEEN

GERTRUDE MORAA ORINA APPLICANT

AND

KENYA SCHOOL OF LAW 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

COUNCIL OF LEGAL EDUCATION 3RD RESPONDENT

ESTHER WANJIRU KIMANI 4TH RESPONDENT

SHARON PURITY OTIENO 5TH RESPONDENT

GEORGE MOGIRE 6TH RESPONDENT

AND

FIONA BOSIBORI MIGIRO INTERESTED PARTY

WAMBUA ANDREW MUTURI INTERESTED PARTY

MUMALI FAITH OSIMBO INTERESTED PARTY

KAHIROO S HALAHALA INTERESTED PARTY

BII VIOLA CHEPKIRUI INTERESTED PARTY

KIMITI GEORGE NJOROGE INTERESTED PARTY

KIRERU JOHN NJENGA INTERESTED PARTY

MUTIGA DICKSON MWENDA INTERESTED PARTY

PARIAT ENOCH LEKHISON INTERESTED PARTY

MWANGI NJOKI MILKAH INTERESTED PARTY



MWANGI MARGARET WAKARINDI	INTERESTED PARTY
NYAMBANE CLINTON OGETO	INTERESTED PARTY
JANE NJERI NJOGU	INTERESTED PARTY
FRIDAH AKISHA MAKENA	INTERESTED PARTY
OMIA GLORIA ADHIAMBO	INTERESTED PARTY
THUO RUTH WAIRIMU	INTERESTED PARTY
WOKABI VIVIAN MURINGO	INTERESTED PARTY
NJAAGA NAOMI WAIRIMU	INTERESTED PARTY
MWAURA SARAH NJOKI	INTERESTED PARTY
MILDRED KAMENE MUSAU	INTERESTED PARTY
MULI DENNIS MUINDE	INTERESTED PARTY
KENNEDY KERUBO SHEILA	INTERESTED PARTY
DIBON GITURWA	INTERESTED PARTY
AUMA LAUREEN APONDO	INTERESTED PARTY
OLINDO I. MMBONE	INTERESTED PARTY
MOHAMMED AHMED ALI	INTERESTED PARTY
KABOGO R. NYAGUTHII	INTERESTED PARTY
ANNE KEMUNTO MORARA	INTERESTED PARTY
MOSES GATHAIYA MBURU	INTERESTED PARTY
LUCY A. ODERA	INTERESTED PARTY
MUKONG T. MERCY	INTERESTED PARTY
RICHARD AKOMO OTENE	INTERESTED PARTY

(Being an Application to strike out the Record of Appeal dated 18th August 2021 against the Judgment of the High Court of Kenya at Nairobi (Mativo, J.) delivered on 28th August 2020 in Judicial Review Application No. 20 of 2020 (Consolidated with Judicial Review Applications Nos. 7 of 2020, 8 of 2020, 13 of 2020, 21 of 2020 and 26 of 2020)

RULING

1. Before us is a Notice of Motion dated 17th September 2021 made under Rules 77, 82, 83, 84 and 87 of the *Court of Appeal Rules*, and in which the applicant, Gertrude Moraa Orina, moved the Court for orders that:
 1. The Certificate of the Record of Appeal dated 6th August 2021 be struck out.
 2. The Notice of Appeal lodged by the [appellant] on 1st September 2020 is struck out.
 3. The Certificate of Delay issued on 17th August 2021 be struck out.



4. The Record of Appeal dated 6th August 2021 and filed on 20th August 2021 is struck out.
5. Costs of this application be provided for.
2. The applicant's Motion is founded on the following 9 grounds, namely:
 1. That the record of appeal has not been served to date to the counsel of the applicant despite it having been lodged in court on 20th August 2021.
 2. That the appellant makes reference to a Notice of Appeal dated 31st August 2020, the Court of Appeal while considering applications for stay of execution in their Ruling dated 7th May 2021 in Civil Application No. E417 of 2020 and E002 of 2021 makes reference to a Notice of Appeal dated 2nd September 2020, the E-filing portal where the appeal is coming from in JR 20 of 2020, does not contain any Notice of Appeal to date.
 3. That Rule 87(5) of the Court of Appeal Rules 2010 requires that the Record of Appeal be certified by the appellant or any other person. As demonstrated, this Record of Appeal is deficient, incomplete and incompetent and contains grave and incurable errors.
 4. That the Certificate of the Record of Appeal itself is incomplete and therefore incompetent for failing to disclose material facts to court.
 5. That the Certificate of Delay did not give a correct chronology of events and omitted material facts to [wit] the fact that the appellant was still actively litigating the matter while the intended appeal was pending.
 6. That the Record of Appeal introduces new evidence without following the mandatory procedure laid down in Rule 29.
 7. That the Record of Appeal should be struck out as it omits critical documents necessary for determination of this appeal as required by Rule 87.
 8. That the Notice of Appeal has not been served on the applicant and all persons affected by the appeal within the prescribed time.
 9. That the appellant has not lodged the Record of Appeal within the time prescribed by law and the proviso to Rule 82 is not available to the appellant.
3. The applicant's Motion is supported by her annexed affidavit sworn on 17th September 2021 in which she sets out the sequence of events leading to her application to strike out the appeal herein. According to her, the appeal herein affects the outcome of not only her Judicial Review application, but all the other Judicial Review applications with which it was consolidated. She decries the stay of execution enjoyed by the appellant pending appeal while their admission to the appellant institution remains in limbo. In addition, the applicant filed a supplementary affidavit sworn on 27th September 2021 in which she alleges mischief in the manner in which service of the Record of Appeal was effected on the respondents to her exclusion. We need not evaluate the rest of the contents of the two affidavits which, in our view, are in the nature of submissions on points of both substantive law and fact, and which go to the core of the pending appeal.
4. The applicant was among the 31 Ex Parte applicants in Judicial Review Application No. 8 of 2020 filed against the appellant herein and the Attorney-General seeking inter alia orders of (a) certiorari to quash the 1st appellant's decision not to admit them to the Advocates Training Programme for the year 2020/2021; and (b) mandamus compelling the 1st appellant to admit them to the training programme for that year. Her application was consolidated and heard together with 5 others, being Judicial Review



Applications No. 7 of 2020, No. 13 of 2020, No. 20 of 2020, No. 21 of 2020 and No. 26 of 2020. It is noteworthy that the matters in controversy in the six Judicial Review applications and in the appeal herein beg for close scrutiny to determine whether any of the respondents to the appeal merit admission to the appellant institution, a matter of profound public interest.

5. By a judgment delivered on 28th August 2020, the High Court (Mativo, J) allowed the applications. He quashed the appellant’s decision and compelled it to admit the applicant herein together with all the ex parte applicants in the 6 applications aforesaid to the Advocates Training Programme for the year 2020/2021. According to the learned Judge:

“ the decision to reject the applicants’ applications by the Kenya School of Law into the ATP is illegal and ultra vires its statutory mandate. KSL’s decision declining each applicant’s admission into the ATP is a gross violation of the applicants’ constitutionally guaranteed rights to education provided under Article 43(1) (f) of the Constitution.”

6. Dissatisfied with the judgment and decree of the court, the appellant lodged its appeal herein on the grounds:

1. That the learned Judge erred in law and in fact by failing to refer to and analyse the appellant’s extensive case and submissions.
2. That the learned Judge erred in law and in fact by concluding that the Legal Education Act prescribes admission requirements to the Advocates Training Programme as it does not. Further, the Honourable Judge misunderstood and misapplied LN No. 169/2009 and the Kenya School of Law Act. The pre-bar under LN No. 169/2009 would have cured the inadequacies of the applicant in JR No. 26/2020.
3. That the learned Judge erred in law and in fact by failing to recognise the statutory obligations of the appellant. The conclusion defeats S.17(2) of KSL Act. The appellant’s admission function is rendered perfunctory and that admission to LLB is an automatic ticket of admission to ATP under S.16 of the KSL Act.
4. That the learned Judge erred in law and in fact by finding that subsidiary legislation overrides substantive law in inferring that regulations of legal education in Kenya gives the Council of Legal Education power to set admission criteria to the ATP when that function has been expressly done by Parliament with a directive that under S.17(2) KSL Act, KSL shall consider applications to the ATP. By applying the doctrine of implied repeal to CLE Regulations of 2016 which are subsidiary legislation of the LEA 2016 which are subsidiary legislation to override the second schedule to the Kenya School of Law Act which is statute.
5. That the learned Judge erred in law and in fact by legislating in the judgment.
6. That the learned Judge erred in law and in fact by interpreting the law in a manner that perpetuates unfair discrimination between foreign school graduates and local graduates without any justification.
7. That the learned Judge erred in law and in fact by disregarding the evidence of the appellant and considering extrinsic matters and made conclusions on KSL admitting students with qualifications similar to petitioners without any evidence being placed before him.”

7. The appellant opposed the applicant’s Motion as appears from the replying affidavit of Frederick Muhia, the appellant’s Academic Services Manager, sworn on 24th September 2021. According to Frederick Muhia, “the Record of Appeal was served on the respondents by way of email on 26th August



2021, and within the stipulated timeline for service.” He explains that the applicant’s email address had been inadvertently omitted, and that the omission was a genuine oversight. In effect, apart from the applicant, all the other respondents had been duly served with the Notice of Appeal and the Record of Appeal as confirmed in paragraph 8 of the applicant’s supporting affidavit.

8. Learned counsel for the applicant, M/s. Masinde Ndivo & Associates Advocates, filed their written submissions dated 20th September 2021 in which they cited 4 authorities in support of their application to strike out the Record Of Appeal on the grounds of (a) alleged want of service on the applicant within the time specified in Rule 90(1) (see *Total Kenya Limited v. Reuben Mulwa Kioko [2018] eKLR*); (b) introduction of additional evidence in violation of Rule 29 (see *Dorothy Nelima Wafula v Nelson Nekesa and Another [2017] eKLR*); and (c) inaccurate certificate of delay.
9. On her part, learned counsel for the appellant, Ms. Pauline Mbuthu, filed her written submissions on 1st October 2021. Learned counsel contended that the applicant’s Motion was intended to sidestep the directions of the Court and canvass matters that are already before this Court. She relied on the authority of *Kivanga Estates Limited v National Bank of Kenya Limited [2017] eKLR* where this Court had this to say:

“There is no greater duty for the court than to ensure that it maintains the integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by, amongst other measures, stopping litigations brought for ulterior and extraneous considerations. The courts, litigants and counsel are enjoined by both the Constitution and the law to assist the court to further the overriding objective for the just determination of the proceedings; the efficient disposal of the business of the court; the efficient use of the available judicial and administrative resources; the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the parties.”

10. When the applicant’s Motion came for hearing on 14th December 2021, learned counsel for the applicant and for the appellant made oral submissions highlighting the salient arguments in their written submissions. In addition, the 4th respondent, Esther Wanjiru Kimani appearing in person, orally submitted that she was in support of the Motion even though she had not filed a supporting affidavit or written submissions to that end. The other 40 respondents did not express their intention to support the applicant’s Motion, and we can only presume their intention to have the appeal determined on its merits.
11. In addition to faulting the appellant for failing to effect service of the Notice of Appeal and Record of Appeal upon her as required under Rule 90 of the Court of Appeal Rules, the applicant also impugns the Certificate of the Record of Appeal which, in her view, does not satisfy the requirements of Rule 87(5). This Rule requires each copy of a record of appeal to be certified to be correct by the appellant or by any person entitled under Rule 22 to appear on his behalf. Accordingly, she submits that the Record of Appeal is deficient, incomplete, and incompetent, and contains grave and incurable errors.
12. In response, learned counsel for the appellant submitted that the apparent want of certification was a formal omission that was by no means incurable. According to her, striking out the record on this account would not be justified.
13. In her Motion, the applicant also contended that the Certificate of Delay issued on 17th August 2021 is defective in that it fails to give the correct chronology of events by omitting material facts. It is noteworthy that the impugned Certificate issued from the office of the Deputy Registrar of the High Court pursuant to Rule 82(1) of the Rules of this Court, and that any questions raised as to its validity or otherwise should be the subject of consideration by the Deputy Registrar.



14. The applicant’s further complaint that the appeal introduces new evidence is, in our considered view, not sufficient to strike out a record of appeal this early in the day as sought. Nothing stands in the way of an application by any party interested to introduce new evidence with leave of the Court before hearing and determination of the appeal. If such an application is made, the appellant will have an opportunity to either concede or oppose it. The same applies to the allegation that the same does not include material documents which could, at any time before hearing and determination of the appeal, be introduced by way of a supplementary record with leave of the Court.

15. Having considered the applicant’s Motion, the affidavits in support, the appellant’s replying affidavit, the written and oral submissions of the respective learned counsel, we call to mind the guiding principle in Article 159(2) (d) of the Constitution, which mandates courts and tribunals to administer justice without undue regard to procedural technicalities. While the Rules of this Court require that certain things be done in accordance with the Rules, and within specified timelines, the interests of justice demand that the Court be alive to the circumstances of each case, and avoid “undue regard to procedural technicalities”. This is a case in which all respondents, but the applicant, have been served with the Notice of Appeal and Record of Appeal. The outcome of the appeal against the judgment and decree made in determination of the applicant’s Judicial Review application in the High Court stands to affect five other Judicial Review applications with which it was consolidated. We cannot take it lightly that the matters in controversy impact the fate and livelihood of 42 candidates for admission to the appellant’s Advocates Training Programme, not to mention those who come after them. Indeed, final determination of the qualifications for such admission is a matter of public interest that begs consideration once and for all. And that can only be possible if the appeal herein is determined on its merits. Accordingly, we hereby order and direct that:
 - (a) the applicant’s Notice of Motion dated 17th September 2021 be and is hereby dismissed;
 - (b) if any copy of the Record of Appeal has been served on any of the respondents without due certification as required by Rule 87(5) of the Court of Appeal Rules, the appellant do certify such copies within 7 days from the date of service upon it with this order;
 - (c) if any party has not been served with the requisite Record of Appeal, the appellant do, within 7 days of certification, serve the same upon such a party and file an affidavit of service in that regard;
 - (d) costs of this application be costs in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole. KANTAI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

