



**Asiligwa v Baumgartner & another (Civil Appeal 372 of 2018)
[2021] KECA 308 (KLR) (17 December 2021) (Judgment)**

Neutral citation: [2021] KECA 308 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 372 OF 2018
MSA MAKHANDIA, S OLE KANTAI & DK MUSINGA, JJA
DECEMBER 17, 2021**

BETWEEN

ERIC LUMOSI ASILIGWA APPELLANT

AND

PETER FELIX BAUMGARTNER 1ST RESPONDENT

AGGREY MUHADI ARAP SABE 2ND RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (K. Bor, J.) dated 26th July, 2018 in ELC Case No. 869 of 2013 (OS) Consolidated with Civil Case No. 957 of 2012)

JUDGMENT

1. This appeal arises from the judgment and decree of two consolidated suits being Civil Case Number 957 of 2012 and Environment and Land Court “ELC” Case Number 869 of 2013 (OS), involving the same parties.
2. In the Civil Case No. 957 of 2012, the 1st respondent had sued the appellant, and one Richard Sang Salat and the Registrar of titles for a declaration that the intended trust having failed to materialize, there is at common law a resulting trust in favour of the 1st respondent; that the 1st respondent is entitled to the ownership of both title number Dagoretti/Waithaka/1460 and title number Dagoretti/Waithaka/1463 and the school constructed thereon under the doctrine of resulting trust and finally, that the Commissioner of Lands be directed to effect and cause the transfer and vesting of titles numbers Dagoretti/Waithaka/1460 and Dagoretti/Waithaka/1463 in the sole name of the 1st respondent.
3. During the pendency of this suit, the appellant, the 2nd respondent and Richard Sang Salat filed ELC Case No. 869 of 2013 against the 1st respondent seeking orders that: Gentiana Self- Help



Centre Registered Trustees be and is hereby wound up; upon such dissolution all the movable and or immovable property held by the said Gentiana Self-Help Centre Registered Trustees more particularly title number Dagoretti/Waithaka/1460, be sold and the proceeds realized therefrom be distributed proportionately among the registered trustees; permanent injunction restraining the 1st respondent whether by himself, his agents, servants and or employees from dealing with the immovable and or movable assets of Gentiana Self-Help Centre and more particularly all that parcel of land known as title number Dagoretti/Waithaka/1460 without the participation of the appellant, 2nd respondent and Richard Sang Salat, pending the hearing and determination of the suit.

4. These suits were a follow-up to yet an earlier suit that had been filed by the appellant, Richard Sang Salat and the 2nd respondent against the 1st respondent being High Court of Kenya at Nairobi Civil Case No. 808 of 2007 in which they sought to restrain the 1st respondent from continuing with sidelining them and running the Gentiana self-help Centre solely which suit was struck out later for being incompetent and misconceived.
5. Upon hearing the consolidated suits at length, the trial court delivered its judgment in terms that: Dagoretti/Waithaka/1460 and Dagoretti/Waithaka/1463 be registered in the name of Gentiana Development Network; (hereinafter “ GDN”), that the names of the appellant, Richard Sang Salat and the 1st respondent be cancelled from the title deed in respect of the said property; that the names of 1st respondent and the appellant be cancelled from the title deed of the property; the land registrar do amend the records accordingly and issue title deeds to GDN; and finally; that the appellant and 2nd respondent having failed to prove their case on a balance of probabilities the same be and is hereby dismissed with costs to the 1st respondent.
6. Being dissatisfied by the judgment and decree aforesaid, the appellant filed a notice of appeal on 30th July 2013 and served it on the respondent together with a letter bespeaking the proceedings on 2nd August 2018. The importance of this detail will become clearer later in this judgment. The appellant subsequently filed an appeal on the grounds that the trial court erred both in law and fact: by directing the properties known as DAGORETTI/WAITHAKA/1460 and DAGORETTI/WAITHAKA/1463 (hereinafter referred to as “the suit properties”) be registered in the name of GDN in place of the appellant, Richard Sang Salat and the 1st respondent when no such prayer had been sought by any of the parties; by making a finding that there had been sufficient evidence creating a resulting trust in favour of GDN when in fact there was no such evidence; by ignoring the fact that it is only the 1st respondent who prayed for a declaration that there was a resulting trust in his favour and substituting the 1st respondent’s prayer with orders that the said suit properties be registered in the name of GDN; by ignoring the provisions of Article 60 of the *Constitution* and the provisions of Section 26 of the *Land Registration Act* that protects the sanctity of title to? and further erred by failing to put into account the fact that no evidence was adduced to the effect that the appellant had acquired the suit properties fraudulently as to warrant his name being expunged from the records of the suit properties; in respect of DAGORETTI/WAITHAKA/1463, the trial court erred by failing to appreciate the overwhelming evidence to the effect that the appellant together with the 1st respondent had jointly purchased the suit property and therefore no issue of a resulting trust could arise in favour of GDN; by failing to appreciate that whereas some financial contribution could have been made for development of DAGORETTI/WAITHAKA/1460 by third parties, the said contribution ought not to have been interpreted in law as being capable of overturning the Constitutional provisions that protects ownership of property by directing cancellation of the appellant’s name from the title of the suit properties and replacement thereof with that of GDN by ignoring clear and unconverted evidence regarding the purchase price paid by the appellant; by wrongly admitting secondary evidence of documents under Sections 68 (a) (i) and 69 (iii) of the *Evidence Act* and relying heavily on the same



to find that a resulting trust in respect of the suit properties had been created in favour of GDN; by disregarding the decision of the High Court that had made a finding that the 1st respondent had engaged in unlawful employment in Kenya while he did not have a valid work permit and further erred by failing to nullify the Respondent's acts and all his other engagements in Kenya during the period of his illegality; purporting to reward the 1st Respondent for his illegal acts by making findings that were favourable to him disregarding the provisions of Section 9(c) (i) of the Land Control Act that expressly prohibits ownership of agricultural land by non-citizens and that consequently the 1st Respondent's name ought to have been expunged from the titles to the suit properties *ex debito justitiae*; by ordering that the suit properties be registered in the name of GDN when there was no evidence whatsoever that GDN had any interest in the suit properties by misapplying the provisions of the Constitution of the Republic of Kenya, the Registered Land Act, the Land Control Act and other Laws that govern land ownership within Kenya; by misapplying and misinterpreting the evidence before her and finally, that the trial court erred in its judgment by making unjustified final orders and in so doing exercised the discretion conferred upon it by law unconscionably, unjustifiably, irrationally and without any legal basis whatsoever.

7. The salient facts leading to this appeal are that, the appellant, 2nd respondent and one, Richard Sang Salat met the 1st respondent, a Swiss Journalist, whilst in his line of duty covering stories about children living with HIV/AIDS in the slum areas of Kenya. The 1st respondent was touched by the plight of the said children and opted to help them by putting up a school. He teamed up with the aforesaid three persons in the venture. The 1st respondent sought finances from well-wishers in Switzerland. He started the initiative by publishing an article in the Swiss Magazine, "Wendekreis," in 1996, about an informal school in Mtego-Kawangware slums. As a result of the initiative, the 1st respondent received donations from the readers in Switzerland which money was used to renovate the school. Thereafter the 1st respondent with others including the appellant founded the Gentiana Primary School which was put up with funding from Swiss Embassy and from the 1st respondent's friends from whom he had sought help. Towards the purchase of the suit properties, the 1st respondent invited the 2nd respondent, the appellant and Richard Sang Salat, being Kenyans, as the law did not permit foreigners to own property in Kenya. All this was being done on behalf of GDN, a duly registered non-Governmental organization which the 1st respondent was using to source funds and whose only interest was to own and run Gentiana Primary School.
8. Later on there was a fall out between the parties following several incidents of insubordination in the management of the school, apparently masterminded by the appellant, that led to poor performance of the school and unrest among the pupils amongst others. These acts compelled the 1st respondent to demote the appellant as head of the school, who was later summarily dismissed after he organized a demonstration in town by students against the institution. This resulted in several suits being filed by the appellant, the 2nd respondent and Richard Sang and among them Nairobi Civil Suit No. 808 of 2007 in which they prayed for restraining order against the 1st respondent from solely and unilaterally running Gentiana primary school and Nairobi Civil Case No. 2258 of 2007** seeking for orders of winding up and sale of the school among other prayers. The suits were all however dismissed. Later the appellant filed the suit leading to this appeal in which he prayed for orders already set out at the beginning of his judgment which was equally dismissed thereby provoking this appeal.
9. Before the appeal could proceed to hearing, the 1st respondent filed a motion on notice seeking that: the appellant's Notice of Appeal dated 27th July 2018 and the record of appeal dated 28th September 2018 be struck out for offending the provisions of Rules 75 and 82 of the Court of Appeal Rules respectively; in the alternative, the appellant be ordered to provide further security for costs in the aggregate sum of Kshs. 10,000,000/- or such other sums as may be approved by court within 14 days of the order, in the



alternative to the prayers above, the appellant's appeal as against the 1st respondent be stayed pending the deposit of such security; alternatively in default of compliance with the prayers 1,2,3, above the appellant's appeal as against the 1st respondent be struck out with costs. The application was predicated on the grounds that the notice of appeal offended Rule 75 of the Court of Appeal Rules as it was not duly lodged with the Registrar of the High Court as required, that the record of appeal equally offended Rule 82(1) of the Court of Appeal Rules having been filed 67 days late, which delay was inordinate and inexcusable, leave having not been sought and obtained from court to file it out of time.; that the appellant had engaged the 1st respondent in numerous but malicious litigation all of which had been concluded in his favour; that he had had filed the bill of costs which was capped at Kshs. 10,000,000/ which monies the 1st respondent may lose in the event the appeal fails taking in to account the costs of the appeal as well, given that the appellants are men of straw having no known assets to attach. The affidavit in support of the application merely reiterated and expounded on the above grounds.

10. In response to the application, the appellant filed a replying affidavit in which he deposed that the notice of appeal was duly lodged in time and stamped by the Deputy Registrar of the High Court, but had not been sealed and dated by the time it was served on the 1st respondent. However, he hastened to add that the omission should not be held against him; that in any case, the same is not a fatal omission to warrant striking out of the notice as it can be cured by the invocation of Article 159(2) of the Constitution and Sections 3A and 3B of the [Appellate Jurisdiction Act](#) which provide for courts to lean more towards substantive justice as opposed to technicalities; that striking out a notice of appeal for reason that the same was duly stamped but not sealed by the registrar of the Superior Court by the time of service would be disproportionate to the prejudice which may have been occasioned to the 1st respondent by the failure to have a duly endorsed notice of appeal served on the respondent; and that though the record of appeal was filed 7 days after the prescribed statutory time, the omission was however taken care of by the certificate of delay issued by the Deputy Registrar dated 28th January 2019 in accordance with Rule 82 (1) of the Court of Appeal Rules. As regards the prayer for security of costs, the appellant states that the same is not justifiable and is unsupported by any evidence. In any event he had already deposited with the court Kshs. 6,000/- as the security for costs as assessed and demanded by court and therefore no further security for costs is required.
11. When both the appeal and the application came for case conference before the Deputy Registrar of this Court, it was directed that both the application and the appeal be heard together and parties to file written submissions. On the day of the plenary hearing of the appeal, the appellant indicated that he had filed his written submissions only in respect to the application whereas the 1st respondent had filed submissions with respect to the appeal but not the application.
12. The 1st respondent submitted through Mr. Ojienda, learned Senior Counsel, that there was no competent appeal before the court on account of defective notice of appeal filed that violated Rule 75 of this Court's Rules.;that though the appellant filed the notice of appeal in time the same was fatally defective and amounted to no notice at all in that it was neither dated, endorsed nor sealed by the Deputy Registrar as required by the rules. Relying on the case of [Daniel Nkirimpa Monirei Vs. Sayialele Ole Koilel & 4 Others](#) [2016] eKLR where a notice of appeal was notlodged with the Deputy Registrar of the High Court as required, this Court held that such omission is fatal therefore ousting its jurisdiction to entertain such purported appeal. We were urged to be guided by the said authority; that this was the same holding in [Salama Beach Hotel Limited & 4 Others vs. Kenyariri & Associates Advocates & 4 Others](#) [2016] eKLR. Similarly, counsel submitted that the record of appeal was filed out of time and without leave of court contrary to the provisions of Rule 82 of the this Court's Rules. Relying on the case of [Patrick Kinya vs. Victor Mugira Marete](#) [2015] eKLR, in which this Court held that whether or not an appeal has been filed out of time went to the jurisdiction of the Court, which



only has jurisdiction to hear appeals filed within time or those, though filed out of time but with leave and holding otherwise was an affront to the set down principles established for the institution of an appeal in this Court. Thus, an appeal filed out of time is incurably defective and cannot be cured by the provisions of Article 159 of the Constitution. He submitted that a record of appeal filed out of time is for striking out. That the certificate of delay is meaningless in the circumstances as the appellant had conceded that the record of appeal had been filed out of time. With regard to the main appeal, the 1st respondent collapsed the grounds into five clusters. The first cluster was whether there was a competent appeal before the Court. On this, the 1st respondent reiterated the submissions he had made in support of the application to strike out the notice of appeal as well as the record of appeal and we need not rehash the same.

13. With regard to the second cluster, as to whether there were manifest illegalities leading to an order of rectification of the register to reflect the name of GDN, the 1st respondent submitted that this was a discretionary power exercised by the trial court to see to it that justice was done after registration of the suit properties had been tainted by manifest illegalities perpetrated by the appellant. That in arriving at the decision, the trial court noted that the appellant was the custodian of the documents of both the school and GDN and having looked at the evidence, it noted that there had been confusion in names when the appellant tried to register Gentiana self-Help Group Centre as a trust; that Sections 26(1), (a) & b. of the *Land Registration Act* which frowns upon titles procured by fraud and or misrepresentation was the basis upon which the trial court invoked Section 80 of the Law Registration Act to order for rectification of the register to capture GDN as the proprietor of the suit properties; and that fraud and misrepresentation perpetrated by the appellant in the transactions was clearly manifest.
14. On the 3rd cluster, dealing with the question of parties being bound by their pleadings, it was submitted that courts have since deviated from this doctrine in pursuit of rendering substantive justice to the parties. In support of this contention we were referred to the case of *Chumo Arap Songok Vs. David Kibiigo Rotich* [2006] eKLR, where this Court stated that the law is settled that parties are bound by their pleadings. It went ahead however to give an exception to that general rule on the basis that there may be occasions when the court would formulate an un-pleaded issue and proceed to determine it to render justice to the case and in particular where the issue has been raised in evidence and left to the trial court to determine. It was on record that the 1st respondent while testifying had indicated that he wanted the suit properties registered not in his name but in the name of the school and in effect GDN. Therefore, the submission by the appellant that the trial court erred in granting an order not sought for or pleaded is incorrect.
15. On the 4th cluster dealing with the issue of implied and or resulting trust, the 1st respondent submitted that the finding by the trial court was not erroneous. The appellant had clearly breached the trust that had been bestowed upon him by the 1st respondent to have the suit properties registered in the name of GDN. That the trial court was therefore right in holding that there was an implied trust created when the 1st respondent tasked the appellant with the duty to purchase the suit properties and have them registered with GDN as the proprietor. The respondent submitted further that by virtue of Article 2.23 of the GDN constitution, the suit properties were acquired for charitable purposes of the organization and none thereof was meant for individual benefit or gain and therefore there was no basis for the appellant's plea that the suit properties be sold and the proceeds thereof shared on pro-rata basis amongst the trustees. The respondent pleaded with the Court to be guided by the case of *Peter Ndungu Njenga Vs. Sophia Watiri Ndungu* [2000] eKLR in determining the issue of the resulting and or implied trust.
16. Turning to the fifth cluster, that is, admission of secondary evidence by the trial court, the 1st respondent submitted that the ruling on the appellant's application objecting to the production of



secondary evidence, that is, copies of the documents was made in line with Section 68 (a) (i) and 69(iii) of the *Evidence Act*. The ruling considered the fact that the appellant was in possession of the primary evidence whose absence from the hands of the respondent necessitated the court to rule the way it did. The requirements under the *Evidence Act* for the production of secondary evidence as opposed to primary evidence were fully met. In any event the documents had been made available to the appellant in advance as they had been served on him as part of the bundle of the 1st respondent's documents.

17. Lastly on the 6th cluster dealing with criminal charges, the 1st respondent submitted that the same is a new issue that was never canvassed before the trial court and was therefore barred from raising it in this court. In the end, the 1st respondent pleaded with us not to disturb the judgment and decree of the trial court.
18. The appellant on this part, through Mr. Mbaabu, learned counsel, submitted that the notice of appeal was duly received and stamped by the Registrar of the Environment and Land Court on 30th July 2018, and it is the copy that was served upon the 1st respondent though not having been endorsed, sealed and dated by the Registrar of the court; that later he received the endorsed, sealed and dated copy on or about 28th January 2019; that the issue which is to be determined is whether service of an un-endorsed, unsealed and undated notice of appeal renders the said notice defective for purposes of Rule 75 of this Court's Rules. To this the appellant asks this Court to rely on the case of *Abdirahman Abdi Vs. Safi Petroleum Products Ltd & 6 Others* [2011] eKLR which is to the effect that what is key is that the notice must be shown to have been filed in the High Court within the stipulated time and that the sealing process is not mandatory.
19. As to the appeal offending Rule 82 of this Court's Rules, the appellant reiterated that it was filed in time as required by the law, and that a written request for typed proceedings in accordance with sub-rule 2 of the above rule was made and served on the 1st respondent in time. This was acknowledged by the Deputy Registrar in the certificate of delay of 28th January 2019 which was to exclude the 23 days it took to prepare typed proceedings. The record of appeal having been filed on 5th October 2018 was therefore in time. Had it been filed after 18th October 2018 the 1st respondent's argument would then have held water, since that was the last date to file the record of appeal.
20. On the aspect of depositing security of costs, the appellant's position is that he should not be denied access to the court even if he was a man of straw; that in any event the award of costs to the 1st respondent is one of the grounds of appeal before this Court. We were urged to be guided by the case of *Thomas Lumasi Pilipili Vs. Julius Ajaga* [2019] eKLR regarding the conditions that a party applying for security for costs must meet, and that the 1st respondent had not met the threshold; that alternatively if the Court finds that the appellant needs to deposit more money, then the same be waived under the provisions of Rule 115 of the court of this Court's Rules. The appellant urged us to rely on the case of *Bamburi Cement Co. Ltd. Vs. Lawi Duda and 21 Others*, Civil Application No. Nai 6 of 2013 in which it was held that a litigant should be permitted to bring proceedings without hindrances and have his case decided on merits and in case any fees is required the same should be reasonable and should not impede justice or deny him access to justice on the ground of being poor.
21. As earlier noted, the appellant did not file submissions in respect of the main appeal, save for oral submissions that he made. He reiterated that the appeal was filed within the stipulated time and if there was any delay, the same had been cured by the certificate of delay that had been filed extending the time within which to file an appeal. Accordingly, the appeal before the Court was competent, contrary to the submissions by the 1st respondent. He further submitted that the trial court erred by making an order that the suit properties be transferred to GDN as the same was not a party to the suit; that parties were bound by their pleadings and therefore the trial court erred by granting prayers that had not been



sought for by the 1st respondent. Further, the appellant submitted that there was no evidence placed before the trial court that inferred the existence of a resulting or implied trust; that no prayer for such an order had even been made and therefore the trial court in determining the same was in total error. It was further submitted that the trial court erred in relying on secondary evidence in reaching its verdict when no proper basis had been laid for the reception of such evidence. Finally, the appellant accused the trial court of not taking into account the criminal record of the 1st respondent at the time he is alleged to have acquired the suit properties and the fact that non Kenyans were not allowed to own landed property. The appellant thus prayed that the appeal be allowed with costs.

22. We have considered the record, submissions by counsel, cited authorities and the law. Our primary duty as a first appellate court is, to re-evaluate, re-assess and re-analyse the evidence before the trial court so as to determine whether the conclusions reached can stand or not, with the usual caution that we never saw or heard the witnesses as they testified and make due allowance for such and in particular the trial court's findings of fact and demeanour of witnesses. See *Kenya Ports Authority vs. Kuston (Kenya) Limited* [2009] 2EA 212.
23. We shall first deal with the application to strike out the notice and record of appeal and depending on our determination on the same we shall then address the appeal.

Rule 75 of this Court's Rules provides, inter alia :

“75. (1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.

(3) Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the address for service of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice.

(6) A notice of appeal shall be substantially in the Form D in the First Schedule and shall be signed by or on behalf of the appellant.”

24. It is plainly clear that the requirements in the above provisions of the law are couched in mandatory terms. Accordingly, the appellant was required to lodge the notice of appeal with the Registrar of the Environment and Land Court within fourteen (14) days from 26th July 2018 which would have been on 9th August 2018. What appears on record is a notice of appeal bearing a rubber stamp of Environment and Land Court on 30th July 2018. This would have been well within the prescribed time. A cursory look at the said notice however shows that it was not lodged with nor received by the Deputy Registrar as required, since it is neither dated, sealed and signed by the Deputy Registrar. In other words, it is unclear when the notice of appeal was lodged as it was neither endorsed sealed nor dated by the Deputy Registrar as required. The notice on the face of it is therefore incurably defective ab initio, having not been duly lodged as required, as there is no evidence that it was ever lodged as envisaged by the law.



25. The procedure of instituting an appeal is laid out under Rule 75 of this Court's Rules, with the pertinent portion thereof being that;

“(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

(2)

26. The rule specifically requires that the notice not only be in writing, but formally lodged with the registrar. In this case, it is not in doubt that a written notice may have been filed by the appellant as required. But was the same lodged within the meaning of Rule 75(1) aforesaid? Rule 10 of this Court's Rules provides some guidance in answering this question; as it provides for the endorsement of documents presented to the Deputy Registrar and requires that:

“Whenever any document is lodged in the Registry or in a sub-registry or in the registry of a superior court under or in accordance with these Rules, the Registrar or deputy registrar or registrar of the superior court, as the case may be, shall forthwith cause to be endorsed showing the date and time when it was so lodged.”

27. It is common ground that no such endorsement was made on the notice in question. Indeed, the notice of appeal included in the record of appeal does not bear such endorsement of the date and time that it was received by the Deputy Registrar. The 1st respondent is of the view that this is a fatal defect which the appellant seems to take lightly by taking refuge in Article 159 of the Constitution. It is however to be appreciated that the institution of appeals and the jurisdiction of this Court with regard to appeals is determined in part by timelines. In fact, the importance of proper and timely lodging of the notice of appeal cannot be gainsaid. It determines the running of time and the attendant accommodations to be given to the appellant in terms of compiling the record of appeal and securing of proceedings from the trial court. (See. Rules 75 (2), 77(1), 82 & 83 of the Court of Appeal Rules). Indeed, the notice of appeal defines the starting point in the computation of timelines in relation to the appeal. The effect of a notice of appeal lodged without endorsement by the Registrar automatically impacts on the timelines of all the other steps to be taken in the appeal. How for example, would the Court or a respondent know whether the notice of appeal was lodged within time (as required by Rule 75(2) of the Rules?). How will the Court and the respondent know whether service of the notice of appeal was effected within 14 days of the lodging of the notice (as envisioned by rule 77(1) of the Rules?) How is the Court and the respondent to tell if the record of appeal has been lodged within sixty days of the lodging of the notice (as required under rule 82(1) of the Rules?) or whether there has been a default in instituting an appeal and when or whether steps ought to be taken under Rule 83?

28. In our view, the failure to properly lodge the notice of appeal is a fatal defect which throws the appellate process into disarray and if allowed, is likely to occasion prejudice and injustice to respondents. The fact that the notice of appeal has a court stamp does not necessarily mean that the same was lodged with the Registrar of the court as required. After all, we are not oblivious to the fact that fake court stamps are in use all over in this country. For avoidance of doubt, we reiterate that for a notice of appeal to be properly lodged, it must be stamped with the court stamp, endorsed by the Registrar by sealing, signing and dating it. This issue has been dealt with by this Court in the case of *Daniel Nkirimpa Meniere Vs. Sayialel Ole Koilel & 4 Others* [2016] eKLR, where it was held that under Rule 77 (1), the appellant must not only be seen to have lodged the Notice of Appeal, but must have served it upon the respondent; that a notice of appeal which bears no rubberstamp of the High Court and or which lacks any other endorsement by the Registrar of the High Court is fatally defective. The Court went



on to add that such a notice cannot be said to have been duly lodged and termed it a glaring deficiency in authentication.

29. We see no reason to depart from that finding as in doing so we would send a message out there that parties can ignore the Rules and introduce a notice of appeal any time in the cause of the appeal without a signature or endorsement. Signature and endorsement is a form of authentication of a document that eventually forms the foundation of an appeal.
30. To us, it is clear that if there is no notice of appeal that is in accordance with the law, there can never be a proper appeal arising therefrom as the notice of appeal is the foundation of the appeal. It is the proper notice of appeal that gives this Court jurisdiction to determine the subsequent appeal. It follows therefore that there was no proper notice of appeal as well as record of appeal capable of being served or at all. We are convinced that on the authorities cited, this Court has been quite consistent on the validity, utility and binding force of its Rules. It has never been the practice of this Court to sympathise with an appellant on account of the importance of the subject matter of the appeal so as to save an otherwise incompetent appeal. We take the view that, the greater the importance of a particular appeal, the more the care and scrupulous attention an appellant should take to ensure compliance with the Rules. This Court must be seen to maintain that consistency.
31. We therefore wish to let the law and the Rules take their course as the omission is flagrant and obvious. Yet the appellant's attitude to his defaults is clearly bold and cavalier. The circumstances of this case provide an ideal appeal that is for striking out with costs, and we hesitate no more in so doing. To hold otherwise would amount to declaring Rules superfluous, not workable and or invalid. Accordingly, we strike out with costs the notice of appeal as well as the record of appeal as beseeched by the 1st respondent. Having reached this conclusion we do not think that it is necessary to deal with the other aspects of the application.
32. Even if we had to decide this appeal on merit, we are satisfied that it would be for dismissal. Firstly, the appellant contends that trust, whether resulting or implied, was never pleaded nor particulars given. We note though from the record that the 1st respondent did set out the said particulars albeit, not in the traditional format. Again, from the evidence on record, the 1st respondent contributed wholly towards the purchase of the suit properties. They were subsequently registered in the name of the appellant and the 2nd respondent. Further, from the record, the appellant, Richard Sang Salat and the 1st respondent were noted as the trustees of Gentiana self- Help Centre who were registered as the absolute proprietors of Dagoretti/Waithaka/1460 while the 1st respondent and the appellant were registered as proprietors of Dagoretti/Waithaka/1463. It is a clear that the 1st respondent and others were holding the suit properties in trust. Consequently, we agree with the trial court's sentiments that,

“There is a resulting trust in favour of those persons who contributed funds for the purchase and development of the suit property and plot number 1463 for the benefit of Gentiana primary school and the other charitable objectives of Gentiana Development Network. The two parcels of land are held by the registered proprietors on a resulting trust from Gentiana Development Network for the benefit of the educational and other needs of deserving children and the local community.”



33 We say so because it is settled law that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because as was held in Gichuki vs. Gichuki [1982] KLR 285 and Mbothu & 8 Others vs. Waitimu & 11 Others [1986] KLR 171.

“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

34. Our perusal of the record clearly shows that the 1st respondent who the trial court found to be a honest witness gave a detailed account and proper paper trail of the funds he had sourced and used for the foundation, construction and maintenance of the school including the purchase of the suit properties. Equally, it is clear that his intention with respect to the funds and the suit properties was to assist needy children and not himself. We believe this was the reason as to why the trial court proceeded to order that the suit properties be registered in the name of GDN as per his evidence and not in any other name; as it emerged from in evidence that the appellant’s NGO, Gentiana self -Help Centre was neither registered at the time the suit properties were registered. Yet the appellant failed to hold the suit properties in trust for GDN. Instead he held them as chattels that could be sold and the proceeds thereof divided amongst them on a prorata basis.

35. It is trite that a resulting trust will automatically arise in favour of the person who advances the purchase money as was the case here. See Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggat Ahmed Al-Heidy & Others [2015] eKLR. Whether or not the property is registered in his name or that of another is immaterial. It is common ground that all the purchase money of the suit properties and the construction of the school and the training and payment of teachers and other staff was raised by the 1st respondent. The suit properties were therefore held in resulting trust for GDN. It therefore follows that the trial court was right in ordering that the suit properties be registered in the name of GDN and we find the holding legal and tenable in law. Of course the issue of the 1st respondent’s criminal record was not raised in the trial court and cannot be canvassed in this appeal.

36. Having expressed ourselves as herein above, we equally find that even if not for the application, the appeal lacks merit and we would have dismissed it with costs anyway.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

ASIKE–MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

