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# THE JUDICIARY

COURT OF APPEAL PRACTICE DIRECTION  
CIVIL APPEALS AND APPLICATIONS 2015

*Justice be Our Shield and Defender*




## COURT OF APPEAL PRACTICE DIRECTION - CIVIL APPEALS AND APPLICATIONS

This Practice Direction is issued pursuant to Section 3A and 3B of the Appellate Jurisdiction Act and to assist litigants and advocates to comply with the provisions of the Court of Appeal Rules, 2010.

This Practice Direction relates to Civil Appeals.

References to “the Rules” or a particular rule in this Practice Direction are references to the Court of Appeal Rules, 2010.

References to action required to be taken by “advocates” shall also apply to litigants in person.

 <b>THE NATIONAL ASSEMBLY PAPERS LAJD</b>	
<b>DATE:</b> 13 MAY 2021	<b>DAY:</b> THURSDAY
<b>TABLED BY:</b>	Hon. Amos Kimunya Leader of Majority Party
<b>CLERK AT THE TABLE:</b>	AS/2020

### 1. Documents filed in the Court of Appeal:

- a. All documents filed in the Court of Appeal shall comply with rule 13.
- b. A4 paper shall be used in place of foolscap.
- c. Care must be taken to see that all documents filed are legible. Where the original document which has been produced in the court appealed from is of poor quality then a typed version of the original should be included in the application, affidavit or Record of Appeal immediately after the copy of the original.
- d. All pages shall be numbered in the top right hand corner.
- e. Every tenth line of every document shall be numbered in the right hand margin.
- f. Advocates shall include in all applications, affidavits and Records of Appeal their e-mail and mobile telephone numbers to facilitate communication by the Registry.

### 2. Records of Appeal:

- a. The heading on the Memorandum of Appeal and the Record of Appeal shall be in Annex A to this Practice Direction.
- b. Records of Appeal shall contain the documents set out in rule 87 in the order set out in rule 87. Advocates shall use rule 87 as a checklist when preparing their Records of Appeal.

- c. With a view to confining Records of Appeal to the essential documents the following guidance is given<sup>1</sup>:
- i. Appearances, Notices of Change of Advocate and List of Documents are neither pleadings under rule 87 (1) (c) nor necessary documents under rule 87 (1) (k) and should not be included in a Record of Appeal unless any particular point turns on such documents.
  - ii. Interlocutory applications filed in the court appealed from and affidavits filed in support of or in opposition to such applications should not be included in a Record of Appeal against the final judgment in the court appealed from unless the final judgment arises from such application or any particular point turns on such documents.
  - iii. Lists of Authorities and the authorities cited in the court appealed from should not be included in a Record of Appeal unless any particular point turns on such documents.
  - iv. In interlocutory appeals the judges notes in the court appealed from are not normally necessary and parties should consider excluding such notes under the proviso to rule 87 (1).<sup>2</sup>
- d. Where a Record of Appeal comprises of more than 500 pages the record shall be bound in separate volumes each of 500 or less pages.
- i. The first volume shall contain an index of all the documents in the Record of Appeal indicating where each subsequent volume starts.
  - ii. All subsequent volumes shall contain an index of the documents in that volume.
  - iii. The covers of all volumes shall be of the same colour with the volume number clearly marked on the front cover.
- e. When filing a Record of Appeal parties shall inform the Court by letter in the form in Annex G of any pending applications in the Court of Appeal arising from or relating to the substantive appeal so that the Court may consider whether the substantive appeal should be heard instead of the pending application.

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<sup>1</sup> The judges are concerned that Records of Appeal are becoming unnecessarily large with many documents which are not required for the determination of the appeal.

<sup>2</sup> This will eliminate the need to apply for proceedings in the court appealed from and should expedite the filing of the appeal.

3. Applications:

- a. All applications and affidavits shall be bound with all pages numbered and every tenth line numbered in compliance with paragraph 1 (d) and (e) above.
- b. Where the application together with the supporting affidavits and exhibits exceed 500 pages then the application should be bound in the same manner as a Record of Appeal in compliance with paragraph 2 (d) above.
- c. Where any affidavit filed in relation to an application exceeds 500 pages then paragraph (b) above will apply to such affidavit.
- d. Where a party wishes to file a further affidavit for which leave is required such further affidavit may be filed prior to the hearing of the application. The Registry will mark all copies of such affidavit as “filed without leave” and the Court’s copy of the affidavit will be kept by the Registry separate from the Court file seen by the judge . The affidavit should then be served on all other parties. At the hearing of the application the party seeking to rely on such affidavit will make the necessary oral application and the judge will consider whether to grant leave for the affidavit to be filed and referred to at the hearing of the application. If leave is not granted the affidavit will be returned by the Court. This practice is encouraged so as to avoid unnecessary adjournments of applications.

If the other party wishes to file an affidavit in response, the same procedure shall be followed.

- e. When filing an application parties shall inform the Court by letter in the form in Annex H of any other pending applications in the Court of Appeal relating to the same appeal or intended appeal so that the Court may consider whether the substantive appeal should be heard instead of the pending application.
- f. The Registry keeps different registers for different types of applications and the headings to be used in applications should be as follows:
  - i. Applications in an intended appeal should have the heading in Annex B to this Practice Direction.
  - ii. Applications in an existing appeal should have the heading in Annex C to this Practice Direction. The number of the application will be that of the Appeal and the application and affidavits in support or opposition may refer to the Record of Appeal which will be placed before the Court together with the application.
  - iii. Applications for certification of a point of general public importance for the purposes of an appeal to the Supreme Court should have the heading in Annex D to this Practice Direction.

4. Case Management:

- a. With a view to making proper use of the court's time and avoiding unnecessary applications and adjournments the court will list all pending appeals before a single judge for a Case Management Conference.
- b. Such Case Management Conference shall be fixed by the Registry for a date at least 60 days after the filing of the Record of Appeal.
- c. The Appellant shall file and serve a Case Management Checklist in the form in Annex J to this Practice Direction.
- d. At the Case Management Conference the judge will:
  - i. Confirm that the Record of Appeal has been prepared in accordance with the Rules and the provisions of this Practice Direction.
  - ii. Give all necessary directions for the filing of Supplementary Records of Appeal to rectify any defects in the Record of Appeal and to ensure that all documents which will be necessary for the hearing of the Appeal are on the court record. The judge will also give directions regarding any pending applications.
  - iii. Consider and give directions on the manner and length of submissions at the hearing. This will include directions as to:
    - (1) oral or written submissions.
    - (2) the length of any oral submissions and whether any skeleton submissions are required.
    - (3) Skeleton submissions are a succinct statement of:
      - (a) what the hearing is about.
      - (b) the background to the hearing.
      - (c) chronologies
      - (d) the issues for determination.
      - (e) what you want the court to decide and why.
      - (f) an outline of the submissions in numbered brief points cross-referenced to the evidence in the Record of Appeal and supported by the authorities citing the proposition of

law relied on and the authority in support with reference to the page or paragraph.

- (4) if written submissions are ordered:
  - (a) the time table for the filing and serving of such written submissions.
  - (b) the length of such submissions.
  - (c) the time which will be allocated at the hearing for oral highlighting.
- iv. If any additional authorities come to the Court's attention either before or after the oral submissions or highlighting of written submissions, the Court may write to the advocates requesting their comments, either in writing or at a further hearing at the option of the Court.

5. Written Submissions:

- a. Written submissions should be typed or printed using 1.5 spacing and a font of at least 12 points.
- b. Written submissions must:
  - i. Contain a chronology of relevant events including any previous court history.
  - ii. Refer to the grounds of appeal being argued and indicate if any grounds are being abandoned or argued together.
  - iii. Identify any error or errors said to have been made by the Court appealed from and the basis in principle or authority for that contention.
  - iv. Where it is contended that a finding of fact should have been made or that a finding of fact which was made should not have been made, the basis for that contention should be set out by reference to the evidence.
  - v. Be set out in numbered paragraphs.
  - vi. Be cross-referenced to the relevant pages and passages in the record of Appeal.
  - vii. Not include extensive quotations from documents or authorities.

- c. At the Case Management Conference [see paragraph 7 below]:
- i. The court has power to limit the length of written submissions and will normally exercise such power. To enable advocates to clearly set out their submissions with headings and numbered paragraphs the court will normally limit the length by reference to word count. As a guide, a page of text is approximately 500 words.
  - ii. The party filing such written submissions limited by word count shall include a certificate as to the number of words at the end of the submissions.
  - iii. A time table for written submissions will be established by the court following the order of address set out in rule 27.
- d. The number of copies of written submissions to be filed in the Registry shall be:
- i. Two, if the application is to be heard by a single judge.
  - ii. Four, if the application or appeal is to be heard by a bench of three judges.
  - iii. Six, if the application or appeal is to be heard by a bench of five judges.
- In addition, copies of written submissions must be served on all other parties to the application or appeal.
- e. In addition to the hard copies of written submissions required by paragraph (d) above, a softcopy in PDF or MS Word should be brought to the Registry on a flash disk. The Registry will copy the written submissions on to the registry computer and return the flash disk to the party filing the written submissions.

6. Authorities:

- a. Lists of Authorities shall be filed and served in accordance with rule 26. The Registry will stamp the List of Authorities to acknowledge receipt.
- b. Copies of the authorities to be referred to must be produced for the use of the court and the other parties. The copies of the authorities shall be served on the other parties with the List of Authorities.
- c. Authorities may be bound or placed in a folder with a copy of the List of Authorities at the top.
- d. The List of Authorities shall contain a summarised analysis of each authority specifying the ratio decidendi, relevance and applicability to the application or appeal.

- e. To assist the court to identify the authorities they should either be flagged indicating the first page and number of each authority or the bundle should be paginated and reference to the page numbers indicated in the List of Authorities.
- f. Parties are encouraged to highlight the passages they wish to rely on by marking the right hand margin<sup>3</sup>. If such highlighting is done then the highlighting must appear on all copies including the copies served on the other parties.
- g. The court's copies of authorities may either be delivered with the List of Authorities or handed in to the court at the start of the hearing.
- h. If written submissions are being filed then the List of Authorities together with the copies of the authorities relied on must be filed with the written submissions, unless already filed.

7. Orders:

- a. Orders on applications should follow the form set out in Annex E to this Practice Direction.
- b. Orders following the completion of a substantive appeal should follow the form set out in Annex F to this Practice Direction.
- c. Where any consequential orders are required, eg for the release of security, it is the duty of the parties to make the necessary requests in their oral or written submissions so that the Court will be aware of the orders which need to be considered and made.

8. Withdrawal of Appeals or Applications:

- a. A party who does not wish to pursue an appeal or application may request the Court to withdraw the application or appeal. Such request may be made in writing by letter copied to the respondent or orally in court.
  - i. If the other party consents to the appeal or application being withdrawn with no order as to costs, the parties can file a consent letter and the order will be made by the Court pursuant to the consent letter.
  - ii. If the other party does not consent to the appeal or application being withdrawn with no order as to costs the party withdrawing can either:

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<sup>3</sup> The judges request that advocates do not highlight the text as this often makes the text hard to read

- (1) Write to the Court stating the wish to withdraw the appeal or application in which case the Court will record the withdrawal and proceed to award costs to the other party; or
  - (2) Make the application to withdraw orally when the matter is next in Court when the Court will determine the appropriate order as to costs.
- b. Where a settlement has been reached disposing of an application or an appeal, the parties may file a consent in writing signed by all parties for the application or appeal to be withdrawn by consent.
  - c. Parties are encouraged to file any consents as early as possible.

9. Fixing of hearing dates for Applications and Appeals:

- a. Save in relation to matters which have been certified urgent, the court will invite the parties to attend at the registry to fix hearing dates by consent which are convenient to all parties.
- b. In the event that the parties can not reach agreement on a suitable date the Registrar shall fix a date convenient to the Court.

10. Adjournments:

If all parties consent in writing and the consent is filed at least 7 days before the date fixed for hearing, the Court will, for valid reasons, agree to remove an application or appeal from the hearing list.

Where a matter is taken out at the instance of the Court, the matter will be given a priority hearing date.

11. Urgent Appeals and Applications:

- a. Where a party wishes an application to be heard urgently, the application shall be accompanied by a Certificate of Urgency signed by the advocate and an Affidavit as to Urgency sworn by the advocate setting out the reasons why the application should be heard urgently.
- b. Where a party wishes an appeal to be heard urgently, a letter shall be written to the Registrar of the Court supported by an Affidavit as to Urgency setting out the reasons why the appeal should be heard urgently. The letter and a copy of the Affidavit shall be served on all other parties.
- c. The application under paragraph (a) above and the letter under paragraph (b) above shall be referred to the President of the Court of Appeal or the Presiding Judge who shall make a determination on the question of urgency within 7 days. Such determination shall be in writing with reasons.

12. Old Appeals filed in 2012 or earlier pending in the Registry in Nairobi:

- a. The court will be listing these appeals for Case Management Conferences under paragraph 4 above commencing 7 days from the date of this Practice Direction, starting with the oldest pending appeals.
- b. Appeals will be listed on an hourly basis before the single judge conducting the Case Management Conferences.

ANNEX A

[Heading on the Memorandum of Appeal and the Record of Appeal]

IN THE COURT OF APPEAL AT \_\_\_\_\_  
CIVIL APPEAL NO \_\_\_\_\_ OF 20 \_\_\_\_\_

..... APPELLANT

and

..... RESPONDENT

(Appeal from the Judgment/Order of the High Court of Kenya at \_\_\_\_\_  
(Mr/Lady Justice ..... ) dated ....., 20... in Civil Case ..... of 20.....

Between

..... Plaintiff

versus

..... Defendant)

\_\_\_\_\_

ANNEX B

[Heading on Application in an intended Appeal]

IN THE COURT OF APPEAL AT  
CIVIL APPLICATION NO \_\_\_\_\_ OF 20 \_\_\_\_\_

In the matter of an intended appeal between:

..... APPLICANT

and

..... RESPONDENT

(Application for stay of execution of the Judgment/Order of the High Court of Kenya at \_\_\_\_\_ (Mr/Lady Justice ..... ) dated ....., 20... in Civil Case ..... of 20...

Between

..... Plaintiff

versus

..... Defendant)

\_\_\_\_\_

ANNEX C

[Heading on Application in an existing Appeal]

IN THE COURT OF APPEAL AT  
CIVIL APPEAL (APPLICATION) NO \_\_\_\_\_ OF 20\_\_\_\_\_

..... APPELLANT

and

..... RESPONDENT

(Appeal from the Judgment/Order of the High Court of Kenya at \_\_\_\_\_  
(Mr/Lady Justice ..... ) dated ....., 20... in Civil Case ..... of 20...

Between

..... Plaintiff

versus

..... Defendant)

(Application for ..... )

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ANNEX D

[Heading on an Application for certification of a matter of general public importance]

IN THE COURT OF APPEAL AT  
CIVIL APPLICATION NO SUP \_\_\_\_\_ of 20\_\_\_\_\_

Between

..... APPLICANT

and

..... RESPONDENT

(Being an application by the Appellant/Respondent in Civil Appeal ..... of 20...  
for a Certificate that a matter of general public importance is involved pursuant  
to Article 163 (4) of the Constitution of Kenya)

ANNEX E

[Form of Order on applications]

Heading as in Annex B, C or D above

In Court this ..... day of ....., 20....

Before: The Honourable Mr/Lady Justice ....., a Judge of Appeal.

The Honourable Mr/Lady Justice ....., a Judge of Appeal.

and The Honourable Mr/Lady Justice ....., a Judge of Appeal.

ORDER

THIS APPLICATION coming up for hearing on the ..... day of ....., 20....., AND UPON HEARING ....., Counsel for the Applicant, and ....., Counsel for the Respondent, AND UPON READING the affidavit of ..... sworn on ..... day of ....., 20.... in support of the Notice of Motion and the replying affidavit of ..... sworn on ..... day of ....., 20..... IT IS ORDERED THAT:

1. ....

2. ....

GIVEN under my hand and the seal of the Court at \_\_\_\_\_ this ..... day of ....., 20....

REGISTRAR

ISSUED at \_\_\_\_\_ this ..... day of ....., 20....

\_\_\_\_\_

ANNEX F

[Form of Order on determination of a substantive appeal]

Heading as in Annex A above

In Court this ..... day of ....., 20.....

Before: The Honourable Mr/Lady Justice ....., a Judge of Appeal.

The Honourable Mr/Lady Justice ....., a Judge of Appeal.

and The Honourable Mr/Lady Justice ....., a Judge of Appeal.

ORDER

THIS APPEAL coming up for hearing on the ..... day of ....., 20....., AND UPON HEARING ....., Counsel for the Appellant, and ....., Counsel for the Respondent, when the appeal was stood over for judgment and this appeal coming up for judgment this day IT IS ORDERED THAT:

1. ....

2. ....

3. ....

GIVEN under my hand and the seal of the Court at \_\_\_\_\_ this ..... day of ....., 20.....

REGISTRAR

ISSUED at \_\_\_\_\_ this ..... day of ....., 20.....

\_\_\_\_\_

ANNEX G

[Form of notification to the Registry on filing an Appeal of any pending applications]

The Registrar  
Court of Appeal

Re: Civil Appeal No ..... of 20.....

Please note that the following pending applications arise from or relate to the above appeal:

[Insert the details of the pending applications]

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ANNEX H

[Form of notification to the Registry on filing an application of any other pending applications]

The Registrar  
Court of Appeal

Re: Civil Application No ..... of 20.....

Please note that the following pending applications arise from or relate to the same intended appeal:

[Insert the details of the pending applications]

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ANNEX J

[Form of Case Management Checklist]

See next page

IN THE COURT OF APPEAL AT \_\_\_\_\_  
 CIVIL APPEAL NO \_\_\_\_\_ OF \_\_\_\_\_

Nature of the Appeal: \_\_\_\_\_

..... APPELLANT  
 [Name and address of advocate: \_\_\_\_\_ ]

versus

..... RESPONDENT  
 [Name and address of advocate: \_\_\_\_\_ ]

..... RESPONDENT  
 [Name and address of advocate: \_\_\_\_\_ ]

**CASE MANAGEMENT CHECKLIST**

Appeal Filed on		Cross-appeal filed on		Notice of Grounds to Affirm filed on	
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<b>Directions for Hearing:</b>	Directions
1. Oral submissions a) Duration b) Skeleton submissions	
2. Written Submissions a) Length of written submissions in words [500 words to a page] b) Length of oral highlighting	
3. Chronologies; maps; plans; diagrams	
4. How much time is required for the hearing?	
5. Is appeal ready for hearing?	
6. Any other directions eg pending applications	

I hereby certify that all matters which are necessary for the preparation of this Appeal for hearing have been done and that the Appeal may now be set down for hearing.


Judge:.....

Dated.....

This Practice Direction issued at Nairobi this            day of            2015.

HON. MR. JUSTICE  
P. KILIKI

PRESIDENT  
COURT OF APPEAL

A large, abstract yellow graphic on the right side of the page, consisting of several curved, overlapping shapes that resemble stylized leaves or petals, set against a dark green background.

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