



REPUBLIC OF KENYA



KENYA LAW
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**Kemuma & another v Mokoro & another (Civil Appeal 62 of 2022)
[2023] KEHC 24641 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24641 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 62 OF 2022
PN GICHOHI, J
OCTOBER 31, 2023**

BETWEEN

CHARLES OMBUI KEMUMA 1ST APPELLANT

NAFAS WORLD AUTO (K) LTD 2ND APPELLANT

AND

MOTENDE COLONERIAS MOKORO 1ST RESPONDENT

GIDEON MATONGO OMAMBIA 2ND RESPONDENT

RULING

1. The background of this matter is that under a certificate of urgency, the Appellants filed a Notice of Motion Application dated 19th July 2022 in Kisii CMCC 947 of 2019 seeking to reopen the Defence case to enable their witness, a doctor, to testify and produce the medical report.
2. That application was opposed by the Respondents who filed a Replying Affidavit dated 2nd August 2022. Vide a ruling delivered on 23rd August 2022, the trial court dismissed the Application, directed the parties to file submissions on the main suit and that the matter be mentioned on 5th September, 2022 for compliance.
3. Aggrieved by that ruling and through the firm of Kimondo Gachoka & Co. Advocate, the Appellants filed this Notice of Motion Application dated 31st August, 2022 under Sections 3, 3A and 100 of the [Civil Procedure Act](#), Order 51 Rule 1 of the [Civil Procedure Rules](#), 2010, seeking:-
 1. Spent.
 2. Spent



3. Stay of the Ruling delivered on 23rd August, 2022 by Hon. C.A. Ogwen; Senior Resident Magistrate in Kisii CMCC 947 of 2019 pending hearing and determination of Kisii Civil Appeal No. - of 2022.
 4. Stay of further proceedings in Kisii CMCC 947 of 2019 pending the hearing and determination of this appeal.
 5. That costs of this Application be borne by the 2nd Respondent.
4. The main grounds on the face of the Application are that the effect of the Ruling by the trial court was that the Appellants case remained closed with parties to file submissions on the entire suit. Further, they stated that due to unforeseen circumstances and for reasons beyond their control, the Appellant/Applicants' witness was unable to attend the Court for defence hearing on 18th July 2022 as the Appellants' witness was attending to a conference. That this was communicated to the Plaintiff via email on 9th July, 2022. They stated that they were desirous of defending the case on both liability and quantum in view of the serious nature of the injuries by the Respondents.
 5. In support of the Application, an affidavit was sworn on 31st August 2022 by Charles Ombui Kemuma. While restating the grounds on the face of the application, he deponed that he was the insured and/or beneficial owner of Motor Vehicle Registration Number KCL 837J and that he is desirous of defending his case both on liability and quantum in view of the seriousness of the injuries allegedly sustained by the 2nd Respondent. Lastly, he deponed that no prejudice will be occasioned upon the 2nd Respondent if this application is allowed.
 6. Simultaneously with this Application, the Applicants filed a Memorandum of Appeal dated 26th August, 2022 raising seven (7) grounds of appeal that can be condensed and summarised as follows: -
 1. The Learned Magistrate erred in fact and in law in failing to find that the Appellants' Application dated 19th July 2022 is merited considering that the Appellants had sufficient grounds to warrant the said Application.
 2. The Learned Magistrate erred in fact and in law in denying the Appellants a chance to defend their suit and consider the documents filed.
 3. The Learned Magistrate erred in fact and in law in stating that the documents that the Appellants were to rely on had not been filed yet they were filed on 10th September 2021 and served on 17th September 2021.
 4. The Learned Magistrate erred in fact and in law in failing to consider the Appellants submissions
 5. The Learned Magistrate erred in fact and in law in finding the Respondent and Appellants' case closed without granting the Appellants an opportunity to be heard.
 7. The Respondents opposed the Application vide a Replying Affidavit sworn by the 2nd Respondent on 16th September 2022 through the firm of G.M. Nyambati & Co. Advocates. He deponed that an appeal of this nature does not lie as of right but with leave of the court and which leave the Appellant never sought and therefore, the Application is an abuse of Court process.
 8. While highlighting the chronology of events leading to the impugned Ruling, he deponed that that the order appealed against is a negative order which the Court cannot stay. He further deponed that



it has been a period of more than one year since the Respondents closed their case and the Appellants were yet to avail a single witness.

9. Further, he deponed that the trial court afforded the Appellants adequate time to ensure that parties' right to a fair hearing is observed and that no party is condemned unheard as required by the law but the Appellants' failed to avail witnesses and this was a calculated move meant to derail the hearing and determination of the case and was in bad faith contrary to Article 159(2)(b) and (d) of the Constitution.
10. He further deponed that that he stands to suffer prejudice and loss if the matter is further derailed having been in court since 2019. That on the other hand the Appellants will not suffer any prejudice or loss having failed to prosecute their case as required by law and procedure.
11. The Appellants filed their Further Affidavit sworn on 3rd October, 2022 by Cynthia Cheruiyot Advocate of Kimomdo Gachoka & Co. Advocates on record for the Appellants. While relying fully on the Supporting Affidavit, she maintained that the Appellants communicated of the doctor's non-attendance vide email dated 9th July 2022.
12. She maintained that no prejudice will be suffered by the 2nd Respondent herein if the Application is allowed. She deponed that the Appellants approached this Court with clean hands, have been vigilant and have not slumbered on their rights. She urged the Court to allow the application in the interest of justice.

Appellants' Submissions

13. In their submissions dated 5th November 2022 and filed on 10th November 2023 and further submissions dated 5th November 2022 and filed on 5th December 2022, they submitted that they filed a List of Witnesses on 10th September 2021 and served the Respondents' Advocates on 17th September 2021 where they intended to avail Dr. Jenipher Kahuthu as a defence witness. They further submitted that the Respondents' Counsel does not deny service of the medical report and/or email sent on 9th July 2022.
14. Reliance was placed on the case of *Ngugi Kagia v Buci Rotuba Limited* [2019] eKLR, where High Court allowed the Application to stay further proceedings and reopened both the Plaintiff and Defendant's case. They further submitted that Courts have discretionary power to allow the Application to reopen the defence case with the main aim being that justice should prevail.
15. Citing the cases of *Patel v EA Handling Services Ltd.* (1974) EZ 75 and *Tree Shade Motor Ltd. v D.T. Dobie Co. Ltd.* CA 38 of 1998 and *Mania v Muriuki* (1984) KLR 407 where the Courts held that the discretion of the court should be exercised to avoid injustice or hardship resulting from accident, inadvertence and excusable mistake or error, they submitted that they should be allowed to call their witness before the issue of liability is determined.
16. They further relied on the case of *Winnie Wambui Kibinge & 2 others v Match Electricals Limited* Civil Case No. 22 of 2010 where the Court held that "It does not follow that just because a mistake has been made party should suffer the penalty of not having his case heard on merit."
17. They further submitted that the overriding objective requires that each case should be treated proportionally in relation to size, importance and complexity of the claim and the financial situation of the parties and therefore, courts should consider the overriding objective when they make rulings, give directions and interpret procedural rules.



Respondents' submissions

18. On their part, the Respondents filed their submissions dated 22nd November 2022 on 23rd November 2022. They reiterated the material in their Replying Affidavit and submitted the Application herein fails the test of Order 42 Rule 6 of the *Civil Procedure Rules*, 2010 which provides for the 3 prerequisites for grant of stay of execution and stay of proceedings pending appeal being :- a) that substantial loss may result to the Applicant unless the order is made; b) that the Application has been without unreasonable delay; and c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the Applicant has been given.
19. While relying on the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, they submitted that this suit is yet to be decided and therefore there is no actual demonstrable loss that can be suffered by the Appellants. Further, they submitted that the appeal itself has no chances of success bearing in mind the delay in prosecution of their defence was not well explained. They further submitted that Article 159 (2) of the *Constitution* binds this Court that justice shall not be delayed and but in this case the Appellant delayed justice by their failure to prosecute defence when they were given a chance to do it and therefore, they failed to satisfy the threshold of granting the orders of stay. That any further delay to the proceedings would amount to infringing on the Respondents' rights to a fair trial.
20. Further, they submitted that in as much as the Court has been invited to invoke its inherent jurisdiction to prevent the defeat of justice, justice has since been served in the trial court and the Applicants will have an opportunity to challenge the decision of the trial court when it is finally entered.
21. They further submitted that the orders sought are negative orders because the court dismissed the Applicants' Application to reopen the Defence case in Kisii CMCC No.947 of 2019. They submitted that consequently, the Application herein must fail as there is no positive orders in the entire suit whatsoever. On this ground, they cited several cases including the Court of Appeal decisions in *Ndungu Kinyanjui v Kibicho Kugeria Services & another* [2007] eKLR and *Sonalux Limited & Another v Barclays Bank of Kenya Limited & 2 others* [2008] eKLR.

Determination

22. In considering the submissions by both parties in regard to the Appellants' application which is the subject of this Ruling, this Court has perused the lower court record and the grounds of appeal. The appeal and the Application herein are in respect of an order of dismissal of the Appellants Application to have the defence case re- opened for them to adduce the evidence of a doctor as they wish to challenge the suit on liability and quantum.
23. The broad issues for determination therefore are whether:-
 1. There was leave to appeal;
 2. The order of dismissal of the Application should be stayed.
24. On the first issue, the right of appeal is conferred by statute and though the Appellant/Applicants did not, on the face of the Application, indicate that they were moving this Court under Order 42 of the *Civil Procedure Rules*, that indeed is the Order applicable herein and the appeal would be subject to Order 43 of the *Civil Procedure Rules* which provides that:
 - (1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act—



- (a) Order 1 (parties to suits);
 - (b) Order 2 (pleadings generally);
 - (c) Order 3 (frame and institution of suit);
 - (d) Order 4, rule 9 (return of plaint);
 - (e) Order 7, rule 12 (exclusion of counterclaim);
 - (f) Order 8 (amendment of pleadings);
 - (g) Order 10, rule 11 (setting aside judgment in default of appearance).
 - (h) Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);
 - (i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);
 - (j) Order 19 (affidavits);
 - (k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);
 - (l) Order 23, rule 7 (trial of claim of third person in attachment of debts);
 - (m) Order 24, rules 5, 6 and 7 (legal representatives);
 - (n) Order 25, rule 5 (compromise of a suit);
 - (o) Order 26, rules 1 and 5(2) (security for costs);
 - (p) Order 27, rules 3 and 10 (payment into court and tender);
 - (q) Order 28, rule 4 (orders in proceedings against the Government);
 - (r) Order 34 (interpleader);
 - (s) Order 36, rules 5, 7 and 10 (summary procedure);
 - (t) Order 39, rules 2, 4 and 6 (furnishing security);
 - (u) Order 40, rules 1, 2, 3,7 and 11 (temporary injunctions);
 - (v) Order 41, rules 1 and 4 (receivers);
 - (w) Order 42, rules 3, 14, 21, 23 and 35 (appeals);
 - (x) Order 45, rule 3 (application for review);
 - (y) Order 50, rule 6 (enlargement of time);
 - (z) Order 52, rules 4, 5, 6 and 7 (advocates);
 - (aa) Order 53 (judicial review orders).
- (2) An appeal shall lie with the leave of the court from any other order made under these Rules.



(3) An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.

(4) Save where otherwise expressly provided in this rule, “order” includes both an order granting the relief applied for and an order refusing such relief.
[Emphasis added]

25. The Appellants required leave to appeal the decision by the trial court. Indeed, trial court record shows that soon after the delivery of the impugned Ruling, Counsel for the Appellant/Applicants prayed for leave to appeal but the trial court directed that they file a formal application for the same.

26. There is no evidence of filing that Application before the trial court and no leave has been sought at all before filing the appeal and Application herein. The issue of leave goes to this Court’s jurisdiction. Jurisdiction is everything and without it, the Court has to down its tools. An appeal filed without leave is incompetent.

27. On the second issue, the chronology of events leading to the trial court declining adjournment sought by the Appellants is not in dispute and indeed the trial court also highlighted the same in her Ruling. She reasoned:-

“It is not enough for the defendant to say that he had informed the Plaintiff’s counsel of the absence her witness. The discretion to allow an adjournment is a reserve of the Court. Up to this moment, the defendant has not presented any evidence to support his claim that his doctor witness is attending a two- week conference. Even so, Judiciary has moved its sessions to a digital space expanding access to justice. The Court having rejected the defence’s application for an adjournment, counsel could have asked for time to reach the doctor to testify virtually at a convenient time within the day.

Be that as it may, what is the basis of calling the Doctor by the defence? They were granted leave way back on 26th May 2021 to file and serve the 2nd medical report. As at the time of delivering the ruling, the same is not on record. The same has not been served upon the plaintiff. There is no other witness listed in the defendant’s list of witnesses.”[Emphasis added]

28. The argument by the Appellants is that the said documents were filed on 10th September 2021 and served on 17th September 2021. A perusal of the court record reveals a list of documents dated 30th August 2021 listed as (1) Medical Report dated 22nd April 2021 and (2) Report from radiologist dated 22nd April 2021. There are no such documents filed to date.

29. Further, though there was an earlier list of witnesses dated 6th February 2020 showing the three Defence Witnesses being (1) Base Commander – Kisii Police Station (2) Doctor Jenipher Kahuthu upon re-examination (3) Driver, they filed another list of witnesses dated 30th August 2021 listing the doctor as the only witness. The spirited argument that the Respondents do not deny service by email is immaterial. Service of the said document through email is not filing of the document.



30. The court record further shows that parties had been granted the last adjournment in the matter. Section 1A and 1B of the Civil Procedure Act provides: -

- “ 1A The overriding objective of this Act and the rules made hereunder is to
- (1) facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
 - (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
 - (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.” [Emphasis added]

31. By their conduct, it is clear that the Appellants failed to comply with the court orders so as to facilitate expeditious disposal of the dispute before court. They cannot claim to have been denied a chance to be heard and therefore Article 50 and 159 (2) of the Constitution do not act in their favour in the circumstances. They are indeed the violators of the same provisions that they wish to rely on. Their right to be heard cannot be indefinite. This Court finds no error in the finding by the trial court.

32. Flowing from second issue is whether the dismissal order was a negative order. At the onset, circumstances leading to the finding in Ngugi Kagia (supra) relied on by the Appellants herein are different from what is before this Court and therefore, case does not support the Appellants herein.

33. In Jennifer Akinyi Osodo v Bonface Okumu Osodo & 3 others [2021] eKLR, the Court of Appeal held that a negative order cannot be the subject of a stay order. The Court further made reference to the case of Raymond M. Omboga v Austine Pyan Maranga Kisii HCCA No 15 of 2010, where Makhandia, J (as he then was) stated: -

“The order dismissing the Application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the Respondent which is capable of execution, there can be no stay of execution of such an order...The Applicant seeks to appeal against the order dismissing his Application. This is not an order capable of being stayed because there is nothing that the Applicant has lost. The refusal simply means that the Applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise...”

34. In this case, the trial court simply directed the parties to file submissions in the suit as it had earlier ordered before this Application. The dismissal order herein therefore remains a negative order incapable of being stayed.

35. In conclusion, this Court makes the following orders: -

1. The Appellants’ Application dated 31st August 2022 be and is hereby dismissed not only for being incompetent but also for lacking merit.
2. The Memorandum of Appeal dated 26th August 2022 is struck out.
3. The costs are awarded to the Respondents.



4. The original court file shall forthwith be placed before the Kisii Chief Magistrate's Court for parties to comply by filing submissions as earlier directed by the trial court towards expeditious conclusion of the case.

DATED, SIGNED AND DELIVERED (VIRTUALLY) AT KISII THIS 31ST DAY OF OCTOBER, 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

N/A for Appellant

N/A for Respondent

Aphline- Court Assistant

