



REPUBLIC OF KENYA



Agricultural Development Corporation v Wanyonyi (Suing as the Legal Representative of the Estate of Alex Wekesa Wanyonyi) (Civil Appeal E026 of 2023) [2024] KEHC 8876 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8876 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL E026 OF 2023
AC MRIMA, J
JULY 25, 2024**

BETWEEN

AGRICULTURAL DEVELOPMENT CORPORATION APPELLANT

AND

DAVID MAKOKHA WANYONYI RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ALEX
WEKESA WANYONYI**

*(Being an Appeal from the Judgment of S. K. Mutai (SPM) in Kitale
Chief Magistrate Civil Case No. 96 of 2017 delivered on 8th May 2023)*

JUDGMENT

Background:

1. David Makokha Wanyonyi, the Respondent herein, instituted a suit before the Kitale Chief Magistrates Court being Civil Case No. 96 of 2017 (hereinafter referred to as ‘the civil suit’) on behalf of the Estate of Alex Wekesa Wanyonyi (hereinafter referred to as ‘the deceased’).
2. It was claimed that the deceased, an employee of Agricultural Development Corporation, the Appellant herein, died of rabies as a result of a wild cat bite while discharging his duties.
3. The Respondent sought compensation under the *Fatal Accidents Act* and The *Law Reform Act*. Upon hearing the suit, the trial Magistrate, in its judgment of 8th May 2023 found the Respondent to have made a case deserving of compensation.
4. The Court awarded general and special damages of Kshs. 2,177,040/- and Kshs. 3,950/- respectively and apportioned liability in the ratio of 80% to 20% in favour of the estate of the deceased.



5. The Appellant was displeased by the said decision.

The Appeal:

7. The Appellant filed a Memorandum of Appeal dated 10th May 2023 and asserted the following grounds of appeal: -

1. The learned trial Magistrate erred in fact and in law when in his judgment he disregarded and or failed to consider the authorities cited by the Defendant's Counsel in support of the Defendant's submissions on the issue of liability hence arriving at an erroneous finding on liability
2. The learned trial Magistrate erred in fact and in law in failing to analyse the evidence before it and finding that the Defendant/Appellant was 100% liable.
3. The learned Magistrate erred in fact and in law when he failed to find that the Plaintiff/ Respondent was also duty bound to take care of himself while on duty.
4. The learned trial magistrate erred in fact and in law by using Kshs. 10,000/- as the Plaintiff's monthly salary thus failing to take into account the fact that the Dosh Form produced before the Court clearly indicated that the Plaintiff used to take home not more than Kshs. 7, 110/- per month thus arriving at a manifestly excessive award.
5. The learned trial Magistrate erred in law and in fact by making an erroneous assumption that the Plaintiff would have worked up to the retirement age of 60 years which is the retirement age but failed to take into account that the Plaintiff's job was that of a risky nature.

8. On 16th June 2016, the parties lodged a consent on security for stay of execution and the same was adopted as an Order of this Court. The consent was couched in the following terms;

- i. There be a stay of execution of the Judgment and Decree in Kitale CMCC No. 96 of 2017 on the following terms;
 - a. The Appellant to pay the Respondent a sum of Kshs. 500,000/- being part of the decretal sum.
 - b. The balance to await the outcome of the appeal.
 - c. The payment to be done within 45 days from today's date.
 - d. The Appellant to prepare, file and serve a Record of Appeal together with written submissions within fourteen (14) days from the date hereof.
 - e. Upon service of the Record of Appeal and the submissions, the Respondent to file and serve written submissions within fourteen days from the date thereof.
- ii. The matter to be mentioned on 31/07/2023 to confirm compliance and fixing a date for Judgment.
- iii. In default of the compliance of the agreed terms, execution to proceed on the entire sum awarded.

9. On 31st July 2023, Counsel for both parties appeared before Court and the appeal was set for judgment.

10. Subsequently, the Respondent, through a Certificate of Urgency dated 6th October 2023 instituted an evenly dated application by way of a Notice of Motion.



11. The application sought the following Orders;
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 2. The Court order and directions made on 16th June 2023 and subsequently on 31st July 2023 as to the hearing and disposal of the Appeal be reviewed, varied and or set aside.
 3. That the Judgment scheduled for delivery by this Honourable Court on 30th November 2023 (*sic*) be suspended.
 4. That this honourable Court be pleased to Order that there is no valid appeal on record in view of failure by the Appellant to meet and or comply with the agreed terms set down and stipulated in the Consent Order dated 16th June 2023 adopted as an Order of this Court.
 5. Any other Order the court shall deem fit.
 6. Costs be in the cause.
12. This Court directed that it will consider the above application in the judgment, hence, this composite decision.
13. What now follows is a consideration of the application since its objective is to strike out the appeal.
14. The application has its roots in non-fulfilment of the consent terms adopted as orders of this Court. The terms therein were in respect of a conditional stay of execution of the judgment in the civil suit.
15. On the basis that the Appellant failed to make the agreed payment of Kshs. 500,000/= within 45 days of the consent order, the Respondent urged this Court to make a finding that the appeal is incompetent and as such it ought to be struck out.
16. In this instance, Counsel for the Appellant informed the Court that the Appellant had paid the sum of Kshs. 300,000/- and it was committed to processing and paying the balance of the agreed sum. However, the Appellant did not seek to vary or review the orders of the Court made vide the parties' consent in any manner whatsoever. Even as at the time of writing this judgment, there is no indication that the balance was ever paid.
17. As the appeal was pending this judgment, both the civil suit Court file as well as the appeal Court file were together and in the Judge's custody. The Respondent would not have, therefore, been able to levy any execution and that is why he reverted to filing the instant application.
18. There is no doubt that the parties agreed that the sum of Kshs. 500,000/= be paid within 45 days of the Consent Order. Notably, the Consent Order was self-executing in the event the Appellant failed to make payment within the 45-days' window.
19. Paragraph iii of the Consent provided as follows: -
 - iii. In default of the compliance of the agreed terms, execution to proceed on the entire sum awarded.
20. It, therefore, means that since the Appellant was in clear breach of the consent terms and had the Respondent been able to levy execution, then the entire judgment sum would have been recovered. With such a state of affairs, the appeal would have been overtaken by events.
21. As stated above, the reason why execution of the decree in the civil suit was not undertaken was the fact that the Court files were in the custody of the Judge pending this judgment. This Court would, therefore, not smack the Respondent of indolence.



- 22. Drawing from the foregoing, it is this Court’s position that since the consent orders on record have not been set aside and/or varied, then the parties are firmly bound by the said orders. Therefore, since there was default in complying with the orders of the Court in place, then social justice and the rule of law, as constitutional imperatives in Article 10 of the Constitution, calls out that it is only fair and just that the Respondent be accorded the opportunity to levy execution of the entire judgment sum in the civil suit. That was what the parties expressly agreed to.
- 23. Having found as much, this Court further holds that the matter ought to come to end at this point in time. Since execution of the entire judgment sum in the civil suit is to be undertaken on the basis of consent orders, the appeal herein is rendered otiose. It is overtaken by events and suffers a false start.
- 24. On the basis of the foregoing, there will be no need of considering the merits of the appeal herein since there is now no competent appeal on the record. This legal journey now reaches its final destination.

Disposition:

- 25. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.
- 26. In the end, the following final orders hereby issue: -
 - a. The Appeal is hereby struck out.
 - b. The Notice of Motion dated 6th October 2023 is allowed to the extent that the Respondent herein is hereby allowed to levy execution for the entire decretal sum in Kitale Chief Magistrates Court Civil Case No. 96 of 2017.
 - c. The Appellant shall bear the costs of the appeal and the application.
- 27. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 25TH DAY OF JULY, 2024.

A. C. MRIMA

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JUDGE

Judgment delivered virtually and in the presence of: -
Miss Auta, Counsel for the Appellant.
Mr. Wanyonyi, Counsel for the Respondent.
Chemosop/Duke – Court Assistants.

