Mukora v Kirui & another (Civil Appeal E008 of 2021)
[2024] KEHC 13335 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13335 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

CIVIL APPEAL E008 OF 2021

JR KARANJA, J

OCTOBER 30, 2024

BETWEEN

SAMUEL MUKORA ..... APPELLANT

AND

EMILY CHEMUTAI KIRUI ..... 1ST RESPONDENT

AM TRANSPORTERS ..... 2ND RESPONDENT

RULING

1. This appeal arises from the judgement of the Chief Magistrate at Kericho in CMCC No 134 of 2018 in which the Appellant Samuel Mukora, had been sued along with the second Respondent, A.M Transporters, by the first Respondent Emily Chemutai Kirui for damages arising from an accident which occurred on the 22nd December, 2013 along the Kericho-Kisumu road involving a Motor vehicle Registration No. KAY 441 J.Mercedes Benz Prime Mover said to belong to both the Appellant and the second Respondent as the registered and beneficial owners respectively.

2. It was pleaded that the said motor vehicle was on the material date so carelessly and/or negligently driven such that it veered off the road and rammed into the first Respondent's commercial and residential building erected on land Parcel No. Kericho/Kapsoit/1786 whereby causing it extensive damage. The first Respondent(Plaintiff) therefore suffered loss and damage and instituted this suit against the Appellant and the second Respondent (1st and 2nd Defendants respectively).

3. The Appellant denied the claim and filed a statement of defence. Apparently, the second Respondent did not file it, defence nor participate in the trial which ended with judgement being entered in favour of the first Respondent (Plaintiff) jointly and severally against the Appellant (first Defendant) and the second Respondent (second Defendant) for special damages in the sum of Ksh 450,500/=.

   Being aggrieved the Appellant preferred the present appeal on the basis of the grounds contained in the memorandum of appeal dated 17th February, 2021.

4. Directions on the hearing of the appeal were effectively given by the court on 8th May, 2023 to the effect that this appeal No. E008 of 2021 and appeals No. E009 and E010 of 2021 be placed before this court for oral highlighting. This was after the parties indicated to the court that directions had earlier been taken for the appeals to be disposed of by written submissions. It was presupposed that parties had already filed their written submissions and were awaiting a judgement date. However, counsel for the Appellant on that 8th May, 2023, Mr. Kiprono asked for a date to orally highlight the submissions and he was indulged by the court when this matter was placed before this very court for oral highlighting on the 31st May, 2023 on which date the matter was pushed forward to 29th June, 2023 and again to 30th June, 2023 due to the confusion arising on service of the hearing notices and the actual party to be served.

5. The confusion persisted upto the 30th October, 2023, 30th November, 2023, 31st January, 2024, 2nd August, 2024 and finally on the 29th May, 2024, rhis court fixed the matter for further hearing of the appeal by way of oral highlights on the 23rd September, 2024 when the Appellant notified the court that he had filed an application dated 4th July, 2024 for production of additional evidence notwithstanding that the appeal had already been disposed of by written submissions and all that remained was oral highlights (if necessary) and judgement date.

   The Appellant/Applicant filed his submissions on the application. The Respondents appear not to have filed their submissions nor any form of response to the application. This explains why Counsel to the Applicant/Appellant Mr. Okok submitted during the hearing of the application on 28th October, 2024 that the application ought to be allowed as it is uncontroverted.

6. Basically, the issues arising for determination are whether the application is proper and competent before this court at this juncture and if so, whether the Applicant is entitled to exercise of discretion by this court in his favour. The application is anchored on Section 78 of the *Civil Procedure Act* and Order 42 Rule 27 of the Civil Procedure Rules. As borne by the record and with regard to the first issue this appeal was disposed of by written submissions and all that remained was a judgement date but for the Appellant to request for time to orally highlight his submissions. He was indulged by the court but failed to utilize the opportunity. Instead, he created confusion on question of service of the hearing notice and the actual parties involved in this matter. This had the effect of delaying the matter i.e the conclusion of the appeal with a judgement of the court. And when the matter was finally set for and highlighting of the submissions on 23rd September, 2024, the Appellant ambushes the court and indeed the Respondent with the present application for which he was nonetheless indulged by the court with a hearing date.

7. However, now that the appeal has already been heard and the parties do not seem to be been to make oral highlights the matter has to be given a judgement date soonest which will therefore render the present application improper and incompetent before this court for having been overtaken by events and for being an abuse of the court process coming as it does belatedly. Exercise of discretion is essentially an equitable principle for which the maxim "Delay defeats, equity" optly applies in the circumstances of this case. With the foregoing conclusion on the first issue for determination, a need does not arise for determination of the second issue.

8. In sum, the present application is dismissed and the judgment date for the appeal be fixed on 31st October, 2024, when the matter will be mentioned for that purpose. Mention notice to issue to the Respondents.

9. Orders accordingly.

J.R. KARANJAH

JUDGE.

DATED, DELIVERED THIS 30TH DAY OF OCTOBER, 2024.

In presence of;-

Mr. Okok for Appellant/Applicant

Respondent- Absent.