



**Otiep v Obonyo (Miscellaneous Application E088 of 2021)  
[2023] KEHC 1750 (KLR) (28 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1750 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS APPLICATION E088 OF 2021  
FA OCHIENG, J  
FEBRUARY 28, 2023**

**BETWEEN**

**FRANCISCA AKOTH OTIEP ..... APPELLANT**

**AND**

**LUCAS OTIENO OBONYO ..... RESPONDENT**

**RULING**

1. The application dated May 10, 2021 was filed by Francisca Akoth Otiep, who shall hereinafter be cited as the 'Defendant'. The respondent to the application is Lucas Otieno Obonyo, who shall hereinafter be cited as the 'Plaintiff'.
2. The application is for the stay of execution of the judgment in CMCC No 381 of 2017, pursuant to which the trial court had granted judgment in favour of the plaintiff for Kshs 1,202,950/-.
3. The defendant wishes to challenge the quantum of the sum awarded to the plaintiff.
4. However, as the said judgment was rendered on October 12, 2018, the defendant first requires leave from the court, in order to be able to file and serve her intended Memorandum of Appeal, as well as the Record of Appeal.
5. It is the defendant's case that she was not to blame for the delay in instituting the intended appeal. She told this Court that the delay had been occasioned by the advocate who had been instructed by her insurer.
6. According to the defendant, the advocate had been appointed by the insurance company to represent her in the case that the plaintiff had filed against her.
7. The case arose from a motor vehicle accident. The plaintiff was a passenger in a motor vehicle belonging to the defendant. During the said accident, the plaintiff sustained injuries. He attributed the accident to the negligence of the defendant's driver.



8. The learned trial Magistrate held the defendant 100% liable. In effect, the plaintiff, who had been a passenger in the vehicle, was not liable for any contributory negligence.
9. The defendant had told this Court that she wished to appeal against the quantum of the sums awarded to the plaintiff.
10. She is aware that an appeal from the subordinate court, to the High Court, ought to be filed within 30 days from the date of the decree or the order, against which the appeal was being filed.
11. As she was well out of time for filing the appeal, the defendant invoked Section 95 of the *Civil Procedure Act*, to seek the enlargement of time for filing her appeal.
12. She said that although the insurance company had defended the case against her, the said insurance company failed to settle the decretal amount.
13. Meanwhile, the insurance company had kept her in the dark, when the case was ongoing. She was therefore, of the considered opinion that the inaction or mistakes of the insurer's advocate ought not to be visited upon her.
14. In support of her argument, the defendant cited the case of *Edward Juma Ongeso Vs Francis M Kinuthia & Another*[2005] eKLR, in which Seron J held that the defendant, who had been let down by an advocate who had been appointed by his insurer, should not be left to suffer due to the mistake of counsel.
15. The plaintiff believes that the defendant was being dishonest, when she heaped the blame upon the advocates who had been appointed by her insurers.
16. If the case was defended by the insurer, and if the insurer's advocate failed to involve the defendant in the trial; as a result of which the court rendered a judgment against the defendant, justice would demand that the defendant ought not to be prejudiced due to the actions of the insurer's advocate.
17. When an insurer had taken upon itself the duty to defend the case brought against its insured, the said insurer had the responsibility to satisfy the judgment against its said insured.
18. Of course there is the necessity to notify the insurer about the intention to sue its insured, as provided for by Section 10 of the *Insurance (Motor Vehicle Third Party Risks) Act*, Cap 405 of the Laws of Kenya.
19. Therefore, when an insurer takes on the duty to engage an advocate to represent its insured, the court is entitled to presume that the insurer had been duly notified prior to the commencement of the proceedings.
20. As a part of its obligations, in such cases, the insurer ought to involve the insured in the proceedings, as deemed necessary.
21. If the insured cooperates with the insurer, in defending the case, he would have discharged his duty. But he can only be expected to co-operate if the insurer, through its advocate, calls upon him to do so.
22. If the insurer and its advocate, keep the insured in the dark, I hold the view that the insurer ought not to be permitted to abandon the insured, to the mercy of the decree-holder.
23. An insurer who wishes to be exonerated for the responsibility of satisfying a decree ought not to take on the responsibility of instructing an advocate to defend the case filed against its insured.



24. For instance, if the insurer held the view that the insured had breached a material term or condition in the contract of insurance, the said insurer should from the outset, make it clear that it would not be taking on the task of defending the insured.
25. In my considered opinion, it is wrong for an insurer to instruct an advocate to defend its insured, and later abdicate its duty, which is to satisfy the judgment which the court had handed down against the said insured.
26. Having so held, I now ask myself whether or not the insurer herein had engaged an advocate to defend the insured.
27. I note from the Replying Affidavit sworn by the plaintiff, that the defendant first filed an application dated December 14, 2020, seeking the stay of execution. The said application was filed before the trial court, and was supported by the defendant's affidavit.
28. At paragraph 2 of the supporting affidavit, the defendant said that although she notified the insurer about the case, she is the one who appointed M/S Kuyo & Co Advocates to defend her.
29. At paragraphs 9 and 10 of her affidavit, the defendant said that although she paid the excess sum demanded by her insurer, the said insurer failed to appoint an advocate, forcing her to personally give instructions to M/s Kuyo & Co Advocates.
30. As the defendant had engaged her own advocate to represent her in the case at the Magistrate's Court, I find that she cannot now turn around and heap blame upon an advocate who had allegedly been appointed by the insurer.
31. It is further noted, that by an affidavit sworn on April 21, 2021, the defendant stated that she had been holding negotiations with her insurer, in the hope that they could satisfy the decretal amount. However, the said negotiations failed to yield the desired results.
32. The message that I get from the affidavits of the defendant is that she had been aware of the judgment from as early as December 2020. She then filed 2 applications seeking stay of execution.
33. In the said 2 instances when she sought stay of execution, the defendant did not indicate that she intended to appeal against the judgment.
34. The defendant had not provided an explanation for the delay in seeking an extension of time, within which to institute an appeal.
35. In the circumstances, the Court is unable to exercise its discretion in favour of the defendant, as she has failed to meet the requirements for extension of time to appeal.
36. The application dated May 10, 2021 is dismissed, with costs to the plaintiff.

**DATED, SIGNED AND DELIVERED THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**FRED A. OCHIENG**

**JUDGE**

