



SAS Freight Ways Limited v Mbae & Nyanje (Suing as the Legal Representatives of the Estate of Moses Angalwa Nyanje - Deceased) & another (Miscellaneous Application 1 of 2023) [2023] KEHC 1039 (KLR) (21 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1039 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS APPLICATION 1 OF 2023
RN NYAKUNDI, J
FEBRUARY 21, 2023**

BETWEEN

SAS FREIGHT WAYS LIMITED APPLICANT

AND

LORRAINE MUKAMI MBAE & PATRICK EMETI NYANJE (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF MOSES ANGALWA NYANJE - DECEASED) 1ST RESPONDENT

DREAMLINE EXPRESS LIMITED 2ND RESPONDENT

RULING

1. Before me for determination is the applicant's application dated January 3, 2023, seeking orders: -
 1. Spent
 2. That pending the hearing and determination of this application inter-parties, the honourable court do grant at temporary stay of execution of the judgment and decree in Eldoret CMCC No 517 of 2020; Lorraine M Mbae and Patrcik Emeti v Dreamline Express Limited and Sas Freightways Limited.
 3. That and /or in the alternative the status quo in regard to the intended execution be maintained in respect of Eldoret CMCC No 517 of 2020; Lorraine M Mbae and Patrcik Emeti v Dreamline Express Limited and Sas Freightways Limited, pending the hearing and determination of this application inter-parties.
 4. That the honourable court be pleased to grant the applicant leave to lodge an appeal out time based on the court's judgment delivered on August 18, 2022.



5. That having granted the leave to appeal out of time, and pending the hearing and determination of the substantive appeal, the honourable court do grant stay of the judgment in Eldoret CMCC No 517 of 2020; Lorraine M Mbae and Patrcik Emeti v Dreamline Express Limited and Sas Freightways Limited.
6. That costs of this application be provided for.
2. The application is premised on the grounds therein and its is further supported by the affidavit sworn by Bilal Hmadu Salim, on January 3, 2023.

The Applicant's Case

3. The applicant deposed that in Eldoret CMCC No 157 of 2020, judgment was entered against it jointly and severally together with the 2nd respondent for sum of Kshs 8,566, 485/=. The applicant contends that no prior service of summons was ever issued upon it and hence the delay in lodging the appeal. The applicant maintains that regardless of the aforementioned Direct line Assurance proceeded to defend the claim against it and the 2nd respondent without its knowledge.
4. The applicant maintains that upon perusal of the trial file, it was established that by its newly appointed advocates that there was no apportionment of blame or liability on its part as the 2nd respondent was the one that had been adversely mentioned.
5. The applicant deposed that with the above in mind, the principal of vicarious liability does not arise as it and the 2nd respondent are separate and distinct persons.
6. The applicant further deposed that warrants have since been extracted and are due for execution after January 13, 2023, when time shall start to run. The applicant is apprehensive that unless interim orders then the intended appeal shall be rendered nugatory,
7. The applicant maintains that Kshs 3,000,000/= has already be paid to the 1st respondent's counsel as thus can serve as security. That the intended appeal raises arguable grounds which shall be rendered nugatory if stay of execution is not granted.
8. The applicant seeks leave of court to appeal out of time.

The 1st Respondent's Case

9. In response to the applicant's application, the 1st respondent filed a notice of preliminary objection dated January 12, 2023 together with a replying affidavit sworn by Patrick Emeti Nyanje, dated January 13, 2023.
10. In the notice of preliminary objection dated January 12, 2023, 1st respondent raised the following grounds:
 1. That the firm of Brenda & Brenda Advocates are not properly on record as their notice of appointment dated January 3, 2023, offends the mandatory provisions of order 9 rule 9 of the [*Civil Procedure Rules, 2010*](#).
 2. That the applicant was properly represented by the firm of Kimondo Gachoka & Company Advocates all along in Eldoret CMCC No 517 of 2020.
 3. That judgment was properly entered on merit with the knowledge of the applicant's advocates and the claim herein has been partially settled.



11. The gist of the 1st respondent's maintain that this instant application is an afterthought, judgment having been delivered on August 18, 2022 in the presence of an advocate representing the applicant and two other defendants. That statutory period to appeal has since lapsed.
12. The 1st respondent maintains that before instituting the suit at the trial court, a motor vehicle search was conducted on motor vehicle registration number KCF 598 U scania bus and it was established that the applicant herein and the 2nd respondent were joint owners of the suit motor vehicle.
13. The 1st respondent maintains that summons to enter appearance were served upon the applicant and his co-defendants in the trial suit and memorandum of appearance was filed on behalf of the said defendants by the firm of Kimondo Gachoka & Company Advocates. Further that on October 6, 2020 a defence was filed by the firm of Kimondo Gachoka & Company Advocates on behalf of the applicant herein and his co-defendants.
14. The 1st respondent further deposed that upon judgment being entered on August 18, 2022. The defendants therein through their insurance company, on October 3, 2022, made a partial payment of Kshs 3,000,000/= as part of the total decretal amount being Kshs 9,274,875.16/=.
15. The 1st respondent maintains that this instant application has been made in bad faith and they stand to suffer great prejudice should it be allowed.
16. According to the 1st respondent, the purpose of this instant application is to deny them from enjoying the fruits of their judgment.

Determination

17. Before delving into the merits or otherwise of this application, I will first address the notice of preliminary objection that has been raised by the 1st respondent herein. The preliminary objection if allowed may dispose off the entire suit without giving parties the opportunity to be heard. This has to be done with caution that the court has a duty to hear all parties and determine the case on merit.
18. The definition of a preliminary objection is well set out in the case of *Mukisa Biscuits Manufacturing Co ltd v West End Distributors Ltd* (1969) EA 696.

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration."

Ojwang, J (as he then was) expressed himself as follows in *Oraro v Mbaja* [2005] 1 KLR 141: -

evidence. Any assertion, which claims to be a preliminary objection, yet i a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract-giving rise to the suit to refer the dispute to arbitration.... A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion....The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be,



a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of t bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from information, which stands to be tested by normal rules of evidence.”

19. Order 9, rule 9 of the [Civil Procedure Rules](#) provides as follows;

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

- (a) Upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

20. Order 9 rule 9 of the [Civil Procedure Rules](#) is applicable in instances where a party changes the advocate after judgment has already been entered in the suit. The reasoning behind the provision was well articulated in the case of [S. K Tarwadi v Veronica Mueblmann](#) [2019] eKLR where the judge observed as follows:

...In my view, the essence of the order 9 rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”

21. It is evident that before a notice of change of advocates can only be filed after judgment has been delivered, it must be preceded by either an application wherein an incoming advocate seeks leave to come on record for a party or by a consent between the outgoing and proposed incoming advocate or party intending to act in person as the case may be. I have looked at the points of law raised by the 1st respondent’s preliminary objection and i note that from the application filed in court there is no indication that the firm of Brenda and Brenda Advocates served the firm of M/s Anyona and Company Advocates with any application of their intention to act for the applicant herein. No consent was obtained from the firm of Kimondo Gachoka & Company by the firm of Brenda & Brenda Company Advocates to come on record for the applicant herein. From the foregoing it evident that the applicant has not met the threshold as set out in order 9 rule 9 of the [Civil Procedure Rules, 2010](#). This court finds that the preliminary objection merited on the point that the notice of motion application dated January 3, 2023, is lodged by advocates who were not part of the trial suit without the leave of the court and ought to be struck out.

Be as it may however, I will address the other issues in this matter.

22. Section 79G of the [Civil Procedure Act](#) provides that:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:



Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

23. It is trite to note that extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the court. That discretion, however, must be exercised judiciously.
24. From the record, it is evident that delay in filing this application is inordinate. The trial court rendered its judgment on August 18, 2022. This application was filed on January 4, 2023, the delay is for about three months. The applicant has not tendered any reasons to persuade this court to allow it to pursue the intended appeal. Having found so, I need not say more regarding the stay orders being sought. In the end, it is my finding that the notice of motion dated January 3, 2023 is not meritorious and is hereby dismissed with costs to the 1st respondent.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 21ST DAY OF FEBRUARY, 2023.

R.NYAKUNDI

JUDGE

Coram: Hon. Justice Nyakundi

M/s Anyona & Co. Advocates

Nyabero & Co. Advocates

