



REPUBLIC OF KENYA



**Africa Merchant Assurance Company Limited v Morris Mugendi Karigi t/a Mugendi Karigi & Co Advocates (Civil Appeal E050 of 2022) [2023] KEHC 17997 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17997 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E050 OF 2022  
LM NJUGUNA, J  
MAY 31, 2023**

**BETWEEN**

**AFRICA MERCHANT ASSURANCE COMPANY LIMITED ..... APPELLANT**

**AND**

**MORRIS MUGENDI KARIGI T/A MUGENDI KARIGI & CO  
ADVOCATES ..... RESPONDENT**

**JUDGMENT**

1. The Appellant herein filed in this court a memorandum of appeal against the judgment of the learned trial magistrate Hon. H. Nyakweba (SPM) in Embu CMCC No. E075 of 2020 delivered on 30.08.2022 dismissing its application. The grounds upon which the appeal is premised are as enumerated on the face of the memorandum of appeal dated the 5<sup>th</sup> September, 2022.
2. The appellant thus prayed that:
  - i. The appeal be allowed.
  - ii. The ruling by the learned magistrate dated 30.08.2022 be set aside.
    - a. To set aside orders issued on 03.06.2022
    - b. To re-open the plaintiff's and Defendant's case for hearing in CMCC E075 of 2022; *Morris Mugendi Karigi t/a Mugendi Karigi & Co. Advocates v Africa Merchant Assurance Co. Ltd.*
    - c. To recall the plaintiff's witnesses in CMCC E075 of 2022; *Morris Mugendi Karigi t/a Mugendi Karigi & Co. Advocates v Africa Merchant Assurance Co. Ltd.*
    - d. To grant a fresh hearing date in CMCC E075 of 2022.
  - iii. Costs be in the suit.



3. The court directed that the appeal be canvassed by way of written submissions and both parties complied with the said directions.
4. The appellant submitted that the centrality of the appeal is based on the violation of the appellant's rights to a fair hearing based on the merits of the case and upholding technicalities over substantial justice through irregular interpretation of statute to curtail the appellant's rights. Reliance was placed *inter alia* on the cases of *Patriotic Guards Limited v James Kipchirchir Sambu* [2018] eKLR, *Phillip Chemwolo & Another v Augustine Kubede* [1982-88] KLR 103 and *Shah v Mbogo & another* [1967] eKLR. That it is conceded that on the trial day, the counsel for the appellant, Mr. Kelvin Juma did not attend court and his failure to attend was expressly explained to the court which was due to an inadvertent failure by him to properly diarise the hearing date. It was therefore submitted that the decision to dismiss the application dated 21.06.2022, contravened the dictum in the aforementioned case as it failed to balance the rights of the parties. That the trial magistrate despite having been notified of the stay orders, proceeded to deliver the final judgment on 27.09.2022 thereby complicating the matter. The appellant averred that the actions of the trial court were an outright case of negligence and contempt of this court's Orders.
5. Further, the trial court was faulted for having reached a conclusion that the absence of the counsel for the appellant was not explained despite the counsel having filed a sworn affidavit to that effect. That the allegation that the counsel ought to have attached a copy of his diary as evidence of misdiarisation cannot suffice to show that he was not aware and /or inadvertently forgot about the hearing. The appellant in support of this proposition relied on the case of *Republic v District Commissioner Machakos J.R Mics Application No. 34 of 2013* to support his contention that a negative task is always difficult and often impossible and would be a most exceptional burden to impose upon a litigant.
6. It was also submitted that the trial court in dismissing the application relied on the grounds on failure to attach a copy of the diary and on its failure to file witness statements and yet, there was a witness statement on record. The appellant decried the fact that the trial court failed to proportionately assess the damage that was likely to be suffered by the appellant vis-a-vis that of the respondent. Reliance was thus placed on the cases *inter alia* *Tana and Athi Development Authority v Jeremiah Kimigo Mwakio & 3others* eKLR and *Wachira Karani v Bildad Wachira* [2016] eKLR. The appellant reiterated the principle in the cases above to state that the ruling of the court went against the course of justice.
7. On the consequential orders that this court should issue in light of the judgment delivered on 27.09.2022, it was submitted that on 19.09.2022, this court issued ex parte orders staying the execution of the ruling and orders issued on 30.08.2022 pending the hearing of the interlocutory application for stay of the ruling on 29.09.2022; the appellant submitted that this court's orders were brought to the attention of the trial magistrate and further, the respondent also admitted to this court that indeed the trial magistrate was informed of the said orders. That despite the orders issued on the 19.09.2022, the judgment was delivered on 27.09.2022 in utter contempt of the existing stay orders. The appellant thus relied on the case of *Wildlife Lodges Ltd v County Council of Narok and Another* [2005] 2 EA 344 (HCK). In conclusion, this court was therefore urged to maintain its sanctity of its orders issued on 19.09.2022 and allow the appeal and in so doing, nullify and/or strike out all the other orders subsequent to the filing of the appeal including the judgment delivered on 27.09.2022.
8. On the other hand, the respondent in his submission stated that there was no ground of appeal that addressed the judgment delivered on 27.09.2022 or the alleged non-compliance of the orders of 19.09.2022. That the appellant herein did not seek leave to amend its memorandum of appeal to introduce the issues on paragraphs 30,61,62,63,65,66,67,68 and 71 of the appellant's submissions



and therefore, the same amounted to introduction of issues not pleaded in the appeal. The appellant submitted on five issues to wit :

- i. Whether the appeal is competent for want of leave of court under section 75 of the [Civil Procedure Act](#) and Orders 43 of the [Civil Procedure Rules](#).
  - ii. Whether the appellant's application before the trial court and subject of the impugned ruling and orders had merits.
  - iii. Whether the appellant's right to fair trial was curtailed.
  - iv. Whether the error on the part of the appellant's counsel can in the circumstances of the case be visited upon the appellant.
  - v. Whether the appellant has proved service and non-compliance of the orders issued on 19.09.2022.
9. On the first issue, it was submitted that the application subject of this appeal was brought under the provisions of Sections 1A,1B,3,3A of the [Civil Procedure Act](#) , Order 51 of the [Civil Procedure Rules](#) and article 159 (2) of the [constitution](#). That Order 43 Rule 1 of the [Civil Procedure Rules](#) lists orders which are appealable as of right while sub rules 2 and 3 makes the provisions for leave of court for appeals against orders not listed in sub rule 1 and section 75 of the Act. It was thus submitted, that the appellant ought to have invoked the inherent jurisdiction of the trial court to grant leave before preferring an appeal to the High Court.
10. On whether the application subject matter of the appeal had merits, it was submitted that the act of misdiarizing was an act capable of being proved by exhibiting a copy of the advocate's diary and therefore the trial court did not fall into any error in citing this failure while dismissing the application. That the position taken by the appellant that the court had an obligation to believe him on this issue of his failure to attend court squarely lay on him and the same was not discharged. The respondent placed reliance on section 107 of the [Evidence Act](#) and the case of [Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another](#) [2005] eKLR. Further, the respondent stated that the appellant was in the habit of delaying and /or obstructing the expeditious disposal of the case and, therefore, the trial court cannot be faulted for allegedly failing to exercise its discretion. The respondent submitted that the appellant's representation that it needed to substitute the defence witness is misleading for the reason that there was no witness statement on record capable of being substituted with the one of Grace Njuguna. That the court was therefore correct in its interpretation of Order 7 rule 5 of the [Civil Procedure Rules](#) on filing of witness statements.
11. On whether the appellant's right to a fair hearing was curtailed, it was submitted that the appellant exercised its right to defend the suit when it entered appearance and filed the statement of defence dated 11.02.2021 which was later amended on 03.04.2021. That the appellant through its counsel failed to comply with the law on the pretrial. Additionally, that the appellant failed to appear in court when the matter came up for hearing and the respondent was heard and both the plaintiff's and the defence case were closed. The respondent on this proposition relied inter alia on the case of [Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & Another](#) [2018] eKLR in buttressing the fact that if a party has been afforded the opportunity to exercise a right to be heard, then such a party cannot claim that his/her right to a fair hearing has been curtailed.
12. On whether the error on the part of the appellant's counsel should be visited upon the appellant, it was submitted that whereas courts will readily excuse a mistake of counsel, the exercise of such discretion is not automatic and will not be exercised to aid a party who has deliberately sought to obstruct the



course of justice. This court was therefore urged to consider that the nature of the appeal before it does not warrant exercise of its discretion.

13. On the nature, service and compliance of the order dated 19.09.2022, it was submitted that contrary to the submissions by the appellant, the order dated 19.09.2022 was served on the court vide the letter dated 20.09.2022 and the record shows that the same was received on 28.09.2022 after the judgment had been delivered by the court. The respondent further stated that the appellant has deliberately left the said letter out of its record of appeal and has instead sought to rely on an email correspondence dated 20.09.2022. That it was incumbent upon the appellant to ensure that the trial court received the said order. In the end, the respondent submitted that equity does not aid the indolent but the vigilant; this court was therefore urged to dismiss the appeal herein as the judgment by the trial court is valid and the same has not been appealed against.
14. The appellant further filed supplementary submissions in which it submitted that it is not disputed that the appellant did not file final submissions in the main suit before the delivery of judgment on 27.09.2022.; that this was so, as there was an order of stay issued by this court, staying any proceedings in the lower court pending determination of the application. It was stated that the subject of this appeal essentially falls under the purview of Order 12 Rule 7 of the Civil Procedure Rules 2010 because the magistrate in dismissing the application expressly relied on the said order. That under the said rule no leave is required before filing an appeal. It was its case that the appellant had filed its evidence to be relied on during trial via list of documents dated 11.02.2022 and therefore, the allegations that there was no evidence filed in support of the appellant's case was erroneous and misleading. The appellant reiterated that the order staying further proceedings at the lower court pending the hearing and determination of its application was served on the lower court registry via email and the said service was effective service. That in any event, the trial magistrate was informed in court that an order had been issued but declined to direct the registry to ensure the order is in the file before the final judgment could be delivered and as such, the appellant blamed the trial court for its laxity. In the end, this court was urged to allow the appeal herein.
15. I have considered the grounds of appeal, analysed the pleadings and the submissions in this appeal and it is my view that the main issue for determination is whether the appeal herein has merits.
16. As it is now settled by the numerous authorities both by this court and the superior courts, the duty of this court as the first appellate court is to revisit the evidence on record, evaluate it and reach its own conclusion. Further, this court ought not to ordinarily interfere with the findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. [See Mwanasokoni v Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga v Kiruga & Another (1988) KLR 348].
17. However, before delving into the merits of the appeal, I note that the respondent raised an issue as to whether the appeal herein is competently before this court. The respondent has submitted that the application subject of this appeal was brought under the provisions of Sections 1A,1B,3,3A of the Civil Procedure Act, Order 51 of the Civil Procedure Rules and article 159 (2) of the constitution. That Order 43 Rule 1 of the Civil Procedure Rules lists orders from which appeals lie as of right while sub rules 2 and 3 make the provisions for leave of court for appeals against orders not listed in sub rule 1 and section 75 of the Act. It was thus submitted that the appellant ought to have invoked the inherent jurisdiction of the trial court to grant leave before preferring an appeal to the High Court. The appellant on the other hand defended this appeal by submitting that the subject of this appeal essentially falls under the purview of Order 12 Rule 7 of the Civil Procedure Rules 2010 because the magistrate in dismissing the application expressly relied on the said order. That under the said rule there was no leave required to be sought before the appeal could be filed.



18. Section 75(1) of the *Civil Procedure Act* provides for the orders against which an appeal would lie as of right and/or with the leave of the court. It provides thus:

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- (1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-
- a. An order superseding an arbitration where the award has not been completed within the period allowed by the court;
  - b. An order on an award stated in the form of a special case;
  - c. An order modifying or correcting an award;
  - d. An order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
  - e. An order filing or refusing to file an award in an arbitration without the intervention of the court;
  - f. An order under section 64;
  - g. An order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
  - h. Any order made under rules from which an appeal is expressly allowed by rules.
  - i. Order 43 Rule (1) of the Civil Procedure Rules sets out the orders and rules in respect of which appeals would lie as of right. Under Order 43(2) it is provided that an appeal shall lie with the leave of the court from any other order made under the Rules. This means that unless the order sought to be appealed against falls under the orders which are appealable as of right under Order 43(1), leave to appeal must be obtained before such an appeal can be preferred. The procedure for obtaining leave is provided under Order 43(3) which states as follows:-
- (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.

20. In the same breadth, Order 12 Rule 7 states as follows:

Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

21. The respondent herein has submitted that the appellant did not seek leave in the lower court to file an appeal.
22. The appellant has appealed against a decision by the lower court which found that the reasons by counsel for his failure to attend court on the date of the hearing were not sufficient. In my view therefore, the appeal herein falls within the ambit of pleadings under Order 43 and any appeal arising



from the setting aside of a judgment or dismissal for non-attendance which was the substance of the application, the subject matter of this appeal. Though the application was brought under Sections 1A, B, 3A of the *CPA* and Article 159 of the *Constitution*, the substance of the application speaks for itself. This to me is a mere technicality. The court should look at the form. The appeal is thus of right according to Order 43 (h) of the *Civil Procedure Rules* and as such, I hold the view that this court has jurisdiction to hear the appeal herein.

23. Further, it is important to note that the appeal currently before this court is against the ruling by the trial court dated 30.08.2022 and in the same breadth, there exists a judgment delivered by the trial court on 27.09.2022. The question that I ask myself is the would be benefit of determining this appeal which deals with the merit of the application dated 21/6/2022 while there exist a final judgment that has neither been appealed against nor set aside and/or challenged in any way.
24. The appellant in its submissions urged this court to maintain the sanctity of its order issued on 19.09.2022 and thereby allow the appeal and in so doing, nullify and/or set aside all the other consequential orders subsequent to the filing of the appeal including the judgment delivered on 27.09.2022. The respondent in response challenged the same and submitted that the appellant herein did not seek leave to amend its memorandum of appeal to introduce the issues of the order and the judgment, and therefore paragraphs 30, 61, 62, 63, 65, 66, 67, 68 and 71 of the appellant's submissions amounts to introduction of issues not pleaded in the appeal.
25. This court has indeed perused the memorandum of appeal filed herein and the prayers sought therein and I find that the judgment by the trial court is not a subject of the appeal. As submitted by the respondent, the appellant did not amend the memorandum of appeal and as such, I agree with the respondent that the said paragraphs amounts to introduction of issues not pleaded.
26. Ojwang, J (as he then was) in *B. v Attorney General* [2004] 1 KLR 431 stated:

“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”
27. As the court has observed herein above, the appellant has not challenged the judgment delivered on 27.09.2022 by the trial court. Upon delivery of the said judgment, the ruling delivered on the 30.8.2022 was overtaken by events and the ruling cannot be challenged in isolation.
28. Consequently, the appeal herein is hereby struck out with costs to the respondent.
29. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 31<sup>ST</sup> DAY OF MAY, 2023.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent

