



**Muthengi & another v Syuki & another (Suing as legal administrators
of Estate of Fredrick Kyuma Musilu) (Miscellaneous Application
522 of 2019) [2023] KEHC 21552 (KLR) (Civ) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21552 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS APPLICATION 522 OF 2019

JN NJAGI, J

JULY 28, 2023

BETWEEN

DANIEL MURIITHI MUTHENGI 1ST APPELLANT

OSMAN GALMAGAI 2ND APPELLANT

AND

PETERSON MUSILU SYUKI 1ST RESPONDENT

ANNA KAMENE MUSILI 2ND RESPONDENT

**SUING AS LEGAL ADMINISTRATORS OF ESTATE OF FREDRICK KYUMA
MUSILU**

RULING

1. The respondents/applicants have filed an application dated April 26, 2021 seeking for orders:
 1. That this honorable court be pleased to direct that Ksh.1,000,000/-deposited in court by the firm of Kairu McCourt be released to the firm of Nyamu &Nyamu Co. Advocate on record for the applicants herein being part payment of the decreed sum in CMCC NO.3469 of 2013 (Nairobi).
 2. That this honorable court be pleased to discharge the orders issued on 2nd October 2019 for stay of execution of the judgement and decree in Milimani Chief Magistrate Court Civil Suit No.3469 of 2013 pending the hearing and determination of the intended appeal.
 3. That this honorable court be pleased to discharge the orders issued on 2nd October, for extension of time and leave to lodge a memorandum of Appeal out of time against the judgement and decree in Milimani Chief Magistrate Court Civil Suit No.3469 of 2013.



4. That this honorable court be pleased to issue any other orders that it may deem fit, just and expedient in the interest of justice.
5. That the costs of this application be in the cause.
2. The application is based on the grounds that the respondents herein filed an application dated July 22, 2019 seeking for extension of time and leave to lodge a memorandum of appeal out of time against the judgment and decree in CMCC No. 3469 of 2013 and stay of execution and decree in the said matter pending the hearing and determination of an intended appeal. That on the October 2, 2019, the parties entered into a consent that allowed the application on conditions of part payment to the applicant and a further deposit of Ksh.1,000,000/= into court. The consent was adopted as an order of the court. The respondents subsequently complied with the terms of the consent. However, that despite the Respondents having a period of over one year they failed to file the memorandum of appeal.
3. The Applicants contend that failure to lodge the appeal and file the record of appeal within reasonable time ought to be construed that the respondents are no longer interested in filing the appeal and therefore the judgment and decree in CMCC No. 3469 of 2013 ought to remain in force. That it is in the interest of justice for this court to grant the prayers sought to enable the applicants to enjoy the fruits of their judgment issued on May 30, 2019.
4. The application was opposed by the respondents vide the replying affidavit of their advocate, Joyce Chichi, sworn on the February 6, 2023 wherein she deposes that counsel for the applicants were served with the memorandum of appeal on the November 18, 2019 which was duly received by the said advocates. A copy of the memorandum of appeal was annexed to the replying affidavit. Counsel further deposed that the said memorandum of appeal was served on the said counsels through email on March 29, 2022. That in view of the foregoing the application ought to be dismissed.
5. Directions were issued that the application be canvassed by way of written submissions. The Applicants' counsel filed their submissions but those of the respondents did not.
6. The Applicants submitted that a consent order imposes a contractual obligation to all the parties and the same may not be set aside or varied without justifiable and valid reasons. The applicants relied on the case of the *Board of Trustees National Social Security Fund v Michael Mwalo* (2015) eKLR where the court stated that:

“A consent judgment or order has contractual effect and can only be set aside on grounds which justify the setting aside of a contract, or if certain conditions remain to be fulfilled, which are not carried out.”
7. It was submitted that by virtue of the parties recording the consent they had an obligation to perform the duties thereto. That it was the duty of the Respondents to file the memorandum of appeal and record of appeal. That the application herein was filed over one year after the consent was recorded.
8. The Applicants submitted that the memorandum of appeal that was served upon the Applicants in Civil Appeal No. 631 of 2019 was dismissed on October 7, 2022. That the memorandum of appeal together with the record of appeal were served upon the Applicants on November 9, 2022 which is after the Respondents had received the instant application. Therefore, that there is no active appeal in respect of the parties herein. That it is 5 years since when judgment was entered and the respondents are guilty of laches and are in abuse of the court process. The applicants urged the court to allow the application.



9. I have considered the grounds in support of the application and the grounds in opposition thereto. The issue for determination is whether the Respondents failed to file the appeal within reasonable time after consent was recorded on 2nd October 2019.
10. The Applicants contend that no appeal had been filed by the time they filed the instant application on April 26, 2021. The respondents on the other hand contend that they filed the appeal, the same being Civil Appeal No.631 of 2019 and served counsel for the applicants with the memorandum of appeal which, as per annexed memorandum, is stamped “Received” by the Advocates for the applicants on November 18, 2019.
11. I have perused the court file and I have not seen any further affidavit in reply to the averment that the applicants were served with the memorandum of appeal on the November 18, 2019. Instead their advocates raised the issue in their submissions to the effect that the memorandum of appeal which they were served with has since been dismissed. They however never filed any document to show that the said appeal has since been dismissed.
12. It is trite that submissions by counsel cannot take the place of evidence. The Applicants were supposed to respond to the averment that they were served with the memorandum of appeal on the November 18, 2019 through evidence. Failure to do so means that they did not controvert the averment that they were served with the memorandum of appeal on the afore mentioned date. The court stamp on the memorandum of appeal shows that it was filed in court on the October 31, 2019. It has a stamp of the Advocates for the Applicants showing that it was received at their offices on the November 18, 2019. I therefore find that the Applicants were served with the memorandum of appeal on the said date.
13. The application herein was based on the ground that the respondents had not filed an appeal a year after consent was recorded. The respondents have shown that the appeal was filed way back in October 2019. I find no merit in the application dated April 26, 2021.
14. I have however noted that there has been inordinate delay in prosecuting the appeal. The Respondents never took any steps in prosecuting the appeal before the applicants filed the application dated April 26, 2021. While I am inclined to dismissing the application, there is no good reason for awarding the costs of the application to the respondents for failure to take steps towards the prosecution of the appeal. In view of the foregoing, the application dated April 26, 2021 is dismissed with orders for each party to bear its own costs.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED AT MARSABIT THIS 28TH JULY 2023.

J. N. NJAGI

JUDGE

In the presence of:

No appearance for Appellants/Respondents

Miss Esami for Respondents/Applicants

Court Assistant – N/A

30 days R/A.

Page 3 of 3

