



**Mukara & another v Wairimu (Suing as the Administrator of the Estate
of the Late Amos Irungu – Deceased) (Civil Appeal E028 of 2022)
[2023] KEHC 24173 (KLR) (Civ) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24173 (KLR)

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

CIVIL

CIVIL APPEAL E028 OF 2022

JN MULWA, J

OCTOBER 26, 2023

BETWEEN

GEORGE MUKARA 1ST APPELLANT

PETER DAVIS ONGORO ONGOU 2ND APPELLANT

AND

**MONICA WAIRIMU (SUING AS THE ADMINISTRATOR OF THE ESTATE OF
THE LATE AMOS IRUNGU – DECEASED) RESPONDENT**

RULING

1. By an application dated 23/9/2022, the appellants sought three main orders for;
 1. Interim stay of execution of the trial court’s Judgment delivered on 29/10/2021 pending hearing and determination the application;
 2. An order of review and/or variation of the stay conditions issued by the court on 23/9/2022.
 3. That the court do allow the appellants to offer security in form of a bank guarantee within 45 days of the ruling instead.
2. The application is premised on grounds stated at the face of the application and supporting affidavit sworn by Ms. Gulenywa, Advocates for the Appellants.
3. In opposing the Application, the respondent’s Advocate Ms. Wendy Mediva swore a replying affidavit on 16/1/2023.

The parties advocates argued the application before me on the 26/7/2023. I have considered the pleadings and the oral submissions.



4. In the first instance, the application is premised on provisions of Order 42 Rule 6, Order 22 Rule 22, and 51 of the Civil Procedure Rules and Section 3, 3A of the Act, and Section 20 (a) of the Small Claims Act and Article 50 of *the constitution*.

The main orders sought are for Review of the Court Orders issued on the 23/9/2022. Order 45 Civil Procedure Rules which deals with review matters has not been invoked to enable the court to be seized with the necessary powers to review and or vary its orders, and or decline the invitation to do so.

5. The court orders sought to be set aside and/or varied where issued by this court on the appellant's application dated 6/4/2022 wherein the appellant sought orders of stay of execution of the trial court's judgment delivered on the 29/10/2021 pending hearing and determination of the appeal, as well as leave to appeal out of time.
6. The court upon consideration of the said application, and by consent of both counsel proceeded to allow the application on the following conditions that:
 1. The application dated 4/6/2022 is allowed on condition that the applicant deposits 50% of the decretal sum into court within 45 days of the order; and the balance being 50% of the decretal sum to be paid to the respondent through her Advocates within 45 days of the said ruling.
In default, the stay order shall lapse automatically.
 2. The Appellants were directed to file the Record of Appeal within 60 days, and directions on the Appeal to be taken on the 5/12/2022.
7. As may be seen from the above orders, the stay orders were conditional upon the Appellants doing what they were ordered to do, failing which the stay orders would lapse automatically. By the above consent orders, 45 days to comply were to lapse on 9/11/2022.
8. As at the above date, no compliance by the applicants had been achieved on the twin conditions. More importantly, the Duty Judge (Nyaga J.) denied to issue interim orders on the 26/9/2022 when the matter was mentioned for directions before him and scheduled the hearing on the 11/10/2022, but the application was not heard on the said date but eventually heard on the 27/7/2023.
9. On the other hand, the consent orders sought to be varied by an order of review have not been set aside; and no reasons whatsoever have been stated to necessitate the same to be set aside.
In the case SNI –V- A of (2020) eKLR, the court reiterated that parties are legally bound to their consent orders unless there is evidence that every material fact in their possession at the time the consent order was entered into, or there was a mistake of misrepresentation to warrant variation or complete setting aside.
10. It is trite that an expression of an agreement already arrived at by the parties to the proceedings is embodied in an order of the court. It is therefore enforceable while it stands and a party affected by it cannot simply wish to set it aside as he desires, but would be expected to comply and obey, then move the court for other reliefs should need arise.
11. There is no dispute that at the time the consent orders were recorded, both the appellants and the respondent had in their possession the Judgment of the trial court. The Appellants would have been expected to have read and understood the entirety of the judgment.

At the time, the appeal was on the issue of quantum of damages only. Obviously, the issue of liability must have come up as an afterthought, in the court's view. This turn of events has not been explained sufficiently to the court's satisfaction.



12. Additionally, the power of the court and its discretion should be exercised to avoid injustice and hardship resulting from inadvertence, excusable mistake or error, but not made to assist a person who has deliberately sought whether by evasion of otherwise to obstruct or delay the course of justice as ably stated in *Shah –vs- Mbogo (1969) EA 116*.
13. It is also important to note with displeasure that the appellants have not complied with the court directive to file the Record of Appeal within the stipulated 60 days which has now expired. Once more, no reasons at all have been stated for the failure. The said failure, for no disclosed reasons renders the Appeal non-existence and that order too cannot be revived by mere statements that the court ought to review the impugned ruling/orders. That which has lapsed cannot be brought back to life.
14. In *Kenya Commercial Bank Ltd –vs- specialized Engineering Co. Ltd (1982) KLR 485*, Harris J held inter alia, that: -
 1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud of collusion or by an agreement contrary to the police of the court of where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside the agreement.
 2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.
15. Having rendered myself as above, I am constrained to disallow the applicant's/appellants application dated 23/9/2022 prayers number 3 and 4. The conditional stay orders having not been complied with and or extended by a court order have since lapsed and cannot be resuscitated to give life to the same.
16. The Appeal having been filed by a Memorandum of Appeal dated 20/1/2022, and the Record of Appeal not filed within the time set by the court, and there being no explanation whatsoever put forth for the failure to comply, I find no reasons at all to find otherwise than that the Appeal stands dismissed. The costs on the application dated 23/9/2023 and the appeal shall be borne by the applicants/appellants.

Orders accordingly.

DATED, DELIVERED AND SIGNED IN NAIROBI THIS 26TH DAY OF OCTOBER 2023.

JANET MULWA

JUDGE

