



REPUBLIC OF KENYA



**KENYA LAW**  
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**Shitemi v Maisibo & another (Civil Appeal E120 of 2023)  
[2023] KEHC 26654 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26654 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL E120 OF 2023  
RN NYAKUNDI, J  
DECEMBER 20, 2023**

**BETWEEN**

**EUNICE WANJALA SHITEMI ..... APPELLANT**

**AND**

**MARY NABIAGE MAISIBO ..... 1<sup>ST</sup> RESPONDENT**

**ESTHER NABALATO MUSONGA ..... 2<sup>ND</sup> RESPONDENT**

*(Being An appeal from the Judgement delivered by P.N  
Areri on 22.6.2023 in CMC Civil Nol212 of 2020)*

**RULING**

1. The applicant in this matter moved this court under Article 159 of the Constitution, S1A 1B, 3A of the civil procedure Act order 42 Rule 6, order 51 of the Civil Procedure Rules 2010, Rule 3 of the High Court Practice and Procedure, vacation Rules. The applicant/intended appellant for that matter is invites this court to call upon and examine the record in CMCC No 212 of 2020 before Hon. Areri (SPM) for the purposes reviewing the order of depositing a half of the decretal sum being Kshs 4,928.000 into a joint account within 30 days and to pay the respondent a decretal of Kshs half of Kshs 4,928,000 and in default execution to proceed as earlier on decreed.
2. The application before me was therefore to stay the order to pave way for the applicant or intended appellant to file an appeal on the same cause of action arising out of the impugned ruling of 5/10/2023.
3. The background of the intended appeal is deducible from the memorandum of Appeal to the effect:
  - a. That in the civil proceedings before Hon Areri in CMCC E212 of 2020 an ex parte judgment had been entered comprising decretal amount of 8,928,000 as against the applicant/intended appellant



- b. That the applicant/respondent of being notified of the ex parte judgement sought leave of the court to have the aforesaid judgement set aside with a review to give an opportunity to the application to ventilate a defence on the merits.
- c. That in exercising discretion over the matter, the learned trial magistrate will set aside the ex-parte judgement with the following provision precedent. “ That the applicant intended appellant and the defendant in CMCC E212 of 2020 do deposit a half of the decretal sum of Kshs 4,928,000 in a joint interest earning account of both parties within 30 days, whereas a further decretal sum of 4,928,000 should be paid to the respondent. In default of the above condition execution was to proceed sequentially.

### **Analysis and Resolution**

4. This indeed is the gist of the intended appeal and subject matter of stay proceedings before the learned trial magistrate. The application is strongly resisted by the respondent Mary Nyabiage who filed a replying affidavit dated 27/11/2023. The respondents contention is that the memorandum of appeal has no chances of success. That the entire case before the trial court on a liquidated claim which is owed by the Applicant/intended appellant and continue to remain due and outstanding. That the record shows of documentary evidence in which the Applicant/Intended Appellant admitted the due sum and even committed herself to pay by instalment before the suit was by necessity file to pursue the claim. It is clear from the trial court record contends the Respondent that after completion of pleadings, the parties duly represented by the respective counsels canvassed the case by way of Viva Voce evidence and a judgement was finally delivered by the court. On this point, a quick perusal of the record confirms the averments by the respondent as to the integrity of the proceedings before the trial court. In an interesting turn of events the
5. Plaintiffs/Respondents closed their case giving room to the Applicant/Intended Appellant to state her defence which was rescheduled to be heard on the 2/5/2023 at 11.30am. Come 11.30am, the defence counsel Mr. Omusundi failed to show up as covenanted with the session magistrate. The trial court presumably drawing from the powers donated by the *Civil Procedure Act Rules* 2010 ordered the defence closed suo-moto. It is from that trajectory final judgement of the court dated 22/6/23 was pronounced decreeing that Judgement be entered in favour of the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff against the defendant for the sum of Shs 8,560,000/= and 1,300,000 respectively plus costs and interests thereon at court rate. It is also acknowledged by the learned trial magistrate that the applicant/intended appellant never adduced evidence to counter the prima facie case in favour of the plaintiff. This indeed is what triggered the current proceedings before this court in the form of stay and intention to pursue an appeal based on the impugned ruling dated 5/10/2023.
6. The truth is on 2/5/2023 the defence case was closed by the learned trial magistrate on his own motion and called for filing of submissions. There is no sufficient cause supported by the record that the defendant now applicant /Intended appellant had no evidence to offer to the cause of action. Considering the central issue in this matter it is the denial by the learned trial magistrate to enlarge time for the Applicant /Intended Appellant to tender evidence past the deadline of 2/5/2023. In addition, on application to stay the execution of the judgement the learned trial magistrate imposed a condition of the decretal sum to be deposited in a joint interest earning account whereas the other half be paid to the respondent.
7. From the outset extension of time for the party to be heard against the agreed timelines is purely in the domain of court’s discretion. However, such discretion to be exercised judiciously meaning there must be good reason upon which the court may decline to enlarge time for a party who was aware of



- the scheduled date and time of hearing but elects not to attend the proceedings. In our legal system, blunders sometimes occur either by the appointed legal representative or the parties themselves. The discretion to take remedial action to protect and
8. Guarantee fair trial rights in our constitution remain the yardstick of procedural justice. Without taking the position of the learned trial magistrate the record shows no reasons given for noncompliance by the learned counsel for the applicant /Intended appellant not to present the defence case on the material day. The other interesting feature is that the learned trial magistrate failed to give reasons in support of closing the defence suo moto in absence of the applicant/intended appellant or her counsel.
  9. As procedural law stands even for a half a day or an hour the court may invoke its discretion powers to provide leadership on case flow management not to extend time to a party who is indolent or one who is not keen to comply with the scheduled directions of the court. However, that discretion must bear in mind the provisions of Article 50 of the Constitution on the right to a fair hearing. In addition Art.10 of the Constitution on National Values and Principles of Governance binds every judicial officer in the decision making process. Some of the key values and principles worthy of consideration include: (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, (c) good governance, integrity, transparency and accountability. It is settled in our jurisdiction that when illegality is pleaded and shown vividly and that such illegality existed on the face of the trial record, on the trial court the appellate or review court has a duty to exercise jurisdiction under section 1(A), 1(B) and 3(A) of the Civil Procedure Act as read with Order 42 and Order 45 of the Civil Procedure Rules to make appropriate orders to correct the error in the interest of justice. Since every party intending to appeal seeks to challenge a decision of the court below either on points of law or facts it cannot in my view be said in the instant case the court is meant to draw a general rule that every intended appellant who demonstrates his or her appeal raises points of law should as of right be granted the remedy prayed for in the appeal. It must be emphasized that such points of law and fact must be that of sufficient importance and also apparent on the face of the record. Such as a question of jurisdiction not one that would be drawn by a long argument or process. (See the case of Principal Secretary, Ministry of Defence and National Service v Duram 1992 TLR 1987
  10. In the case at bar the applicant/intended appellant made reference to the ruling of the court pronounced by the Senior Principal Magistrate in which he granted a conditional stay based on the decretal sum which he apportioned between the parties as a way of balancing the rights which accrued from the judgement. That decision denies the applicant /intended appellant to exercise her right of appeal unless she complies with the two conditions of depositing half of decretal sum in a joint interest earning account while the other half must be paid to the respondent within 30 days from the date of the ruling.
  11. In essence she is challenging the justness, correctness, regularity, or legality of that order which imposes a limitation of her rights to access the appellate court to ventilate the so intended appeal. In my considered view the circumstances of this case and impugned ruling are in tandem with the principles in the case of Westmont Holding SDN BHD & Central Bank of Kenya, Kamlesh Mansukhlal Patini, & Uhuru Highway Development Limited Petition No. 16 (E023) of 2021. In that judgement, the court made the following observations on the right to access justice and the right to security for costs or in our case the depositing of the decretal sum as a condition for the intended appellant to file an appeal to this court. Placing reliance to the provisions of Article 24 of the Constitution the learned judges reiterated that “ A right of fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including: the



need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.

12. The court further gave guidelines on relevant factors to influence the trial court in exercising discretion to make an order for security for costs or in our case to deposit the decretal sum of the primary judgement as a condition precedent to invoke one's constitutional right of appeal renders the impugned ruling untenable. The means of the applicant is not alone ground sufficient to justify an order for costs because of the rule that poverty should not be a bar to justice. However the financial weakness may be relevant, for example, if the applicant is a company), the prospects of success is a relevant matter to take into consideration (ordinarily, the court will not undertake a detailed assessment of
13. The likelihood of the applicant's success unless it can be demonstrated that there is a high probability of success or failure) whether the applicant's claim is made bona fide, whether it is genuine and not trivial, vexatious or a sham, whether or not there has been delay in bringing the application, and any difficulties of enforcing an order for costs and the amount of costs to be incurred.

The Supreme Court of Uganda in *Goodman Agencies Ltd v Attorney & Another* (Constitutional Application 1 of 2012) (2014) UGSC 124 stated as follows: " If the Supreme Court were to turn away an appellant who is dissatisfied with a decision of the Constitutional court and to strike out a Constitutional appeal without hearing its merits merely because the appellant has not deposited further security for costs as was ordered by the court in this case, this would be contrary to not only the spirit, but also the letter of the *Constitution*, as clearly provided for under Article 132(3). Access to the Supreme court of Uganda, sitting as a final appellate court to determine constitutional appeals or applications, should not depend on how deep a constitutional appellant's pocket is, Otherwise, it would mean that those who are loaded with cash will have their constitutional appeals heard by this court because they can overcome the financial barriers imposed by an order of the court requiring payment of further security for costs of the other party.

14. It seems to me that the conditions on the decretal sum pronounced by the learned trial magistrate was for the protection of the rights of both parties given
15. The nature of the evidence so far as conceived by the trial court. That view might be correct but in absence of the applicant being granted leave to prosecute a defence then the objective of the claim having been determined on the merits is moot. Simply because the applicant/intended appellant was not afforded the right to be heard under Article 50 of the *Constitution*. Therefore, albeit with the conscientious position of the learned trial magistrate without prejudice to what had been submitted above in the affidavits both in support and against the notice of motion to me it was not ripe for the trial court to impose imputation to stifle the rights to a fair hearing. It was still within his jurisdiction to order for costs in favour of the respondents for non attendance other than closing the defence on behalf of the applicant. The right to a fair hearing in our Article 50 of the
16. Constitution is as old as mankind as its evident in the biblical account between God, Adam and Eve in the Garden of Eden. That's why *Black's law Dictionary* defines fair hearing as judicial or administrative hearing conducted in accordance with due processes. In essence, fair hearing means giving equal opportunity to the parties to be heard in the litigation before the court. Equity, fair play and equal treatment are what constitutes justice which we all clamored for to come up with our constitutional architecture.



17. Now with specific reference to all issues raised before me I am of the considered view that the impugned ruling dated 5/10/2023 in so far as the subject matter on deposit of a half of the decretal sum of Kshs 4,928,000 in a joint earning interest account of both counsels and further the balance of 4, 928,000 plus costs and interest be released to the advocates for the plaintiff both within 30 days is one which is likely to infringe or violate the provisions of Art. 48 of the Constitution on access to justice.
18. True it is that where discretion is vested in a particular tribunal or court under Art. 50 (1) of the constitution it follows that no other tribunal or court can substitute its discretion with that of the 1<sup>st</sup> primary, court, /tribunal unless it is conceivable by the findings of facts and law were essentially wrong and further the impugned tribunal or court acted in excess of jurisdiction. Lord Manisfield
19. In *Rex v. Wilkes* (1770K,B )2527 observed as follows: “Discretion when applied to court of justice, means sound discretion guided by law. It must be governed by rule not by humour, it must not be arbitrary, vague and fanciful, but legal and regular.”
20. How large is this sphere of discretion certainly the answer to this question varies from time to time, it is case is specific depended upon of course on branches of law, rules and principles that creates a range for independence in the decision making of a judge. The general inquiry then would be whether the purposed judicial discretion ever goes so far as to affect the substantive right of parties. Thus it has been said judicial discretion is the exercise of judgement performed
21. By a legal decision maker as provided for in the Constitution or statute in making a choice among a close list of alternatives in which there is no preference on one alternative over another. The realist account of the trial court record shows an interplay of a number of factors yielding competing but equally legally valid results between the applicant and the respondents. It is discernible that co-relating the underlying factual scenarios of the disputes in issue, sufficed to say the legal outcome in the aforesaid ruling by the trial court potentially exposed the applicant to some risk of infringement, threats or violation of her fair trial rights. The procedural fairness of the learned trial magistrate in determining the outcome of the dispute failed the legitimate expectation on the applicant.
22. As a consequence, therefore, I exercise discretion on the scope of the matter to review the said orders and grant the applicant/intended appellant leave to re-open the trial court proceedings for purposes of admitting the specifics of her defence. The same be listed on a priority basis before the same learned trial magistrate. Thereafter in the same light proceed to purpose to deliver judgement in the merits. The costs of this application to abide the outcome of the primary suit.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 20<sup>TH</sup> DECEMBER 2023**

In the Presence

Mr.Miyienda for the Respondent

Akinyi for the Applicant

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**R. NYAKUNDI**

**JUDGE**

