



REPUBLIC OF KENYA



KENYA LAW
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Daniel Maithima Rukunga t/a Deem Garage v Karigi & another (Civil Appeal E037 of 2021) [2022] KEHC 13243 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13243 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E037 OF 2021
TW CHERERE, J
SEPTEMBER 22, 2022**

BETWEEN

DANIEL MAITHIMA RUKUNGA T/A DEEM GARAGE APPELLANT

AND

SAMUEL KIRIMI KARIGI 1ST RESPONDENT

XPLICCO INSURANCE LTD 2ND RESPONDENT

(Being an Appeal from Order in Meru CMCC No. 97 of 2017 by Hon. M. Odhiambo (RM) on 02nd February, 2021)

JUDGMENT

Background

1. The case for the 1st Respondent who was the Plaintiff in the trial was heard and closed on 24th September, 2020.
2. When the matter came up for defence hearing on 02nd February, 2021, Mr. Mwanzia, counsel for Appellant who was the 1st Defendant at the trial made an application for admission of additional witness statement and list of documents. He argued that the documents which had previously been filed and served by a replying affidavit dated 13th June, 2017 in response to the notice of motion dated 22nd May, 2017 did not introduce new matters that were not within the Respondent's knowledge.
3. Mr. Mutuma for the 1st Respondent opposed the application on the ground that 1st Respondent's case had been closed and that he would be prejudiced.
4. After hearing the arguments by counsel, the trial court ruled that the 1st Respondent would be prejudiced and disallowed the application.



Appeal

5. Dissatisfied with the trial magistrate's order, Appellant has appealed mainly reiterating the same grounds that formed the basis of the dismissed application which are that the documents and statements sought to be admitted were necessary for fair determination of the case.
6. I have considered the appeal in the light of the evidence on record and submission by the parties.
7. It is trite that documents ought to be filed and served within certain perimeters and within set timelines. (See *Alois Oceano D'sumba v Rajnikant Narshi Shah & another* [2017] eKLR and *Sedy Kenya Freight Limited v Multiple Solutions Limited* [2021] eKLR).
8. Whereas it is not disputed that the 1st Respondent's case had been closed as at the time the application to admit new documents was made, there is evidence that the documents sought to be admitted were within the 1st Respondent's knowledge the same having been filed together with a replying affidavit dated 13th June, 2017.
9. The filing of the documents together with a replying affidavit dated 13th June, 2017 is however not an excuse for the same not to have been properly filed and served as required by the rules. However, I find that the court would fail in its duty if it visited mistakes of counsel on the Appellant especially where sufficient explanation has been given showing good faith. (See *Phyllis Kariuko Njagi v Jane Waguama Njagi & another* [2018] eKLR).
10. As to whether the 1st Respondent will be prejudiced by the admission of documents filed after its case is closed, I am guided by Sections 1A, 1B, 3 and 3B of the *Civil Procedure Act* and Article 159(2) (d) of *the Constitution*, which place heavy premium on substantive justice as opposed to undue regard to procedural technicalities. A look at recent judicial pronouncements from all the three levels of court structure leaves no doubt that courts today abhor technicalities that impede dispensation of justice.
11. Additionally, I find that the prejudice to be occasioned to the 1st Respondent, if any, can be cured by cross-examination of the Appellant's witness/s and recalling of the 1st Respondent if need be.
12. The rules of natural justice require that the court must not drive away any litigant without affording them an opportunity to be heard on merit.
13. For the reasons given on the foregoing analysis, I am persuaded that the Appellant has made out a case for this court to interfere with the impugned trial court's ruling.
14. In the end, I find that this appeal has merit and it is allowed in the following terms:
 1. The order issued on 02nd February, 2021 dismissing the Appellant's oral application dated 14th October, 2019 for admission of the list of documents and further statement both dated 01st February, 2021 and filed on 02nd February, 2021 is set aside and substituted with an order admitting the said documents
 2. The list of documents and further statement both dated 01st February, 2021 and filed on 02nd February, 2021 shall be served on the Respondents within 14 days' from today's date
 3. The matter shall be mentioned before the trial court for directions as to hearing
 4. Appellant shall bear the costs of the appeal.

DATED AT MERU THIS 22ND DAY OF SEPTEMBER 2022





WAMAE.T. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For Appellant - Mr. Mwanzia for Muia Mwanzia & Co. Advocates

For 1st Respondent - Mr. Mutuma for Mutuma & Koskei Advocates

For 2nd Respondent - N/A for Ahmednasir, Abdikadir & Co. Advocates

