



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPL. CASE NO. E372 OF 2021

MELZEDEK OKERO KENYATTA.....1ST APPLICANT

GIRO GABO ADAN.....2ND APPLICANT

= VERSUS =

SAMUEL NDERITU AMOS..... RESPONDENT

RULING

The amended application dated 9th September, 2021 seeks the following orders.

- 1a) THAT this Honourable court be pleased to extend time and grant leave to the Applicants to lodge a Memorandum of Appeal out of time against the ruling entered by Honourable D. W. Mburu (Mr.) Senior Principle Magistrate delivered on 29th July, 2021 in CMCC 5321 of 2018.**
- 2. THAT this Honourable court be pleased to grant stay of any and all further proceedings in this matter Milimani Chief Magistrate case number 5321 of 2018 pending the hearing and determination of this application.**
- 3. THAT this Honourable court be pleased to arrest judgment slated to be delivered on 17th September 2021 in Milimani Chief Magistrate Case Number 5321 of 2018 pending the hearing and determination of our application dated 9th July, 2021 that is pending before the lower court.**

The affidavit of Janerose Nanjira advocate supports the application. The Respondent filed a replying affidavit sworn by James Ichaura Wachira advocate on 25th August, 2021.

Counsel for the Applicant submitted that the application is seeking leave to appeal the lower court's ruling out of time and also arrest the delivery of the Judgment. The Applicants had intended to call their witnesses namely a driver, a police officer and a doctor but the defence case was closed without being accorded the opportunity to do so. The Applicants would like to have the defence case re-opened and this would assist the court to give a justified Judgment. The vehicle which caused the accident is not the one that was sued.

Counsel for the Respondent opposed the application. It is submitted that what is being raised is an afterthought. The case was adjourned several times at the instance of the Defendant. The Applicants were given ample time by the trial court.

The Applicants contend that on the date fixed for the hearing of the defence case, the doctor was on personal duties in the theatre. There is no explanation as to where the police and driver were. The Applicants also contend that they had an application dated 9th July, 2021 seeking orders to re-open the defence case. That application was not heard and was to be heard on 29th July, 2021 but on that date the trial court closed the defence case. I believe the defence case was closed since there was no defence witness and the court had given the last adjournment. The trial court ought to have heard the Applicants' application and determine it on merit instead of leaving it pending in the file. I believe the trial court was of the view that it had accorded the Applicants ample time to present their witnesses.

The replying affidavit does establish that the case was adjourned several times at the instance of the Applicants. The case was listed for hearing on 28th January, 2021, 11th May, 2021, 24th May, 2021, 29th June, 2021 and 29th July, 2021. In all those instances the case was adjourned at the instance of the Applicants. The adjournment of 24th May, 2021 was to be the last one for the defence. However, the trial court accommodated the defence and adjourned the case on 24th May, 2021 and 29th June, 2021.

The Applicants have not explained why they could not avail their witnesses in all those occasions. A party cannot claim that he/she was condemned unheard if such a party fails to prosecute his/her case within the time limits provided by the court. Article 50 (e) requires that a trial begins and concludes without unreasonable delay. Between January and July, 2021 the Applicants were accorded the opportunity to

defend themselves. They failed to do so and the trial court cannot be faulted for having closed the defence case.

The Applicants contend that the wrong vehicle was sued. None of the parties has annexed the pleadings before the trial court. If the Applicants' contention that the respondent is pursuing the wrong vehicle is true, it would be a miscarriage of Justice for the court to condemn them without hearing their case. That opportunity cannot be in perpetuity and can be denied if it is found that the Applicants are delaying the conclusion of the dispute. The current application has been filed without inordinate delay. The Applicants are likely to suffer great loss if the Judgment is entered and their appeal is not heard. The respondent is likely to execute so as to realize the fruits of his Judgment unless his suit is dismissed.

I do find that since the Applicants are disputing liability and contend that a wrong vehicle is being pursued and in the interest of Justice, I do find that the application dated 2/8/2021 and amended on 9/9/2021 is merited and is hereby granted as prayed. The Applicants to file their Memorandum of Appeal within fourteen (14) days hereof. Costs of the application shall follow the outcome of the Appeal.

DATED DELIVERED AND SIGNED AT NAIROBI THIS 29TH DAY OF SEPTEMBER, 2021

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S. CHITEMBWE

JUDGE