



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC APPLICATION NO. E079 OF 2020**

**MBARAKA SULEIMAN MBWANA.....RESPONDENT**

**-VERSUS-**

**NASORO BAKARI NGUTA.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**YUSUF ALI YUSUF.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. The application before me is a Notice of Motion dated 7<sup>th</sup> December, 2020 brought under the provisions of Article 159 Rule 2 (sic) of the Constitution, Articles 48 and 50 of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21), Order 12 Rule 2, Order 43 Rule 2 and Order 51 Rules 1 and 3 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The defendants/applicants seek the following orders-

(i) Spent;

(ii) 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 that was delivered on 5<sup>th</sup> November, 2020 against the applicants by the Senior Resident Magistrate Hon. S. A. Ogot in CMCC No. 37 of 2020 at Msambweni;

(iii) Spent;

(iv) That this Honourable Court be pleased to stay proceedings in the Senior Resident Magistrate's Court Civil Suit No. 37 of 2020 which is coming up for defence hearing on 10<sup>th</sup> December, 2020 pending the hearing and determination of the intended appeal;

(v) Spent;

(vi) That this Honourable Court be pleased to issue any other orders that it may deem fit, just and expedient in the interest of justice; and

(vii) That the costs of this application be in the cause.

2. The application has been brought on the grounds on the face of it and is supported by an affidavit sworn on 7<sup>th</sup> December, 2020 by Elfine Sitati, the applicants' Advocate.

3. The plaintiff/respondent on 28<sup>th</sup> January, 2021 filed grounds of opposition dated 25<sup>th</sup> January, 2021 and a replying affidavit sworn on the same day by Samuel Olalo, the plaintiff's/respondent's Advocate.

4. The application was canvassed by way of written submissions. The applicants' submissions were filed on 12<sup>th</sup> March, 2021 by the law firm of Kimondo Gachoka & Co. Advocates while the respondent's submissions were filed on 9<sup>th</sup> March, 2021 by the law firm of Akedi & Olalo Advocates.

5. Mr. Masolia, learned Counsel for the applicants submitted that they had moved the Court at the earliest instance seeking to set aside proceedings in the lower Court. He submitted that this Court has powers to exercise its discretion judicially to grant the prayers sought by the applicants. He relied on the case of **MWK v JDK** [2020] eKLR, where the Court granted an order for stay of proceedings on grounds that it was a matter of judicial discretion exercised in the interest of justice and if it is, the terms on which it should be granted. That the said Court

went on to state that it had to consider the expeditious disposal of cases, the *prima facie* merits of the intended appeal, the optimum utilization of judicial time and whether the application had been brought expeditiously.

6. He also submitted that the applicants' draft memorandum of appeal raises serious triable issues that should be determined in order for an injustice not to be occasioned on the applicants.

7. Mr. Masolia stated that the case before the lower Court arose from a road traffic accident where the applicants were wholly blamed for it, hence it was unfair for the Trial Magistrate to deny the applicants an opportunity not to adduce evidence through the medical report prepared by their doctor. He further stated that the decision to expunge the applicants' medical report and consequently denying them the opportunity to produce the medical report was tantamount to condemning the applicants unheard. The applicants' Counsel relied on the case of **Mandeep Chanlan v Kenyatta National Hospital & 2 others** [2013], where the Court held that it is a rule of natural justice that every person must be heard before a decision can be taken against them, *audi alteram partem*.

8. The applicants' Counsel submitted that the right to hearing is a fundamental right that cannot be denied. He indicated that the applicants had demonstrated their willingness to comply with the orders of the Court but the same was frustrated by the respondent who gave conflicting instructions to the Advocate who was holding his brief. Mr. Masolia thus stated that the applicants did not occasion the failure to comply, hence they should not be made to pay for an error occasioned by the respondent.

9. He relied on the case of **Yatin Vinubhai Kotak v Tucha Adventures L & another** [2000] eKLR, where the Court held that obedience to peremptory orders of the Court is the foundation of its authority but if the non-complying party can demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, the failure ought not to be treated as contumacious and ought not to disentitle him to rights which he would otherwise have enjoyed.

10. Mr. Masolia submitted that the Trial Magistrate's decision was an error of the principles of justice. He further submitted that the application herein had been brought without any inordinate delay and that the applicants were still interested in defending their suit in the lower Court. He indicated that if the orders sought were not granted, the applicants stood to be condemned unheard. This Court was urged to allow the present application as prayed.

11. Mr. Olalo, learned Counsel for the respondent submitted that the respondent filed a suit vide a plaint dated 9<sup>th</sup> March, 2020 against the applicants for an accident that occurred on 8<sup>th</sup> December, 2019. That the applicants put in their defence on 19<sup>th</sup> May, 2020 and the matter was scheduled for pre-trial conference on 16<sup>th</sup> July, 2020. He indicated that notice was served on the applicants on 15<sup>th</sup> July, 2020 but come the date of the pre-trial, the applicants' Advocate did not attend Court despite service having been done and no reason was furnished to the Court for non-attendance. He submitted that the applicants were granted a further 30 days within which to comply. That the same was communicated to them through a letter dated 16<sup>th</sup> July, 2020 but they still did not comply. The respondent's Counsel indicated that the matter was then fixed for hearing on 1<sup>st</sup> October, 2020 when the applicants were represented by Ms Ndinda.

12. He stated that the present application was brought under the provisions of Order 12 Rule 2 of the Civil Procedure Rules, 2010 yet it was not the respondent alone who was present in the lower Court as the applicants were also present in Court on the day of the hearing. Mr. Olalo argued that the applicants seek to appeal against the order issued by Hon. Sandra Ogot under the provisions of Order 43 of the Civil Procedure Rules, whereas the said Order in Rule 1 sets out the orders and rules for which appeals lie as of right. He submitted that the applicants should have obtained leave before preferring an appeal.

13. It was submitted by the respondent's Counsel that the applicants had failed to demonstrate sufficient cause for their failure to file an appeal within time. He stated that they were also required to obtain leave of Court as provided under Section 75(1) of the Civil Procedure Act and Order 43 Rule 1. He further stated that under the said provisions, such leave should have been sought by way of either an oral application at the time the order was made or within 14 days from the day the order was made, from the Court that made the order. He cited the case of **Serephen Nyasani Menge vs Rispah Onsase** [2018] eKLR, to support his submission on the necessity of a party to obtain leave to appeal in certain circumstances.

14. Mr. Olalo submitted that the applicants failed to seek leave from the lower Court to file the intended appeal and no competent appeal could be lodged. He further submitted that equity aids the vigilant and not the indolent and that the respondent had demonstrated that he made all efforts in reaching out to the applicants so as to have them defend their case, but they had not made any effort of exercising their right to be heard. He argued that the applicants' actions were in total disregard of procedure on account of the fact that they had been allowed to file the medical report they intended to rely on, on condition that they paid the respondent costs for the day before the next hearing date, despite having not provided any explanation as to the reason for the delay. He indicated that the applicants did not fulfill the said condition and no valid excuse had been advanced as to the reason for the delay. He urged this Court to dismiss the applicants' application.

#### **ANALYSIS AND DETERMINATION.**

15. This Court has considered the application filed herein, the affidavit filed in support thereof, the grounds of opposition, the replying affidavit by the respondent and the written submissions by Counsel. The issues that arise for determination are -

**(i) Whether the applicants ought to have sought leave to appeal before the Trial Court; and**

**(ii) Whether the application for leave to file an appeal out of time is merited.**

16. In the affidavit filed by the applicants they deposed that on 28<sup>th</sup> September, 2020 the matter before the Trial Court came up for pre-trial hearing (sic) but there was no appearance for them and that the said Court did not confirm whether there was proper service upon them. That the Trial Court certified the matter ready for hearing with the documents that were already on record and fixed it for hearing on 1<sup>st</sup> October,

20. They averred that when the matter came up for hearing on the said date, they had not filed their list of documents and Miss Ndinda who was holding brief for Mr. Nyabuti explained to the Court that the delay was occasioned by the e-filing system in Court.

17. The applicants further averred that they were given the option to either have the matter adjourned and pay costs to the respondent or the matter would proceed without their documents on record. That the Counsel opted to adjourn and pay costs instead of proceeding on that day and the Court ordered the applicants to pay witness' costs of Kshs. 21,000/= before the next hearing date. That they were granted leave to file their list of documents, which was the 2<sup>nd</sup> medical report dated 26<sup>th</sup> June, 2020 and the matter was set down for hearing on 5<sup>th</sup> November, 2020. They averred that they proceeded and filed their documents as ordered by Court.

18. The applicants deposed that on 29<sup>th</sup> October, 2020 their Advocates on record made several attempts to call the respondent's Counsel on the mobile number given in paragraph 11 of the supporting affidavit to get information about his account details so as to remit the amount ordered in Court but the same was unsuccessful.

19. They further stated that when the matter came up for hearing on 5<sup>th</sup> November, 2020, the applicants' Counsel and the respondent's Counsel came to a verbal agreement that the applicants would have 7 more days to pay the said costs but when the matter was called out, the Counsel who was holding brief for the respondent's Counsel informed the Court that he did not have instructions to indulge the applicants' Counsel. That as a result, the applicants' medical report was expunged from the Court record and the hearing proceeded with the respondent's witnesses.

20. The applicants deposed that the present application had been made in good faith and with no delay. They further deposed that they were willing to pay reasonable costs incurred.

21. The respondent in his replying affidavit deposed that the applicants were guilty of material non-disclosure and had deliberately misrepresented evidence to the Court that they had been denied the right to be heard yet they were in contempt of Court thus undeserving of the orders sought. He denied that the matter came up on 28<sup>th</sup> September, 2020 since it was a Monday as the Trial Court proceeds with civil matters on Thursdays. Additionally, that the handwritten proceedings of the Court for 28<sup>th</sup> September, 2020 were not annexed to the applicants' affidavit.

22. The respondent further averred that on 13<sup>th</sup> August, 2020 the matter was fixed for hearing on 1<sup>st</sup> October, 2020. He deposed that he was a stranger to the allegations contained in paragraph 11 of the applicants' supporting affidavit as the respondent's Counsel's official telephone numbers are given in the pleadings. The respondent denied that they had reached a verbal agreement of indulging the applicants for 7 more days. It was stated by the respondent that despite the applicants having pleaded with the Court and with the respondent's Counsel for 7 days within which to make payment, more than 3 months after the Court order, payment had not been made.

23. The respondent stated that there was no reason why this Court should sympathize with the applicants since their Advocates were duly served with all the Court processes and either failed to take part in or chose not to follow laid down law and procedure.

#### **Whether the applicants ought to have sought leave to appeal before the Trial Court.**

24. Section 75(1) of the Civil Procedure Act provides for the orders against which an appeal would lie as of right and/or with the leave of the Court. It provides that:

***“An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-***

***a) An order superseding an arbitration where the award has not been completed within the period allowed by the court;***

***b) An order on an award stated in the form of a special case;***

***c) An order modifying or correcting an award;***

***d) An order staying or refusing to stay a suit where there is an agreement to refer to arbitration;***

***e) An order filing or refusing to file an award in an arbitration without the intervention of the court;***

***f) An order under section 64;***

***g) An order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;***

***h) Any order made under rules from which an appeal is expressly allowed by rules.***

25. Section 75 of the Civil Procedure Act must be read together with the provisions of Order 43 Rule 1 of the Civil Procedure Rules which sets out the orders and rules in respect of which appeals would lie as of right. Order 43 Rule 1(2) provides that an appeal shall lie with the leave of the Court from any other order made under the Rules.

26. In the present application, the applicants seek to appeal against an order expunging the applicants' list of documents for failure to pay

costs of witnesses amounting to KShs. 21,000/= which was a condition precedent to the filing of the said list of documents, that included a medical report dated 26<sup>th</sup> June, 2020. The order was as a result of an oral application that was made under the provisions of Order 11 of the Civil Procedure Rules, 2010 which does not fall under the orders which are appealable as of right, as per the provisions of Order 43 Rule 1 of the said Rules. As such, the applicants did not have an automatic right to appeal against the order delivered on 5<sup>th</sup> November, 2020. They were required to obtain leave of the Court as stated under Section 75(1) of the Civil Procedure Act and Order 43 Rule 1 sub-rule 3 of the Civil Procedure Rules before an appeal could be preferred.

27. Order 43 Rule 1(3) of the Civil Procedure Rules states as follows-

***“An application for leave to appeal under Section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.”***

28. The above requirement is couched in mandatory terms. In the case of **Serephen Nyasani Menge v Rispah Onsase** [2018] eKLR, Mutungi J stated as follows in regard to the necessity for parties to seek leave of the Court before filing appeals-

***“where leave to appeal is a pre-requisite before an appeal can be lodged, failure to seek and obtain the leave is fatal and consequently no competent appeal can be lodged against such an order.”***

29. In the present application, the applicants seek leave of this Court to lodge a memorandum of appeal out of time against the ruling that was delivered on 5<sup>th</sup> November, 2020 by the Senior Resident Magistrate Hon. S. A. Ogot in CMCC No. 37 of 2020 at Msambweni Law Courts. It is noteworthy that the present application is not one for leave to appeal which in any event should have been made before the Court that made the order which the applicants seek to appeal against. There is also no evidence of whether the applicants obtained the requisite leave to appeal as provided under Order 43 Rule 1 sub-rules 2 and 3 of the Civil Procedure Rules and under Section 75 of the Civil Procedure Act.

30. The applicants' application is therefore destined to fail for the reasons outlined hereinabove. Apart from the fact that no leave to appeal was obtained from the Trial Court, the applicants would still have been unsuccessful as no sufficient reasons have been put forth to explain why the appeal was not filed within the timelines provided in law. It is worth noting that throughout the proceedings before the Trial Court, the applicants were represented by Counsel and therefore they must have exercised their options consciously.

31. The upshot is that the application dated 7<sup>th</sup> December, 2020 is unmeritorious and the same is dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2021.**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of-**

**Mr. Olalo for the plaintiff/respondent**

**Ms Nannungi for the defendant/applicant**

**Mr. Oliver Musundi – Court Assistant**