REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

CIVIL APPEAL NO 195 OF 2013

MULTIPLE HAULIERS (E.A) LIMITED……..…1ST APPELLANT

JAMES IGOGO WACHIRA…….2ND APPELLANT

VERSUS

NANKAY KUKAN KIPASI….……RESPONDENT

JUDGEMENT

Background

1. Before me is an appeal against the ruling dated 24.9.2013 dismissing an application that was by way of Notice of Motion dated the 18th day of July, 2013 in which **Multiple Hauliers (EA) Limited and James Igogo Wachira** (the applicants) sought orders of stay of execution of the judgement and decree in **MACHAKOS C.M.C.C No. 546 of 2012** entered by Honorable Mr Gesora (SPM) as he then was on 14.6.2013 pending the hearing and determination of this application and setting aside of the judgement delivered on 14.6.2013 and the orders of 19.3.2013 closing the applicants' case and seeking an order that the appellants' case be reopened so that they may proceed to call their evidence.

2. The application was filed under ***Order 51 rule 1*** and ***Order 22 rule 22*** of the ***Civil Procedure Rules***. It is premised on the grounds stated on the body of the motion and is supported by an affidavit sworn by John Diro on 18th July, 2013.

3. The respondent **Nakay Kokan Kipasi** sued the appellants in civil case No 546 of 2013 in the Chief Magistrate's Court at Machakos seeking among other reliefs general damages for injuries as a result of an accident alleged to have been caused as a result of negligence.

4. After the suit was filed, summons were issued and served on the defendant (the appellants) who did file a defence and consequently, the matter was scheduled for hearing. On the date for hearing, a date that was taken by consent, after the plaintiff's witness had testified, the plaintiff's counsel closed their case and so did the defendant who prayed for a date for submissions and the learned trial magistrate proceeded to give a date for mention for submissions, and judgement was entered on 14.6.2013. Thereafter the appellants filed an application on 18.7.2013 seeking orders *inter alia*, to reopen the case. The application was dismissed.

The Appeal

5. Aggrieved by that decision, the appellant filed a memorandum of appeal dated 30th September, 2013 challenging the learned magistrate's refusal to allow the case to be reopened. In the appeal, the appellant prayed that the ruling and order of the Honourable Magistrate dated 24/09/2013 be set aside.

6. No response was made in opposition to the appeal. **This** appeal was canvassed by way of written submissions by Learned Counsels for the respective parties.

Submissions

7. The appellants' case as can be discerned from the memorandum of appeal and the submissions filed on its behalf is that in refusing to grant them the orders sought in their application, the learned magistrate erred in law and fact.

8. It was the appellants' contention that in bringing the application to reopen the case, there was no inordinate delay. For this proposition, reliance was placed on the case of ***Joseph Ndungu Kamau v John Njihia (2017) eKLR.***

9. It was also the appellants' case that the evidence of the appellant would be the same evidence if the witness was called to testify, and the same is significant and weighty to the defence case. He urged the court to exercise its discretion to grant the prayers sought as the respondent stands to suffer no prejudice and so that the issue of negligence against them may be established.

10. In response to the appeal, learned counsel for the respondent submitted that the appellants squandered their opportunity to present their evidence having failed to appear in court on the hearing dates and the date for mention to confirm filing of submissions.

11. Counsel further submitted that the application that is the subject of the appeal was brought after the lapse of the 30-day stay period that was granted by court and 6 months from the date of close of the defence case and no explanation has been given for the delay hence the application was an abuse of the court process. For the foregoing reasons he relied on the case of **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakia & 3 Others [2015] eKLR** .

Analysis

12. I have considered the memorandum of appeal, the court record, the written submissions made by Counsel for both parties as well as the authorities cited.

13. I note that this is an appeal against a ruling and the issue for my determination is whether or not to allow the appeal as sought herein. In doing so, I will need to be satisfied as to why the trial court was not convinced as to the explanation that was given by the appellant why he did not adduce the evidence at the time when it was scheduled for hearing. I wish to borrow from the wisdom of the trial magistrate **who stated that "on that day counsel on record was categorical that he will not lead viva voce evidence for the defence and proceeded to close the defence case. He went further and prayed for a date to file submissions…..it is expected that he was properly instructed and .he must bear the brunt .."** The trial magistrate found the application to be an abuse of court process and proceeded to dismiss the application.

14. Applying the same standard it will be most imprudent to allow an appeal on account of what I consider a lack of keenness on the part of counsel. Counsel himself closed the case and therefore his own action militates against the exercise of discretion.

15. I am also of the view that there was an adequate alternative remedy available to the appellant for quick and ready redress as opposed to an appeal, which remedy they opted not to utilize. I am guided by the observation by my brother Majanja J in **Francis Gitau Parsimei & 2 others v National Alliance Party & 4 others [2012] eKLR, on the** principle that where the Constitution and or statute establish a dispute resolution procedure, then that procedure must be used.

16. In this case the appellant ought to have moved the trial court to exercise its discretionary powers to review its decree or order. **Section 80** of the Civil Procedure Act and **Order 45** of the Civil Procedure Rules permit the court, on application to do so and to make "**such order thereon as it thinks fit".**

17. In terms of **Order 45** any person who is aggrieved by an order or a decree may ask the court that made the order or issued the decree to review it if he can demonstrate that he has discovered new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made.

Determination

18. I find that this is not a proper case for appeal. Indeed there is no evidence that the Appellant has filed an application for review in the lower court.

19. Therefore, the appeal is devoid of merit and I consequently dismiss it with costs to the respondent.

It is so ordered.

Signed, Dated and delivered at Machakos this 22nd day of January 2019.

D.K. KEMEI

JUDGE