



## REPUBLIC OF KENYA

### High Court at Nairobi (Nairobi Law Courts)

#### Civil Appeal 174 of 2004

#### Editorial Summary

1. *Civil Appeal*
2. *Civil Practice and Procedure*
3. *Subject of Main Subordinate Court Case*

#### TORT

3.1 *Running Down*

3.2 *Fatal accident*

3.3 *Minor female aged 14 years*

3.4 *Court awards:*

- |    |                                    |                             |
|----|------------------------------------|-----------------------------|
| a) | <i>Loss of expectation of life</i> | <i>Ksh. 100,000/=</i>       |
| b) | <i>Pain and suffering</i>          | <i>Ksh. 10,000/=</i>        |
| c) | <i>Lost years</i>                  | <i>Ksh.</i>                 |
| d) | <i>Special Damages</i>             | <i><u>Ksh. 22,806/=</u></i> |
|    | <i>Total</i>                       | <i><u>Ksh.</u></i>          |

*300,000/=*

*432,806/=*

3.5 *Defendant files appeal*

*award excessive*

3.6 *Stay of execution by subordinate court upon*

*deposit of decretal sum to court of*

*Ksh. 432,806/-*

3.7 *Defendant/appellant fails to deposit sum*

3.8 *Appeal by High Court Sitati J – 12<sup>th</sup> August 2011*

enhances award:

100,000/=	a)	Loss of expectation of life	Ksh.
Ksh. 10,000/=	b)	Pain and Suffering	
1,200,000/=	c)	Lost years	Ksh.
<u>Ksh. 22,806/=</u>	d)	Special Damages	
<u>Ksh. 1,232,806/=</u>		Total	

3.9 Application for stay of execution

willing to deposit decretal sum to court.

3.10 Held that (Ang'awa J) stay of execution granted

Condition that Ksh. 432,806/- be paid to the respondent

Balance 767,194/- be in an interest earning account.

15<sup>th</sup> November 2011

4. Notice of Motion 25<sup>th</sup> January 2012

- i) Certificate of urgency
- ii) Leave be granted for new firm of advocates to come on record.
- iii) Interparte hearing, applicant absent
- iv) Application dismissed under Order 12 Civil Procedure rules for non-attendance

5. Notice of Motion 16<sup>th</sup> February 2012

- i) Certificate of urgency
- ii) Leave be granted for new firm of advocates to come on record.
- iii) Application identical to one dismissed.
- iv) Supporting affidavit a photocopy of original application dismissed.

- v) *Plaintiff applicant appellant not deponed to affidavit.*
- vi) *Application opposed by respondent on anomaly of applicant.*

6. *Held:*

- i) *Application of 16<sup>th</sup> February 2012 a sham and same struck out.*
- ii) *Order 12 Civil Procedure Rules permits application to set aside orders dismissing an application an application on suit or the filing of new application on suit.*
- iii) *Application mere photocopy.*

7. *Case Law:*

8. *Advocates :*

- i) *T. Odhiambo instructed by M/s Nyaencha Waichari & Co Advocates for appellant/applicant*
- ii) *D M Wambua instructed by B. Mbai & Co Advocates for respondent/respondent*

**H.Z. & COMPANY LTD .....**

**APPELLANT/ APPLICANT**

**VERSUS**

**MUNGAI MUCHUNGI KIARIA (Suing on his behalf and the estate of**

**NELLY NJERI MUGAI (DECEASED) ..... RESPONDENT/ RESPONDENT**

*(Being an appeal from the Judgment of Hon. P. Wekesa Esq*

*Resident Magistrate in*

*Civil Case No. 8275 of 1998 dated 13<sup>th</sup> February 2004 at  
Milimani Commercial Courts, Nairobi)*

**RULING**

*Application for leave to come on record*

*Notice of Motion 16<sup>th</sup> February 2012*

I. BACKGROUND

1. What appears to be a simple application for “leave to come on record in place of a new advocate” must fail on grounds that it is a sham.
2. The background of the application dated 16<sup>th</sup> February 2012 is that the subordinate court at Nairobi heard a running down cause. This cause was in effect a fatal accident of a 14 year old minor child. The subordinate court gave an all inclusive award (subject to costs) of Ksh. 432,806/-. The appellant original defendant being dissatisfied appealed to the High Court stating the award was too high.
3. The High Court (Sitati J) upon hearing of the appeal enhanced this sum to Ksh. 1,332,806/-. Being dissatisfied, the appellant respondent intended to appeal to the court of appeal.
4. An application for stay of execution was applied for by application 1<sup>st</sup> September 2011. This was opposed on grounds that the appellant had failed to deposit the sum due to the court pending appeal.
5. This court (Ang’awa J) guided prayers for stay of execution on grounds Ksh. 432,806/- be paid to the respondent’s estate and Ksh. 767,194/- be held in an interest earning account.
6. The appellant applied to change advocates. This was by way of application of 25<sup>th</sup> January 2012.
7. On the day called out for hearing the new advocates were absent. The application was dismissed in the presence of the respondent on grounds of non attendance to court under Order 12 Civil Procedure Rule on 14<sup>th</sup> February 2012.
8. The applicant filed a new application dated 16<sup>th</sup> February 2012 seeking orders of leave to come on record.

II APPLICATION FOR LEAVE TO COME ON RECORD AS ADVOCATE

NOTICE OF MOTION 16<sup>TH</sup> FEBRUARY 2012

9. This application was deponed to by the insurance company’s legal representative explaining the reasons why they wished to have a change of advocates.
10. The application was opposed to on the grounds that the affidavit by the legal officer one Caroline Njeri was a photocopy of the application that had been dismissed.
11. It was then that the only item changed from the affidavit that bore the stamp of 2<sup>nd</sup> March 2012 (photocopy) had only the last page changed as to the date to 16<sup>th</sup> February 2012.
12. This document is a sham. It is an abuse of the process of the law and most certainly must be struck out.
13. This is a matter for the disciplinary committee and a copy of this ruling to hereby ordered to be forwarded to the advocate complaints commission.
14. Under Order 12, the advocate would have come to apply for setting aside of the court’s order under Order 12 r 8 Civil Procedure Rules. Alternatively to file a new application deponed to by the appellant and any other relevant persons.

15. I would accordingly struck out this application with costs to the respondent.

DATED THIS 20<sup>TH</sup> DAY OF MARCH 2012 AT NAIROBI

**M.A. ANG'AWA**

**JUDGE**

***Advocates*** :

iii) *Odhambo instructed by M/s Nyaencha Waichari & Co Advocates for appellant/applicant*

iv) *D M Wambua instructed by B. Mbai & Co Advocates for respondent/respondent*