



**Ranalo Foods Limited v Kibandi & 2 others; Postal Corporation of Kenya & 28 others (Interested Parties) (Environment and Land Appeal E009 of 2022) [2022] KEELC 13337 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13337 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E009 OF 2022  
LC KOMINGOI, J  
SEPTEMBER 30, 2022**

**BETWEEN**

**RANALO FOODS LIMITED ..... RESPONDENT**

**AND**

**SAMUEL KARIUKI KIBANDI ..... 1<sup>ST</sup> DEFENDANT**

**ROBINSON GACHUHI ..... 2<sup>ND</sup> DEFENDANT**

**NAOMI WAMBUI ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**POSTAL CORPORATION OF KENYA ..... INTERESTED PARTY**

**SALOME NYAMBURA & 27 OTHERS ..... INTERESTED PARTY**

**RULING**

1. This is the notice of motion dated March 3, 2022 brought under sections 1A, 1B and 3 of the [Civil Procedure Act](#) cap 21 of the Laws of Kenya, order 45 rule 1 and 2 of the [Civil Procedure Rules 2010](#), article 159 (2) (d) of the [Constitution](#) and all other enabling provisions of the law.
2. It seeks orders:-
  1. Spent.
  2. That the court be pleased to reinstate the appellants' case and the memorandum of appeal and the application under certificate of urgency both dated the February 24, 2022 and filed on February 25, 2022 be deemed to be filed within time.



3. That the order made on February 28, 2022 be set aside or be reviewed and varied and substituted with new orders on such terms as the honorable court may deem fair and just.
  4. That the application for stay of execution dated the February 24, 2022 be set for *ex parte* hearing together with the instant application.
  5. That costs of this application be in the cause.
3. The grounds are on the face of the application and are:-
- a. The appellants filed their memorandum of appeal and an application to stay of execution both dated February 24, 2022 on February 25, 2022.
  - b. That counsel for the appellants was having issues with filing on the judiciary online portal and he inadvertently failed to attach all the documents when filing though he was billed and paid for the same on February 25, 2022.
  - c. The counsel for the appellants served the respondent's counsel Osiemo Wanyonyi & Co Advocates via email into@osiemowanyonyiadv.co.ke on the February 25, 2022 with the pleadings as filed. Osiemo Wanyonyi & Co Advocates brought to the attention of the counsel of the appellants, the fact that only one page of the memorandum attached when they were served on email on March 1, 2022. The respondent's counsel was duly served afresh with the memorandum of appeal and the application for stay aforesaid.
  - d. The failure to attach all the pages of the pleadings to with the memorandum of appeal and the application for stay of execution both dated February 24, 2022 and filed on February 25, 2022 was therefore inadvertent and is regretted and we urge the court to consider the appeal and the application as having been filed in time.
  - e. We therefore urge the court to duly reinstate the suit and allow the orders prayed herein as prayed there being no inordinate delay in filing the instant application.
  - f. The respondents will not suffer any prejudice if the instant application is allowed.
4. The application is supported by the affidavit of S N Gacoya, advocate for the applicants sworn on the March 3, 2022.
  5. The application is opposed. There are grounds of opposition filed by the respondent.
  6. The 1<sup>st</sup> interested party did not file any response.
  7. On the March 23, 2022, the court with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.

### **The Applicant's Submissions**

8. They are dated March 5, 2022. They raise two issues for determination:-
  - a. Whether the applicants has made out his case for the court to vary, set aside and interfere with its orders of the February 28, 2022?
  - b. Who should bear the costs of this application?
9. Counsel submits that failure to attach all pages of the pleadings when he filed the memorandum of appeal and the application dated February 24, 2022 through the online filing portal was inadvertent and unintended.



10. He urges the court to review the orders of February 28, 2022 and allow the instant application. The mistake of counsel ought not be visited on the client. He has put forward the cases of *Tana & Arthi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 others* [2015] eKLR; *Philip Chemwolo & another v Augustine Kubede* [1982-88] KAR 103 at 1040; *Belinda Murai & others v Amos Wainaina* [1978] KLR 278; *Burbani Decorations & Contractors v Morning Foods Ltd & another* [2017] eKLR.
11. Counsel urges the court to allow the application and that costs be in the cause.

### **The Respondent's Submissions**

12. They are dated June 23, 2022. Counsel submits that the pertinent issue for determination is whether the applicants have established any of the grounds set out under order 45 rule 1 of the *Civil Procedure Rules*.
13. He has put forward the cases of *Muyodi v Industrial and Commercial Development Corporation & another* [2006] 1EA 243 where the Court of Appeal described an error apparent on the face of the record.
14. On discovery of new evidence and important matter which was not within the knowledge of the applicant the Court of Appeal has made a finding in the case of *Pancras T Swai v Kenya Breweries Ltd* [2014] eKLR.
15. Counsel submits that the applicants have not satisfied the requirements for grant of the orders of review. The applicants have not demonstrated that they discovered new evidence which was not within their knowledge. He prays that the application be found to be unmeritorious and be dismissed.
16. I have considered the notice of motion and the affidavit in support. I have considered the rival submissions and the authorities cited. The issue for determination is whether this application is merited.
17. In paragraph 4 of the affidavit in support, counsel depones;

“That I inadvertently failed to attach all pages of the memorandum of appeal and the application for stay of execution dated February 24, 2022 and filed on February 25, 2022 though I was billed and paid for the same on February 25, 2022 (attached hereto and asked as exhibit SNG-1 are copies of the memorandum of appeal, the application for stay aforesaid and the payment receipt for the filing fees thereof).

In paragraph 5 he depones;

“That I served counsel the respondent's counsel whose email I could find in the advocates file Osiemo Wanyonyi & Co Advocates via email info@osiemowanyonyiadv.co.ke with the pleadings as filed in court only to find out that only one page had attached when they reverted on March 1, 2022. We served them afresh with the full pleadings as they had requested. (attached hereto and marked as exhibit SGN -2 is a copy of the email correspondence).”

18. The above averments have not been controverted.



19. I find that the failure to attach all the documents is an excusable mistake. In the case of *Tana & Arthi Rivers Development Authority v Jeremiah Kimigbo Muwakio & 3 others* [2015] eKLR the Court of Appeal held thus:-

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel’s duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side.”

20. Similarly, the Court of Appeal decision in *Philip Chemwolo & Another v Augustine Kubede* [1982-88] KAR 103 at 1040 Apallo J (as he then was) cited with approval in *Richard Ncharpi Leiyagu v IEBC & 2 others* Nyeri CA 18 of 2013 where it was stated as follows:-

“...blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud as it often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline...”

21. In conclusion, I find merit in this application and the same is allowed in the following terms:-

- a. That the appellant’s memorandum of appeal and the notice of motion dated February 24, 2022 and filed on February 25, 2022 are reinstated and deemed to be filed within time.
- b. That the orders of February 28, 2022 are hereby set aside.
- c. Costs be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> SEPTEMBER 2022.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Gacoya advocate for the 2<sup>nd</sup> -27<sup>th</sup> Applicants

Mr. Osiemo advocate for the Respondents

Mr. Wachira for the 1<sup>st</sup> Interested Party

No appearance for the 2<sup>nd</sup> to 28<sup>th</sup> Interested Parties

Steve – Court Assistant

