



Wario v Provincial Electrical Engineers (Kenya) Ltd & another (Environment and Land Appeal 002 of 2021) [2023] KEELC 21947 (KLR) (4 December 2023) (Ruling)

Neutral citation: [2023] KEELC 21947 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT AND LAND APPEAL 002 OF 2021
PM NJOROGE, J
DECEMBER 4, 2023**

BETWEEN

SALA WARIO APPELLANT

AND

PROVINCIAL ELECTRICAL ENGINEERS (KENYA) LTD 1ST RESPONDENT

COUNTY GOVERNMENT OF ISIOLO 2ND RESPONDENT

RULING

1. The applicant claims that this application has been brought to court under Order 45 of the [Civil Procedure Rules](#) and Section 18 of the [Civil Procedure Act](#). The application is dated 13th March, 2023 and seeks orders:-
 - 1) That the Honourable Court be pleased to review its Judgment issued on 21st November, 2022 and an order be made to set aside the Judgment.
 - 2) That an order be made allowing the Amended Memorandum of Appeal dated 16th March, 2020.
 - 3) That costs of this application be in the cause.
2. The application is supported by the affidavit of Sala Wario the applicant and has the following grounds:
 - 1) This Honourable Court made an error of fact by failing to take into account the fact the firm of Kaimenyi & Co. Advocates did not file a notice of change of advocates under Order 9 Rule 5 & 6 of the [Civil Procedure Rules](#).
 - 2) No evidence was presented to show that the firm of Kaimenyi Kithinji & Co. Advocates served on the firm of E.P.O Omayo & Co. Advocates, a notice of change of advocates as obligated under Order 9 Rule 6 of the [Civil Procedure Rules](#).



- 3) The applicant did not instruct the firm of Kaimenyi Kithinji & Co. Advocates.
 - 4) The 1st Respondent's Advocate on 1st March, 2016 informed the court that the firm of E.P.O Omayo & Co. Advocates

“ is no longer in existence. We are seeking a further mention to serve the 1st defendant directly ... ”
 - 5) The court on 1st March, 2016 granted the 1st Respondent leave to serve the Applicant a fresh with the pleadings.
 - 6) On 10th July, 2018 the Honourable Magistrate dismissed the suit for want of prosecution for non-attendance, and later adjourned the matter and gave a hearing date, without complying with Order 12 Rule 7 of the Civil Procedure Rules.
 - 7) The 1st Respondent did not provide evidence of service of the further Amended Plaintiff.
 - 8) To show evidence of service, the applicant produced 2 affidavits of service attached to the replying affidavit of Domisiano Marete Njeru, which are neither dated, commissioned, nor bear the court stamp. The 3 affidavits of service are not signed.
 - 9) The applicant has been in and out of hospital for more than 10 years and hence was not able to regularly follow up on this case but placed reliance on his advocates, E.P.O Omayo & Co. Advocates to defend the suit and inform him of the development.
 - 10) Mistake of counsel should not be visited on the client, especially one who has been distressed by ill health.
 - 11) The 1st Respondent being a company will not be prejudiced if this court be so pleased to allow this application and have the matter back at the magistrate court to be heard a fresh on merits.
 - 12) The magistrate made a huge error taking the evidence of the son of the director of the 1st Respondent despite having no authority from the company to testify and produce documents.
 - 13) In the interest of justice, this court ought to set aside its Judgment of 21st November, 2022 and allow the matter to be heard on merit.
3. The parties have extensively submitted to support their veritably and diametrically incongruent assertions. This notwithstanding, I am inclined to dispose of this application by considered the grounds of opposition dated 5th June, 2023 and filed on 6th June, 2023 by the advocate for the 2nd Respondent.
4. The grounds of opposition take the following format:-
- 1) The application is fatally defective since one cannot lodge an appeal as well as apply for review.
 - 2) That the applicant has already filed a notice of appeal which was lodged in court on 2/12/2022.
 - 3) That the applicant has not satisfied the benchmarks to warrant review of the judgment.
 - 4) That the applicants only remedy lies in the appeal to the court of appeal.
 - 5) That the application has been filed after an inordinate delay.
- Reasons Whereof the 2nd Respondent prays that the application dated 13/3/2023 be dismissed with costs.



Dated at Meru this 5th Day of June, 2023

For: Mbogo & Muriuki

Advocates for the 2nd Respondent

5. The 2nd respondent's advocate proffered the cases of Nairobi Court of Appeal Civil Application No. 277 of 2005, the *Chairman Board of Governors Highway Secondary School v William M'Mosi Moi* and Machakos High Court Civil Appeal No. 188 of 2021, *HA Versus LB* for his assertion that once an appeal has been filed, a review of the matter in the lower court is not available.
6. I agree with the 2nd respondents advocate that the applicant having filed an appeal against this court's judgment delivered on 21st November, 2022 cannot purport to have it reviewed. It is either one or the other. He ought to proceed to canvass his appeal.
7. I do opine that the review process is sometimes misused by applicants who do not file their appeals within the stipulated timelines. Whereas some of these applications may go through, where an appeal or even a notice of appeal has been lodged with the court of Appeal, such applications must be dismissed, Of course that situation does not arise in this matter.
8. In the circumstances, I issue the following orders:
 - a) This application is dismissed.
 - b) Costs shall follow the event and are awarded to the 1st and 2nd respondents.

DELIVERED IN OPEN COURT AT ISIOLO THIS 4TH DAY OF DECEMBER, 2023 IN THE PRESENCE OF :

Court assistant: Balozi/Rahma

Kimani Mwangi holding brief for Adanu for the Applicant.

Miss Sally Kerubo holding brief for Manasses Kariuki for the 1st Respondent.

Ken Muriuki present for 2nd Defendant.

HON. JUSTICE P.M NJOROGE

JUDGE

