



REPUBLIC OF KENYA



**Seven Fourteen Limited & another v Merie (Commercial Appeal E044 of 2022)  
[2025] KEHC 3308 (KLR) (Commercial & Admiralty) (17 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3308 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND ADMIRALTY  
COMMERCIAL APPEAL E044 OF 2022  
JWW MONG'ARE, J  
MARCH 17, 2025**

**BETWEEN**

**SEVEN FOURTEEN LIMITED ..... 1<sup>ST</sup> APPELLANT**

**JOSHUA MBITHI MWALYO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SYLVIA WANJIRU MERIE ..... RESPONDENT**

**RULING**

1. What is before this court is an application filed on 2<sup>nd</sup> July 2024 by the Respondent and brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* and order 51 Rule 1 of the Civil Procedure Rules seeking the following orders:-
  1. Spent
  2. That upon granting prayer one above the Honourable Court be pleased to order the appeal overtaken by events on admission.
  3. That upon granting order 1 and 2 above the Honourable Court to order this appeal struck out on account of admission.
  4. That the costs of this application be provided for.
2. The application is supported by the grounds set on the face of it and the supporting affidavit sworn on 2<sup>nd</sup> July 2024 and supplementary affidavit sworn on 22<sup>nd</sup> November 2024 of SYLVIA WANJIRU MERIE, the Defendant. The application is opposed and the Appellant filed grounds of opposition dated 7<sup>th</sup> October 2024 and a replying affidavit sworn by JOSHUA MBITHI MWALYO on 7<sup>th</sup>



October 2024. The application was canvassed by written submissions. Both parties filed their written submissions which I have carefully considered.

### **Analysis and Determination:-**

3. Having carefully considered the application alongside the supporting affidavit and the supplementary affidavit filed herein and the grounds of opposition and response by the Appellant and the parties' rival submissions, I note that his court is being called to determine whether or not the Appellants appeal should be struck off.
4. A perusal of the court record reveals that this court had issued directions for disposal of the appeal when the present application was filed. It is the Respondents position that the appeal should be dismissed as the same has been overtaken by event since, in her opinion, the Appellant has made an application to be allowed to liquidate the decretal amount by instalments at the lower court and has indeed, towards settling this debt, made a partial payment for Kshs.1,000,000/= . It is the Respondent's position that the said action of the Appellant amounts to an admission of debt and therefore renders the appeal irrelevant and unnecessary.
5. In his response the 2<sup>nd</sup> Appellant while admitting that indeed he has made partial payment towards the judgment debt, contends that the said payment was done to forestall execution as he has been unable to obtain a stay of execution, from the courts, of the judgment subject matter of the appeal. He maintains that the Appellants are still keen to prosecute the appeal filed herein and believe that they have an arguable appeal with high chances of success.
6. The Appellants further argue that the present application is anchored under the wrong provisions of the law as the same having been filed under Order 13 Rule 12 of the Civil Procedure Rules which deals with matters before a trial court while the appellate jurisdiction and procedure is anchored under Order 42 of the Civil Procedure Rules. The Appellants argue that the motion is not brought under any known law and that in any event, having been filed after seven (7) months, the same was filed with inordinate delay and was therefore an afterthought whose sole intention was to scuttle the determination of the appeal filed herein, since the court had already issued directions on its disposal.
7. I have considered the arguments by both parties and note that in making this application, the Respondent/Applicant has invoked the oxygen principles as set out under the *Civil Procedure Act* and article 159 of *the Constitution*. The Applicant urges the court to find that by moving the court to make payments towards the judgment debt, the Appellant is deemed to have admitted the debt and therefore constructively abandoned the appeal filed herein. Black's Law Dictionary 11<sup>th</sup> Edition defines Admission as follows; - "a statement in which someone admits something is true or that he or she has done something wrong, esp. any statement or assertion made by a party to a case and offered against that party, an acknowledgement that facts are true." Further, Order 13 Rule 1 describes provides as follows; - "Any party to a suit may give notice by his pleading, or otherwise in writing, that he admits the truth of the whole or part of the case of any other party.
8. Flowing from the above definition and provisions of the law, the court is called to determine if indeed the actions of the Appellants amount to Admission as envisioned above and that the same can be grounds upon which the present appeal should be struck off. It is important to bear in mind that the present appeal was filed by the Appellants in this court on 12<sup>th</sup> April 2022 and subsequently, this court admitted the same as being duly and properly filed and issued directions on its disposal. It is also important to remember that the present application was filed while the court had already issued directions for the disposal of the Appeal.



9. Order 42 Rule 13 of the Civil Procedure Rules deals with Directions before hearing of an appeal and provides as follows:-

- (1) ) Upon notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the registrar shall cause the appeal to be listed for the giving of directions by a judge in chambers.
- (2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.
- (3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.
- (4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
  - (a) the memorandum of appeal;
  - (b) the pleadings;
  - (c) the notes of the trial magistrate made at the hearing;
  - (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
  - (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
  - (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:  
Provided that—
    - (i) a translation into English shall be provided of any document not in that language;
    - (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

10. I have carefully looked at Order 42 and have not found provisions on striking out an appeal where directions have been issued by the court. I further note the application that the Respondent wishes to base her present application on was filed in the lower court and not before the present court. This Court therefore has not been availed an opportunity to interrogate the said application and on its merits. I further note the explanation by the Appellant for making the said application to avoid execution is logical and in my view cannot be deemed to be an admission, constructive or otherwise, as envisioned by Order 13 rule 1 of the Civil Procedure Rules.

11. In conclusion I find and hold that the present application by the Respondent filed on 2<sup>nd</sup> July 2024 is without merit. The same is hereby dismissed with costs to the Appellants. The Appellants are at liberty to prosecute the appeal presently before this court to its logical conclusions. It is so ordered.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17<sup>TH</sup> DAY OF MARCH  
2025**

.....

**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

1. Mr. Ding'i for the Appellant/Respondent.
2. Mr. Nyamweya for the Respondent/Applicant.
3. Amos - Court Assistant

