



Bemwa Stationers Ltd & another v Musyoka (Civil Miscellaneous E118 of 2024) [2025] KEHC 9382 (KLR) (2 May 2025) (Ruling)

Neutral citation: [2025] KEHC 9382 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL MISCELLANEOUS E118 OF 2024**

TM MATHEKA, J

MAY 2, 2025

BETWEEN

BEMWA STATIONERS LTD 1ST APPLICANT

PATRIC NJUNGE NDUNGU 2ND APPLICANT

AND

FRANCE MUTINDA MUSYOKA RESPONDENT

RULING

1. The application before me is the Notice Of Motion dated August 5, 2024
2. The applicants seek orders for extension of time and leave to lodge their memorandum of appeal out of time against the judgment and/ or decree entered against them by Hon. MW Kibe SRM in civil suit number E 046 2021 Makindu Law courts,
3. The application is supported by the grounds on its face and in their affidavit sworn by the second applicant.
4. The application is opposed by the replying of affidavit of the respondents sworn on the 2nd October 2024.
5. Parties agreed to canvass the application by way of written submissions.
6. I have carefully considered the application which is brought Order 21 rule (b) Order 22 rule 22, order 40 rule 6, order 51 rule 1 of the *Civil Procedure Rules*, section 1A, 1B and 3 A of the *Civil Procedure Act* and article 159(2) (a) & (d) of the *Constitution* of Kenya 2010 .
7. According to the applicants the main reason for delay in the filing of the memorandum of appeal is that “after the judgment was delivered on the 20th may 2024 our insurers were undergoing managerial



structural changes leading to the freezing of their accounts for an indeterminate period of time and hence the time to launch an appeal had already expired” .

8. In his affidavit in support of the application the second applicant depones that he is informed by his advocate that the that the delay in filing the appeal was occasioned by a court order freezing the insurers accounts Direct line insurance for an indeterminate period of time. He annexes the copy of the order freezing the accounts.
9. In the reply the respondent depones that when the judgment was delivered on 20th May 2024 the applicants were given 30 days stay so as to settle the decretal sum and that demand was written on the 29th may for them to settle the decretal sum but they did not pay and on 11th of July 2024 the applicants were served with a draft decree in preparation for execution and it is after that the applicants rushed to court to file this application.
10. The respondent also depones that the parties consented on liability and the defendants/ applicants did not call any evidence to controvert the evidence of the plaintiff .He further depones that the said insurance company is not a party to this suit or to the suit in the lower court and that the orders that had frozen they said insurance company’s accounts were immediately discharged
11. The applicants submitted on the issues: Whether the applicant had given sufficient reason for the delay in filing the appeal; what prejudice the responded would suffer; whether their memorandum of appeal raises arguable issues , and whether the applicant will suffer substantial loss.
12. It is submitted that failure to file the appeal in time was caused by a structural changes freezing of their client accounts and vandalism of the insurance properties.
13. Relying on *Kenya Power and Lighting Company Limited Vs Rose Anyango and Another* [2020] eKLR where 40 days delay was found not to be inordinate it is submitted that the delay hearing is not inordinate .
14. Citing the Court of Appeal in *Nicholas Kiptoo Korir Arap Salat Vs IEBC* [2013] eKLR it is submitted that justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardships
15. On the Memorandum of appeal it was submitted that “The applicant is appealing mainly on quantum as the same is excessive and not proportionate to the injuries suffered or the evidence that was I’ve used before the trial court as the injuries were soft tissue injuries in nature and ought to attract a lower award “.
16. The applicants rely on the Court of Appeal in *Kenya Revenue Authority Versus Sydney Keitany Changole and Three Others* [2015]eKLR Where it was stated:

“This court has further held that the applicant need only prove or establish one arguable point noting that an arguable appeal Appeal is not necessarily one that will succeed but one that is not frivolous “.
17. It is submitted further that the applicants will suffer substantial loss if stay is not granted as the respondent has not demonstrated how he would pay the decretal sum if it is paid to him and should be the appeal succeed . The applicants rely on *Edward Kamau and another vs Hannah Mukui Gichuki and Another* [2015] eKLR
18. For the respondent it is submitted that that the 55 days delay has not been explained in any way and that despite demand letters from his counsel to pay the decretal sum there was no response and



19. there was no explanation that they were undergoing any financial constraints. He relies on of
20. *Hezron Muiruri Gitbau vs James Waiharo and another* 2024 eKLR where the court stated that
:

“Extension of time is not a right of any party it is a negative remedy that is only available to a deserving party at the discretion of the court ...The applicant himself did not give any particulars of his financial constraints of not paying KSH 1500 to file a memorandum of appeal there was no mention of the specific financial constraints to the declined”

21. Also submitted that the applicants do not have an arguable appeal and they have not laid any basis for the order of stay of execution .
22. The issue then is whether this application has any merit
23. The court is guided by the provisions of section 79G of the *Civil Procedure Act* and the principles laid down by the Supreme Court in *Nicholas Kiptoo Korir Arap Salat vs IEBC* [2014] eKLR
24. It was the applicants burden to lay down a basis to the satisfaction of this court. That they could have done by explaining the delay. The delay was not explained to the satisfaction of the court . The applicants claim that the insurer is not able to raise money to file a memorandum of appeal is not tenable because the case belongs to the applicants, they did not demonstrate any inability on their part to pay the filing fees for the for the filing of the memorandum of appeal .
25. It is also not denied that the applicants entered into a consent on liability and that they did not call any evidence during the hearing of the matter in the lower court.
26. On the submission that the appeal is on quantum only , it is apparent on the face of the record that there is no arguable appeal. The appellants speak about appealing against quantum on the ground that the award was not commensurate to the injuries sustained. However this claim had nothing to do with either soft tissue injuries or serious injuries but about compensation for the killing of the cows belonging to the respondent. The trial court noted that parties did not submit on general damages and proceeded to award the special damages as sought, which claim was supported by the evidence of the veterinary officer Kibwezi during the trial . That evidence on the special damages was not challenged by the applicants. There is no award of general damages to be challenged.
27. Clearly , in my view this application was only filed to delay the settlement of the decrease to some and not for the purpose of any appeal
28. In the circumstances I find that the Application without merit. It is declined with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA CTS ON 2ND MAY 2025

MUMBUA T MATHEKA

JUDGE

CA Chrispol

Ms Muema for Mr. Ouko for Applicants

Mr. Muindi for Respondent

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

