Liech & another v Wuluma (Civil Appeal E519 of 2022)
[2025] KEHC 7151 (KLR) (Civ) (22 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7151 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E519 OF 2022

REA OUGO, J

MAY 22, 2025

BETWEEN

DAVID OTIENO LIECH ..... 1ST APPELLANT

THOMAS THUO CHUAGA ..... 2ND APPELLANT

AND

MAXSON WEKULO WULUMA ..... RESPONDENT

(An appeal from the Ruling of Honourable Magistrate Senior Resident Magistrate- Selina Muchungi (SRM) delivered on the 1st July 2022)

JUDGMENT

Background

1. The respondent filed a suit against the appellants in the subordinate court, seeking general and special damages for injuries sustained in a road accident on 12th May 2019. The respondent submitted his plaint and witness statements. The appellants filed a defence and a list of witnesses, indicating their intention to summon the driver, the defendant's doctor, the investigating officer, and any other documents required by the trial court. The parties conducted a pre-trial conference before the trial court, with the respondent fully complying. The appellants were granted time to comply. On 30th March 2022, the respondent testified alongside his three witnesses, who were subsequently cross-examined by the appellants' counsel. After the respondent closed his case, his counsel sought an adjournment to call the driver and the Base Commander, a request opposed by the respondent's counsel. After hearing both sides, the trial court denied the adjournment request. The court noted that there was no statement from the driver whom the appellants intended to call as a witness, and they had been given time to comply with the provisions of Order 11 of the Civil Procedure Rules. Additionally, they had failed to pay the costs awarded to the respondent. The appellants' counsel informed the court

that she did not have instructions to close the defence case; subsequently, the parties were given time to file written submissions. Judgment was reserved for 1st July 2022. The appellants filed an application dated 31st March 2022, seeking a stay of the proceedings and a review or setting aside of the proceedings of 30th March 2022. On 1st July 2022, the trial court dismissed the application dated 31st March 2022. The said ruling is the subject of this appeal.

2. The appellants filed their appeal on 14th July 2022. They have nine grounds of appeal as follows:

   i. That the Learned Magistrate erred in law and facts in dismissing the application dated 31st March 2022.

   ii. That the learned Magistrate erred in law and fact by dismissing the appellant's application dated 31st March 2022 without considering the repercussions it would do to the appellants and without giving due consideration to the legal question thereby arriving at a wrong decision.

   iii. That the learned magistrate erred in law and fact declining to review, set aside and or stay proceedings of 30th March 2022.

   iv. That the learned Magistrate erred in law and fact by closing the defence case and striking out the list of documents and list of witnesses thus denying the appellants the right to a fair hearing and being condemned unheard.

   v. That the learned magistrate erred in law and in fact by declining to grant the appellants an adjournment indicating the appellants had severally adjourned the matter , when in real facts, this was coming up for hearing for a second time.

   vi. That the learned magistrate erred in law and facts in declining to grant an adjournment to the appellants without a prior warning of a last adjournment had been issued to the appellants.

   vii. That the learned magistrate erred in law and in fact in declining to give an opportunity to the appellants to file written submissions and delivering the judgment the same day the Ruling was delivered.

   viii. That the learned magistrate erred in law and in fact in failing to appreciate that it was necessary for the appellants to be allowed to adduce her evidence. In failing to give an opportunity to the appellants to give evidence in defence the same was in contravention of the breach of Rules of Natural Justice and particular the rule that a party is not to be condemned unheard.

   ix. That the learned magistrate erred in law and failed to embrace the principles enunciated in the overriding objective to the *Civil Procedure Act* and as a result failed to make a just determination of the proceedings. It was in the interest of justice that the appellant be heard.

3. The appellants seek the following orders that ;

   a. The appeal be allowed with costs.

   b. The Ruling of 1st July 2022 be reviewed and or set aside.

   c. The judgment delivered on 1.7.2022 by the trial court in CMCC No.9398 of 2019 be stayed pending hearing and determination of this appeal be set aside.

   d. The appellant's list of documents and list of witnesses dated 25th April 2022 be allowed as being filed out of time.

   e. The defence case closed on 5th May 2022 be re-opened and the appellants be allowed to call their witnesses.

f. Costs of the appeal be borne by the respondent.

4. Parties canvassed the appeal by way of written submissions. The appellants submitted as follows: they had no intention for the matter to proceed undefended, they had a defence of record, and they had filed their list of witnesses and documents dated 11.8.2020. Mistakes of the advocate for not filing the witness statement should not be visited upon the appellants. The respondent will not suffer any prejudice. Reliance was made in the Court of Appeal decision in Philip Chemwolo & Another vs Augustine Kubende [1982-88]KAR , Apaloo JA states as follows;

I think a distinguished equity judge has said:

> " 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 determined on its merits."
>
> I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline. In this case, the appellants offered to pay the costs. The respondent will not agree'.

5. The appellants also relied on the decision in Belinda Murai & 9 Others vs Amos Wainaina CA Nairobi 9/1978, where the Court of Appeal pronounced itself as follows;.

> 'A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule'.

6. It was further submitted that *the Constitution* 2010 commands us to administer justice without undue regard to procedural technicalities, and the provisions of sections 1A and 1B of the *Civil Procedure Act* oblige the court to exercise the authority in a just, expeditious, proportionate and affordable manner in resolving disputes. The appellant's counsel's mistake for not filing the witness statement is a technicality that the court can correct by allowing an adjournment for the appellants to comply or for the matter to begin de-novo. Counsel applied to correct the errors, and they also deposited Kshs. 176,525 in court as security for stay conditions. It is in the interest of justice that the appellants be allowed to defend the suit, as both parties in a suit have a legal and constitutional right to a fair trial. Reliance was also made in the decisions of Peter Ng'ang'a Muiruri vs Cooperative Bank of Kenya Ltd & 2 Others [2012] eKLR, where the court stated that it is the defendant who knows the weight of its defence or how weighty it intends to make it and the case of Hassan Shirwa vs Swalahudin Mohamud Ahmed [2011] eKLR.

7. The respondent contended that the central question is whether, after rejecting an oral application for adjournment on 30.3.2022 and granting leave to appeal, the trial court could be approached with a formal application for review or for setting aside the same orders on the same grounds previously raised and rejected in the oral application. Additionally, the respondent raised the issue of whether the appeal

against the refusal of the adjournment (grounds 5 and 6) can be pursued in an appeal that is not against the order of 30.3.2022 but rather the order of 1.7.2022. It is asserted that the application for review had no merit, either in fact or in law, and that the law would not permit a review once an oral application has been heard and determined on the same grounds. Res judicata would apply, and the formal application would constitute an abuse of court process. The refusal of an adjournment is a matter of discretion, and a substantive appeal should have been filed following the leave granted on 30.3.2022. The appeal was filed in July, and any order concerning the order of 30.3.2022 is beyond the time limits. The right to a hearing is one that should be enjoyed by a litigant who has adhered to the established due process, and this right cannot be exercised in a manner prejudicial to the opposing party. Furthermore, it is submitted that when an adjournment is declined at trial, and a judgment is issued, the refusal of the adjournment can only be challenged in an appeal from the judgment and not through an interlocutory appeal; otherwise, it would lead to a multiplicity of appeals. This is the essence of section 76 of the *Civil Procedure Act* 2010.

Analysis And Determination

8. This Court is required to analyze and reassess the evidence on record and reach its own conclusion in the matter (see Selle vs. Associated Motor Boat Co. [1968] EA 123).

9. I have considered the proceedings before the trial court record, the grounds of appeal, and the rival submissions. In view of this, the issue for determination can be summed up as follows: Did the trial court err in dismissing the appellants' application dated 31.3.2022, which sought a review of its orders on 30/3/2022?

10. I have already outlined the background of this appeal. The trial court heard the respondent's case on the 30th of March, 2022, and at the close of the respondent's case, the defence counsel sought an adjournment to call their witnesses. The trial court declined the application made by the appellant's counsel. The court provided reasons for its decision, stating that the application was unwarranted, the driver they wished to call had yet to file a witness statement, and the appellant had requested time to comply with the provisions of Order 11 of the Civil Procedure Rules, despite having already been granted time to do so. Furthermore, the appellants failed to comply with the court order to pay the respondent's costs. Allowing the appellants to file their witness statements would have prejudiced the respondent, as the respondent had already closed its case and the appellants had no justification for not securing the attendance of the police officer. The trial court subsequently closed the defence case. There is nothing in the proceedings indicating that the court struck off the list of documents and witnesses. In the application dated 31st March 2022, the appellants sought to review the court's decision of 30th March 2022. The appellants' appeal is against the ruling delivered on the 1st of July 2022.

11. The trial court, in its ruling of 1st July 2022, provided reasons for rejecting the appellant's request as follows: the trial court articulated its reasons for disallowing the appellant's application, and thereafter, the defence case was closed; the appellants sought leave to appeal, which the court granted. Since there was no order to stay the proceedings, the respondent requested time to file their final submission. Although the respondent filed proceedings, the appellants did not. Instead, they sought a review of the court's orders. The trial court examined the provisions of section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. The trial court expressed that it was not convinced that the matter was suitable for review in accordance with the provisions of Order 45 and that permitting the application would effectively be sitting as an appellate court on its own decision. The court reminded the appellants that they had been granted leave to appeal.

12. The respondent has raised the issue that the appellants presented the same matters in their application for review as in their oral application. I concur with this submission and find that the trial court did

not err in declining to review its order in its ruling of 1st July 2022. The oral application addressed the same grounds submitted in the review application. Indeed, there was no discovery of new and vital evidence after exercising due diligence that was within their knowledge, nor was there a mistake or error apparent on the face of the record; no sufficient cause was shown to warrant the review. The situation or circumstances had not changed, as the appellants raised the same issues as they did in their oral application.

13. The appellant chose not to appeal the court order dated 30th March 2022, resulting in the closure of their case. Instead, they contested a ruling dated 1st July 2022 that rejected their application for review. I concur with the respondent's submissions that the substantive appeal should have been directed against the order dated 30th March 2022 rather than the ruling of 1st July 2022. The order of 30th March 2022 led to the closure of their case and should have been the foundation of their appeal. In my opinion, permitting the appeal regarding the ruling dated 1st July 2022 would not benefit the appellant, as it pertains to an interlocutory application which, in my view, lacks merit.

14. Lastly, the record indicates that after the court declined the adjournment, the appellants chose to seek a review of the court's decision that denied them the adjournment. The court noted that no stay order was in place and provided directions for the submission of written pleadings. The appellants failed to comply, and the court delivered its ruling on the application dated 31.3.2022, which was accompanied by a judgment based on the evidence presented by the respondent. The ruling and judgment were read on 1.7.2022. I find that the trial court did not err in dismissing the application dated 31.3.2022. There was no request for a stay of proceedings in the application dated 31.3.2022, nor was there a stay order from the High Court suspending the proceedings pending appeal.

15. In conclusion, I find no merit in the appeal and dismiss it with costs to the respondent.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF MAY 2025.

R.E.OUGO JUDGE

In the presence of :

Miss Nanjira -For the Appellant

Mr. Kaburu -For the Respondent

Peter - C/A