



Mbukoni Services Ltd v Ngati & another (Suing as administrators of the Estate of the Late John Ngata Kilungu) (Miscellaneous Civil Application E034 of 2023) [2024] KEHC 3210 (KLR) (11 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3210 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
MISCELLANEOUS CIVIL APPLICATION E034 OF 2023
TM MATHEKA, J
MARCH 11, 2024**

BETWEEN

MBUKONI SERVICES LTD APPLICANT

AND

EUNICE MUMO NGATI AND LOISE KAVATA KILUNGU (SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE JOHN NGATA KILUNGU) RESPONDENT

RULING

1. On 27/04/2023 the Hon. A. Ndungu - PM delivered judgment in Makindu PMCC 138/2018 against the appellant/applicant.
2. On 12/6/2023, the applicant brought this Notice of Motion seeking orders: -
 1. That this application be certified urgent, service thereof be dispensed with and the same be heard ex-parte in the first instance.
 2. That this Honourable Court be pleased to grant leave to the Applicants to lodge an appeal and file a Memorandum of Appeal out of time against the judgment and decree of the Honourable A. Ndung'u, Principal Magistrate, in Makindu PMCC No. 138 of 2018 dated and delivered on 27th April 2023.
 3. That this Honourable Court be pleased to grant a stay of execution of the judgment and/or decree issued by Honourable, Honourable A. Ndung'u, - Principal Magistrate, in Makindu PMCC no. 138 of 2018 dated and delivered on 27th April, 2023 pending the hearing and determination of this application.



4. That this Honourable Court be pleased to grant a stay of execution of the judgment and/or decree issued by Honourable, A. Ndung'u - Principal Magistrate, in Makindu PMCC No. 138 of 2018 dated and delivered on 27th April, 2023 pending the hearing and determination of the intended appeal.
 5. That this Honourable Court allows the applicants' security to the court be in the form of a Bank Guarantee from the Family Bank.
 6. That the application be heard inter -partes on such date and time as this Honourable Court may direct.
 7. That the costs of this application abide by the outcome of the appeal.
3. The application is supported by the grounds on its face and the affidavit of Alfred Kyallo Kivuu – the manager of the applicant sworn on 12/6/2023 to the effect that the judgment delivered made the following award: liability at 50%, loss of dependency at Ksh 1, 760,000, loss of expectation of life, Ksh 100,000, pain and suffering, Ksh 100,000. He avers that a copy of the judgment is annexed but none is annexed. He depones that aggrieved by the judgment he instructed his advocates to file an appeal on the grounds in the draft memorandum of appeal annexed –
1. That the learned Magistrate erred in law and fact in awarding Kshs.100,000/= under the head of loss of Expectation of Life without any justification.
 2. That the learned Magistrate erred in law and fact in using a multiplier of 20 years and earnings of Kshs. 11,000 for a deceased who was not employed and aged 36 years thus awarding his estate Kshs. 1,760,000 as loss of dependency without any explanation in law and fact of how the said assessment was arrived at.
 3. That the learned magistrate erred in fact and law in failing to use lump sum approach and by adopting the multiplier approach.
 4. That the learned magistrate erred in fact and law by totally disregarding the appellant's submissions filed on the 14th March, 2023 and relying entirely on the respondent's submissions.
 5. That the learned magistrate erred in law and fact in failing to make any proper findings on quantum in accordance with the facts placed before her and in light of the submissions.
4. The application is opposed vide the replying affidavit of Eunice Mumo Ngati on the grounds that judgment was delivered in the presence of both counsel for the parties, that no good reason has been given for the delay and that the appeal is only on quantum and not on liability – that the quantum was reasonable.
 5. Counsel filed rival submissions.
 6. I have carefully considered the application, the supporting affidavit, and the rival submissions. The issue for determination is whether the applicant has fulfilled the requirements for application for leave to file an appeal out of time.
 7. The applicant has set out three issues for determination – whether there are plausible grounds for delay in filing the Memorandum of Appeal, whether the draft Memorandum of Appeal raises triable issues, whether substantial loss will occur.



8. The applicant relies on *Kenya Power & Lightning Company Ltd –vs- Rose Anyango & Anor [2020]* eKLR where a delay of 40 days was found not to be inordinate; in *Nicholas K. Arap Salat –vs- IEBC [2013]* eKLR on the submission that form and procedure should not stand in the way of substantive justice – and that justice must not be sacrificed at the altar of procedural law.
9. It is also submitted that the applicant has an arguable appeal relying on *Kenya Revenue Authority –vs- Sidney Keitany Changole & 3 Others [2015]* eKLR.
10. The applicant submits that it will suffer substantial loss as the respondent’s means are unknown and would be impossible to recover the decretal sum in the event of a successful appeal – court is referred to *Edward Kamau & Anor –vs- Hannah Mukui Gichuki & Anor [2015]* eKLR that only respondent knows their means and without an affidavit of means the court would not know their ability to refund the money.
11. For the respondent it is argued that the delay has not been explained; that the defendant/applicant did not call any witness at the trial ; that the court awarded minimal damages as compared to the claim made by the plaintiff/respondent. That should the court allow the application then the applicant be ordered to deposit the entire decretal sum together with Ksh. 500,000/= in court to cater for accruing interest.
12. The applicant in his affidavit states that the reason for the delay in filing the Memorandum of Appeal is because the instructing client served the instructions late. He also claims that he received a copy of the judgment from the advocate after the delivery of the same and immediately proceeded to review it with a view of making their informed and final decision on available options (para (g) on face of application). In the same breath he states that the judgment was delivered in the absence of parties and the applicant came to learn of the judgment when the time for lodging an appeal had lapsed. He also states at (h) that the delay in filing the appeal was occasioned by the need to communicate with his advocate to ascertain the options available.
13. The respondent depones that the judgment was delivered in the presence of counsel for each party and the advocate who was present for the applicant is named. This fact is not controverted by counsel.
14. It is evident that the applicant has put forth different reasons given for the delay and they don't add up. The applicant appears to be simply making a shopping list of reasons that would support such an application – but on his part – there is no reasonable ground given for the delay giving the impression that that the decision to bring this application was an afterthought.
15. Is there an arguable appeal? While it is risky to consider this at this stage this is one case that draws the courts attention to this issue. A look at the grounds of appeal establishes that they are purely an attack on the discretion of the trial magistrate to award the sums awarded – some of which are the conventional sums on loss of expectation of life and pain and suffering.
16. It is noteworthy that the applicant depones that counsel advised him that the damages were beyond the injuries sustained by the respondent He states at paragraph 8 I am informed by my advocate on record that which information I verily believe to be true that our appeal has a high chance of success as the respondent did not deserve the quantum and liability awarded as it was too high as compared to the injuries they suffered.”- yet – this was a fatal injury claim where the person died. It appears to me that applicant and his counsel may have been on another matter
17. All in all, this application fails in the key requirements for this kind of application, the delay is not explained, the application appears to have been intended for another cause and the Memorandum of Appeal does not reveal an arguable appeal.
18. The application is not merited and the same is dismissed with costs



DATED AND SIGNED AND DELIVERED THIS 11TH MARCH 2024,

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MUMBUA T. MATHEKA

JUDGE

Ms. Waweru- We seek 30 days stay of execution to enable us settle the claim.

Court: Stay of Execution granted for 30 days up to and including 11th April 2024

Mumbua T Matheka J

CA Nelima

M/S Mutunga & Muindi Co Advocates for the respondent

Ms Waweru for Kimondo Gachoka & Co Advocates for the applicant

