



REPUBLIC OF KENYA



**Aziza & another v Kenya Credit Traders Ltd (Civil Appeal  
71 of 2019) [2024] KEHC 7628 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7628 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL 71 OF 2019  
SC CHIRCHIR, J  
JUNE 20, 2024**

**BETWEEN**

**GETRUDE AZIZA ..... 1<sup>ST</sup> APPELLANT**

**MAKEYA ELPHAS ORWAKO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**KENYA CREDIT TRADERS LTD ..... RESPONDENT**

*(Being an appeal from the decision of Hon. T Odera S.P.M  
delivered on 20th June 2019 in Mumias SRM CC No.17 of 2018)*

**JUDGMENT**

1. On 20<sup>th</sup> June 2019, the trial Magistrate in Mumias Chief Magistrate delivered a Ruling in SRMCC No. 17 of 2018, in which it dismissed a prayer for recusal, and the Appellant's request to pay the decretal sum in instalments of ksh. 1,000.
2. The appellant being dissatisfied with the decision proffered this appeal against the said Ruling. He has set out the following grounds
  - a. That the learned Magistrate erred in granting orders which were not sought via formal application nor supported by any pleadings.
  - b. That the learned Magistrate erred in Law in granting application against the appellant when the defendant, a company under the *companies Act* had not instructed the officer swearing the same under a resolution power of attorney or CR12 form as required by the *companies Act* cap 484 Laws of Kenya.
  - c. That the learned magistrate erred in law in issuing substantive orders in a miscellaneous application.



- d. That the learned magistrate erred in issuing orders against the chattels which were neither registered under the *Chattels Transfer Act* (repealed) as Chattels nor under the current regime.
3. The Appellant prays that the Appeal be allowed and the orders dated 20.6.2019 as well as 13<sup>th</sup> February 2019 in miscellaneous Application No. 17 of 2018 be set aside.( Emphasis added)
4. The court directed the parties to prosecute the Appeal by way of written submissions.

### **Appellant's submissions**

5. It is the Appellants' submissions that Respondent's suit in the lower court was incompetent as the officer who swore the verifying Affidavit was not authorised.
6. They further fault the trial court for issuing substantive orders in a miscellaneous application as well as allowing execution against chattels which were not registered under the *Chattels Transfer Act* (repealed) ,or under the current regime.

### **Respondent's submissions**

7. It is the respondent's submission that the appellant's ground of appeal was out of sync with the ruling dated 20/6/2019.
8. On the issue of recusal, it is submitted that the Appellant have not advanced reasons as to why they thought the court was biased.
9. The Respondent further points out that the order made on 13/2/2019 was not challenged and no leave was sought to appeal against the said order yet it was made months ago.
10. On the ground that the court erred in granting the application when the respondent's company had not instructed the officer, swearing the affidavit under a resolution or power of attorney , it is the respondent's submission that failure to file a resolution authorizing the deponent of the supporting affidavit was not fatal to the application.
11. According to the respondent, the claim that the orders sought were for a substantive orders and ought not to have been granted under a miscellaneous application was misguided and that the appellant had not made attempts to expound this issue in this submissions.

### **Determination**

12. I have perused the grounds of Appeal as well as the Appellant's submissions. In the preamble to the memorandum of Appeal, it is expressed as an Appeal against the ruling of 20.6.2019. However trial court ruling of the said date only dwelt on two issues , namely;\_ recusal, and an Application to pay the decretal sum by instalment as aforesaid.
13. It is evident from the memorandum of Appeal, whose particulars are set out in paragraph 2 of this judgment, that the Appeal has no bearing to recusal or a case for payment of the decretal sum by instalments.
14. Further , save for the preamble, the grounds of Appeal is actually against the Ruling of the trial court delivered on 13<sup>th</sup> February 2019 and not the one delivered on 20<sup>th</sup> June 2019, yet the Appellant's plea is that he is appealing against the Ruling of 20<sup>th</sup> June 2019. The Appellant submissions too are in relation to the ruling of 13<sup>th</sup> February 2019 and nothing about the ruling of 20<sup>th</sup> June 2019.



15. The Appellant therefore is seeking an Appeal against the ruling of 13.2.2019 but disguised in the preamble to the memorandum, as an Appeal against the ruling of 20.6.2019.
16. The Appeal was filed on 27<sup>th</sup> June 2019. Even if this court was to treat the reference to the ruling delivered on 20.6.2019 as merely a clerical error, the appeal against any order issued on 13.2.2019 was time – barred by almost 4 months. I have not seen an order granting the Applicant enlargement of time to file an appeal. If the memorandum of Appeal was against the ruling of 13.2.2019 the same was time -barred and needs to be struck off in any event.
17. If it was meant to be against the ruling of 20.6.2019, the grounds of Appeal presented to the court are at variance with the ruling against which the Appeal has been filed .
18. The submissions too, do not address the ruling against which the appeal has been filed. This court will therefore treat the Appeal as not having been prosecuted . For this reason the Appeal was fatal from the start.
19. It is instructive that the Appellants conclude their grounds of Appeal by asking the court to set aside both the orders of 13. 2. 2019 and those of 20.6.2019 .
20. This conclusion make me believe that this mix-up was deliberate on the part of the Appellant. The Appellants’ real intention was to appeal against the Ruling of 13. 2. 2019 , but knowing very well that they were time- barred , came under the disguise of the ruling delivered on 20.6.2019.
21. I take note of the fact that the Appellants were represented by an Advocate . The memorandum of Appeal and the submissions was drawn by an Advocate. Thus the drafting of the memorandum and submissions which have got no bearing to what the litigant intended to complain about in the first place, and filing an Appeal which violate procedural law is not for want of technical know- how.
22. It is my conviction that it was an act of mischief on the part of the Advocate. It is taking the courts for a ride. It is an abuse and misuse of the court process.
23. The Appeal is struck off , with costs to the Respondent

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 20<sup>TH</sup> DAY OF JUNE 2024.**

**S. CHIRCHIR**

**JUDGE.**

In the presence of :-

Godwin- Court Assistant.

