



**Yuga & another (Suing as legal representatives of the Estate of Mwamchombo Abdalla Sinago (Deceased) v Kamau (Civil Appeal 208 of 2019) [2024] KEHC 7375 (KLR) (11 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7375 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 208 OF 2019  
DKN MAGARE, J  
JUNE 11, 2024**

**BETWEEN**

**SALIM MOHAMED YUGA AND ZAWADI ABDALLA SINANGO (SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF MWAMCHOMBO ABDALLA SINAGO (DECEASED) ..... APPELLANT**

**AND**

**GEORGE MUNGAI KAMAU ..... RESPONDENT**

**RULING**

1. This matter was concluded on 6/7/2023. I had earlier on 29/3/2023 given directions for hearing. The directions were logged into the CTS system and parties accordingly served. The matter was slated for directions again, when, I ordered, ex abundanti cautela that all parties be served, again via email. The matter proceeded till judgment.
2. I considered submissions on record and those of the lower court. The dispute was on one issue. Whether the dependency ratio was 2/3 or 1/3. I noted that both parties had in their submissions submitted on 2/3 as the dependency ratio. The lower court simply got a different ratio from what both parties agreed on.
3. The court then made a decision on points of law raised. In the memorandum of Appeal dated 17/10/2019. The Appellant issued a letter dated 19/9/2023 demanding an amount of 1,273,342/= the same consists of lawfully awarded amounts and some additions which have no basis.
4. This triggered the Appellant to make the application herein. The Notice issued on 29/3/2023 was to be served by both parties. The matter was listed and posted at Kenya Law.



5. The directions are said to have been served on a different firm. The Applicant however is silent on two aspects. The first one being the automatic service by the CTS and the cause list at Kenya Law. The application sought the following orders: -
  - i. Spent
  - ii. That this Appeal be re-heard.
  - iii. Costs be provided for.
6. They state they were not served. The Respondent did not respond to the application dealt with. There was no cross appeal that was heard. The nature of an appeal of a retrial. In In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
7. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another Vs Associated Motor Board Company and Others* [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
8. In the case of *Peters vs Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
9. In *Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others* (2019)eKLR , Justice D.S Majanja held as doth:

“General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same.”
10. The court therefore proceeded to decide the Appeal on basis of evidence on record. Therefore, there is nothing to re-hear. If the applicant was aggrieved they should have appealed. If they were served late, which is doubtful, they will have applied to extend time.



11. It was stated by the Court of Appeal in *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

12. In *Ogando v Watu Credit Limited & another (Civil Suit E098 of 2022)* [2024] KEHC 3074 (KLR) (14 March 2024) (Judgment), I posited as hereunder: -

“On submissions the position I hold is that parties cannot rely on submissions to do that which should have been done by pleadings and evidence, in the case of *Robert Ngande Kathathi v Francis Kivuva Kitonde* [2020] eKLR, justice G V Odunga as then he was stated as doth: -

“It also relied on submissions of the parties to which no agreed documents were annexed. Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions.

13. As was held by Mwera, J (as he then was) in *Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu* HCCA No. 46 of 2007:

“Submissions simply concretize and focus on each side’s case to win the court’s decision that way. Submissions are not evidence on which a case is decided.”

14. The same Judge in *Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi* Nairobi HCCC No. 36 of 1993 expressed himself as follows:

“Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court’s view, are a course by which counsel or able litigants focus the court’s attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgment. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case.”

15. Similarly, in *Ngang’a & Another vs. Owiti & Another* [2008] 1KLR (EP) 749, the Court held that:

“As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court’s focus is sought to be concentrated on the main aspects of the case that affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis



of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.”

16. Therefore, unless prejudice is shown or there was an application to adduce additional evidence, the court cannot be faulted. Indeed the application is expressed to be brought under Order 42 Rule 23. The said Rule provides as doth: -

Where an appeal is heard ex parte and judgment is pronounced against the respondent, he may apply to the court to which the appeal is preferred to re-hear the appeal; and if he satisfies the court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the court shall re-hear the appeal on such terms as to costs or otherwise as it deems fit.

17. This matter did not proceed ex parte. The basis for service of 8/5/2023 was ex abundanti cautela. The system automatically serves parties. The same was also listed in the cause list which is a public forum. Then Secondly, the date was posted on the e-filing system. There was no need of any other service.
18. Lastly, the court concluded analysis of law. No new facts were entertained. The Application is thus not merited. An appeal should have been preferred from the judgment. Even in the unlikely event that they got the information of delivery of judgment late, they should have sought leave to appeal out of time. It is a waste of judicial time to re-hear on a matter where submissions were considered as filed in the lower court. In any case submission are not binding on the court.
19. In the circumstances the application has no merit and is accordingly dismissed. Given that I had not received a replying affidavit and submission each party to bear their own costs.
20. Before I depart I need to point out that the contents of the letter written to the appellant is incorrect. Parties must execute on the basis of only ascertained amounts as per the decree and certificate of costs. The Appellant should thereof serve the certificate of costs and decree in this matter before execution. Otherwise the application has no merit.

### **Determination**

17. The upshot of the foregoing is that I issue the following orders:-
- a. The application dated 18/9/2023 is hereby dismissed.
  - b. Each party to bear its costs.
  - c. The Appellant/Decree holder to serve the Decree and certificate of costs before execution.
  - d. In view of the issues raised herein there be 30 days stay of execution.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11<sup>TH</sup> DAY OF JUNE, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of:-**

Miss. Mulongo for the Appellant

No appearance for the Respondent.

Court Assistant - Jedidah



M.D. KIZITO, J.

