



**Intex Construction Company Limited v King'ori & 2 others (Miscellaneous Application E1237 of 2023) [2024] KEHC 12203 (KLR) (Civ) (15 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12203 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
MISCELLANEOUS APPLICATION E1237 OF 2023  
JN MULWA, J  
OCTOBER 15, 2024**

**BETWEEN**

**INTEX CONSTRUCTION COMPANY LIMITED ..... APPLICANT**

**AND**

**MAGDALENE NYAMBURA KING'ORI ..... 1<sup>ST</sup> RESPONDENT**

**JACKSON WAMAMA WANYOIKE ..... 2<sup>ND</sup> RESPONDENT**

**VICTA ENTERPRISES LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for leave of court to appeal against the trial court's judgment delivered on 18/12/2019 in Nairobi CMCC No. 7736 of 2015.)*

**RULING**

1. By a Notice of Motion dated 18/12/2023 brought pursuant to Section 1A, 1B, 3A, 63(e), 65(1)B, 67 of the [Civil Procedure Act](#) and Order 42 Rule 6, Order 50 Rule 5 and Order 51 Rule 1 of the Civil Procedure Rules, the applicant sought leave of court to appeal against the trial court's judgment delivered on 18/12/2019 in Nairobi CMCC No. 7736 of 2015, as well an order of stay of execution of the said judgment pending hearing and determination of the intended appeal.
2. The application is based on the grounds appearing on the face of the application and the depositions in the Supporting Affidavit of one Lindah Akinyi Atingah, the Legal Manager of Intex Construction Limited the Applicant herein, sworn on 18/12/2023.
3. The application is opposed by the 1<sup>st</sup> Respondent's Replying Affidavit sworn/2024 upon arguments that the applicant had filed a similar appeal against the same judgment dated 15/01/2020 which was dismissed on 19/5/2023 for want of prosecution, and therefore the intended appeal if the application is allowed would be res-judicata and an abuse of court process.



4. In response, the applicants filed a Supplementary Affidavit dated 20/3/2024 where it attributed the mistake to its advocates who it deposed never informed it of the instructions issued to appeal the said judgment hence it was not aware of the existence of any appeal lodged to this court. It therefore urged the court not to visit the omissions of its insurer and the appointed advocates on it.
5. The court has considered the application the supporting affidavit and supplementary affidavit sworn on 20/3/2024 as well as the Respondents' replying affidavit and oral argument by the parties advocates.  
On the supporting affidavit to the application brought under certificate of urgency, the court (Meoli J) on 21/12/2023 granted interim conditional stay order of execution upon the applicant depositing Kshs. 1,200,000/= into court as security by 22/01/2024. The said order was duly complied with and the deposit made on 22/01/2024.  
Over the period the said orders have been extended and are in force.
6. Upon the court considering the replying affidavit, it has become clear that the applicant failed to place all material facts before the court at the ex parte stage of this application thus obtained ex parte orders of stay of execution upon the limited facts thereof.
7. It is now evident that the Applicant had filed an appeal -HCCA No. E016/2020 against the impugned judgment by a Memorandum of Appeal of appeal dated 15/1/2020.  
The court further notes that the said appeal was not prosecuted and a notice to show cause why the same should not be dismissed was issued by the court and served upon the advocates representing the appellants on 22/03/2023.  
It is further clear that, confirmed in the judiciary e-filing portal that the appeal was dismissed for want of prosecution.  
The above facts are deposed in the replying affidavit sworn on 15/02/2024, which was served upon the applicant's current advocates.
8. In the supplementary affidavit sworn on 20/3/2024 other than stating that the applicant did not inform the Insurance Company of existence of the appeal, it did not address itself on the pertinent and legal implication arising from the fact that there was an earlier appeal filed and dismissed.
9. The 1<sup>st</sup> Respondent argued and rightfully so that there having been an appeal filed against the impugned judgment and dismissed, seeking leave to file (another) appeal out of time is but an abuse of court process.
10. Further there being a valid court order of dismissal of the appeal in force, the court's hands are tied. It is indeed gross abuse of court process for the applicant to take the course it took to seek for leave to file an appeal out of time.
11. With the knowledge that its appeal was dismissed for want of prosecution, its arguments for the said dismissal, blaming the applicants former advocates would have been good arguments had it applied for reinstatement and/or setting aside of the Appeal no. 15 of 2020 but not for the orders it seeks.
12. It is trite that litigation must come to an end. To allow the application before the court is to give the applicant a second bite at the cherry without considering the prejudice such action would occasion to the 1<sup>st</sup> respondent.
13. The court further notes that the impugned judgment was delivered by the trial court on 6/12/2019. It would be unjust and unfair to keep the decree holder out of enjoyment of its judgment fruits longer.



14. As at 18/12/2023, the decretal sum as per warrants of attachment was Kshs. 1,422,213.78/= as stated by the Applicant in its supporting affidavit. A sum of Kshs. 1,200,000/= is already deposited in court as security by the applicant.
15. For the foregoing, the court finds no merit in the application dated December 18, 2023. It is dismissed with costs to the 1<sup>st</sup> Respondent.
16. Further orders are hereby issued that the sum of Kshs. 1,200,000/= deposited in court as security by the applicant on 22/01/2024 be released to the 1<sup>st</sup> Respondent forthwith through its advocates Morara Apiemi & Nyangito Advocates
17. The Applicant is granted 45 days from the date of this ruling to pay the Respondent the balance of the decretal sum as may be assessed by the Deputy registrar of the court.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN NAIROBI THIS 15<sup>TH</sup> DAY OF OCTOBER 2024.**

**JANET MULWA**

**JUDGE**

