



**Kavata v Macharia (Civil Appeal E034 of 2021)
[2024] KEHC 12816 (KLR) (16 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12816 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E034 OF 2021
DKN MAGARE, J
OCTOBER 16, 2024**

BETWEEN

PETER KAVATA APPELLANT

AND

MARY WAMBUI MACHARIA RESPONDENT

JUDGMENT

1. This appeal arises from the ruling and order of Hon. Wendy Kagendo, Chief Magistrate delivered on 30/6/2016 in Nyeri CMCC No. 211 of 2016.
2. The Ruling arose from the application dated 25/5/2021 to stay proceedings and reopen the Appellant's case so that the Appellant could call witnesses to testify.
3. In the said application, the Appellant averred that the matter had proceeded ex parte in his absence during the hearing and his case had been closed.
4. The application was also based on the ground that the Appellant's advocate had a matter in the High Court which he gave priority when this case proceeded and as a result the Appellant had suffered injustice.
5. The lower court considered the application and rendered its ruling on 30/6/2021 dismissing the application with costs in the cause. The Appellant, aggrieved, lodged appeal vide a Memorandum of Appeal dated 26/7/2021 raising 7 grounds of appeal. I have perused the 7 paragraph memorandum of appeal. It is prolixious, repetitive, and unseemly. The proper way of filing an appeal is to file a concise memorandum of appeal without arguments, cavil or evidence. The rest of the King's language should be left to submissions and academia. Order 42 Rule 1 provides as doth: -

“1. Form of appeal –



1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

6. The Court of Appeal had this to say in regard to Rule 86 (which is pari materia with Order 42 Rule 1) in the case of [Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat](#) [2020] eKLR: -

"We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of Rule 86 of the [Court of Appeal Rules](#). That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See *Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others* [2013] eKLR) and *Nasri Ibrahim v. IEBC & 2 Others* [2018] eKLR. In the latter case, this Court lamented:

"We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs."

The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

7. Further in [Kenya Ports Authority v Threeways Shipping Services \(K\) Limited](#) [2019] eKLR, the court of appeal observed that :-

"Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the [Kenya Ports Authority Act](#) ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In *William Koross v. Hezekiah Kiptoo Kimue & 4 others*, Civil Appeal No. 223 of 2013, this Court stated:

"The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."



8. The memorandum of appeal raises only one issue, that is, whether the learned magistrate erred in the exercise of discretion by dismissing the Appellant's application seeking to stay proceedings and reopen his case for hearing.

Submissions

9. The Appellant filed submissions dated 19/2/2024. It was submitted that the lower court erred in declining to reopen the case. Reliance was placed on the case of *Wavinya Mutavi v Isaac Njoroge & Another* (2020) eKLR as follows:
 10. Over the years, Kenya's superior courts and courts in the Commonwealth have developed principles which guide the exercise of jurisdiction to re-open a case and receive additional evidence in a civil trial court. First, the jurisdiction is a discretionary one and is to be exercised judiciously. In exercising that discretion, the court is duty-bound to ensure that the proposed re-opening of a party's case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible.
10. The Appellant also relied on the case of *David Kiptanui Yego & 134 Others v Benjamin Rono & 3 Others* (2012) eKLR to submit that the lower court failed to exercise its discretion judiciously.
11. The Respondent on the other hand filed submissions dated 9/7/2024. It was submitted that the Appellant appealed against the Ruling and not the judgment and therefore the issues in the application became moot and should not be subject of appeal.
12. It was also submitted that the Appellant ought to have sought leave to appeal before filing the appeal as required under Order 42 Rule 1 of the *Civil Procedure Rules*.

Analysis

13. The issue for determination is whether the lower court erred in dismissing the Appellant's application seeking stay of proceedings and reopening of the case to allow the Appellant call witnesses.
14. The Respondent submitted that as the Appellant did not appeal against the Judgment, the finding in the ruling dated 30/6/2021 becomes moot upon delivery of the judgment and so the appeal is incompetent.
15. The Appellant indicated that he sought to reopen the case and call witnesses. If this court were to allow this application, what would be the impact on the judgment dated 30/6/2021? I note the Appellant also sought to set aside the judgment and reopen the case.
16. In dismissing the application, the court noted that this was not the first time the Appellant was seeking to be indulged as the case had against been reopened at the instance of the Appellant. The court had to do justice for both parties and not just the Appellant. In *Harris Horn Senior, Harris Horn Junior*



v. Vijay Morjaria Nyeri Civil Appeal No. 223 of 2007 when confronted with similar arguments, the Court made observations therein inter alia as follows:

“(32) As for the need to do justice to the parties before it, we have no doubt that this is the core business of the Court. However, a court of law cannot ignore principles of substantive law or case law governing the particular aspect of justice sought from its seat. Its primary role is to ensure that the justice handed out is kept anchored on both the law and the facts of each case.”

17. Therefore, in this court’s reevaluation, the Appellant had the burden to prove that indeed he was entitled to a hearing by reopening the case. This could follow an explanation on the reasons for which the Appellant was not in court at the time of trial. I have perused the proceedings. I note the Appellant’s advocate and the Appellant were both not in court when the matter was called out for hearing. The explanation given by counsel for the Appellant that he was in the High Court on a different case was not plausible. In *Wavinya Mutavi v Isaac Njoroge & Another* (*supra*) the court stated as doth:

10. Over the years, Kenya’s superior courts and courts in the Commonwealth have developed principles which guide the exercise of jurisdiction to re-open a case and receive additional evidence in a civil trial court. First, the jurisdiction is a discretionary one and is to be exercised judiciously. In exercising that discretion, the court is duty-bound to ensure that the proposed re-opening of a part’s case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible.

18. As a result, the lower court correctly exercised its discretion in dismissing the application. The court would not be expected to haphazardly exercise judicial discretion in favour of a party. Discretion is unfettered but exercisable within the bounds of the law. In the case of *Ramakant Rai v. Madan Rai*, CR LJ 2004 SC 36, the Supreme Court of India rendered itself thus on the issue of judicial discretion:

“Judicial discretion is canalized authority not arbitrary eccentricity. Cardozo, with elegant accuracy, has observed:

“The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to ‘the primordial necessity of order in the social life.’ Wide enough in all conscience is the field of discretion that remains”.

19. Therefore, the lower court correctly dismissed the Appellant’s application as it was not merited. Since no appeal was lodged to specifically challenge the merit of the Judgment of the lower court, I venture not into the details of the same. In the circumstances, the appeal entirely fails.



Determination

20. In the upshot, I make the following orders: -

- a. The Appeal is dismissed for lack of merit.
- b. The Respondent shall have costs of the appeal assessed at Kshs. 55,000/-.
- c. 30 days stay of execution.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 16TH DAY OF OCTOBER, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

FKIZITO MAGARE

JUDGE

In the presence of: -

Mr. Njuguna for the Appellant

No appearance for the Respondent

Court Assistant – Jedidah

