



**Mtito T Sacco & another v Kamatu (Miscellaneous Application
3 of 2024) [2024] KEHC 12360 (KLR) (15 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12360 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION 3 OF 2024**

**FR OLEL, J
OCTOBER 15, 2024**

BETWEEN

MTITO T SACCO 1ST APPLICANT

MARTIN MUNGAI 2ND APPLICANT

AND

JAMES KAMATU RESPONDENT

RULING

1. The application before court for determination is the Notice of Motion application dated 15th January 2024 seeking the following orders;
 - a. Spent
 - b. This Honourable court be pleased to grant leave to the Applicant to lodge an appeal and file a memorandum of Appeal out of time against the judgment and decree of the Honourable M.Thibaru/Resident magistrate against the Applicants on 6th November 2023 in Machakos Small Claims court claim no E418 of 2023.
 - c. Spent
 - d. This Honourable court be pleased to grant a stay of execution of the judgment and/or decree issued by Honourable M.Thibaru/Resident magistrate against the Applicant on 6th November 2023 pending the hearing and determination of the intended appeal.
 - e. This Honourable Court allows the Applicants' security to the court be in the form of a bank guarantee from the Family Bank.
 - f. Spent
 - g. The costs of the Application abide the outcome of the Appeal.



2. The Application is supported by the Affidavit of the 2nd Applicant sworn on an even date, who depones that judgment was entered against them, both on liability and quantum. Liability against them was determined at 100%, General damages Kshs.300,000/=, Special damages Kshs.5000/= plus costs and interest of the suit. Being aggrieved by the said judgment, they had sought to appeal but time has lapsed due to delay caused by the need for communication between himself and the advocates in ascertaining the options available with regard to the impugned judgment.
3. The applicants further deponed that they believed that, their Appeal had high chances of success and that the Respondent may levy execution against them which would render the proposed appeal to be rendered nugatory and cause them irreparable loss and damage. On security, the applicant averred that their insurer, Directline Assurance Company was ready to furnish the court with a Bank guarantee from Family Bank (K) Ltd, to secure the decretal sum.
4. The Respondent opposed this application, through his replying affidavit filed on 7th March 2024, where he deponed that the application was an abuse of the court process and should be dismissed as he was the claimant in Machakos SCC 417 of 2023, James Kimatu vs Mtito T Sacco and Martin Mungai, where Judgement was entered in his favour on 6th November 2023 as follows; general damages of Kshs.550,000/=, Special Damages of Kshs.5,800/=, future medical expenses of Kshs.155,000/= and the decretal amount had since been paid.
5. He denied being the claimant in Machakos SCCC 418 of 2023 and stated that the Claimant therein was one Boniface Muli who unfortunately had not been sued as a party to the proceedings herein. This application was therefore fatally defective as it was based on glaring mistakes and/or misrepresentation of facts, and the applicant could not be granted any discretionary orders based on the irregularities pointed out. With regard to the relevant matter Machakos SCCC 418 of 2023, where Boniface Muli was the claimant, the applicants had been woken up from their slumber, after the respondent's counsel had written to them to demand settlement of the decree and that is when they decided to file the instant Application.
6. The applicant had not provided sufficient basis, for the court to exercise discretion in their favour and urged the court to find that this application lacks merit and the same be dismissed with costs to them.

Analysis & Determination

7. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and discern that the issues which arise for determination are whether the applicants should be granted leave to appeal out of time and secondly, if leave is granted, orders of stay of execution of the primary decree should issue and on what conditions.
8. Based on the respondents averment, this court called for the record of Machakos Small Claims court claim no E417 of 2023 and Machakos Small Claims court claim no E418 of 2023, and confirmed that the respondent was not the claimant in the former suit, where the plaintiff was one (Bonface Muli). The respondent's assertion that the decree in the latter suit has been settled is also not denied. In short, the applicant has sued a wrong party, whose decree has been settled and left out Bonface Muli, who should have been the right party to sue. Despite noticing this error, they have not sort to amend their pleadings to correct this glaring mistake.
9. The application as filed is therefore hopelessly defective. I am guided by the finding of the court in Apex International Ltd and Anglo Leasing and Finance International Finance Ltd v Kenya Anti-Corruption Commission (2012) eKLR, the Court quoted the words of Mukhtar J. of the Supreme



Court of Nigeria in Goodwill and Trust Investment Ltd V Will and Bush Ltd (2011) LCN/B820 (SC) as follows:-

“It is trite law that to be competent and have jurisdiction over a matter proper parties must be identified before the action can succeed, the parties must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the Court, the Court lacks jurisdiction to hear the suit and where the Court purports to exercise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned.”

Disposition

10. Considering all relevant factors, I do find that;
 - a. The Application dated 15th January 2024 is hopelessly defective and hereby dismiss the same.
 - b. The costs of this Application are awarded to the Respondent and the same is assessed at Kshs 20,000/= all inclusive.
11. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS ON THIS 15TH DAY OF OCTOBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 15TH DAY OF OCTOBER, 2024.

In the presence of: -

No appearance for Appellants

No appearance Respondent

Susan Court Assistant

