



REPUBLIC OF KENYA



**Onganga v Mokua & another (Miscellaneous Application  
E005 of 2022) [2023] KEHC 3821 (KLR) (24 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3821 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
MISCELLANEOUS APPLICATION E005 OF 2022**

**JK SERGON, J**

**APRIL 24, 2023**

**BETWEEN**

**MARGRET BOSIBORI ONGANGA ..... APPLICANT**

**AND**

**MOMANYI MOKUA ..... 1<sup>ST</sup> RESPONDENT**

**INDOMITABLE AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for leave to file an appeal out of time against the judgment  
and decree in Kericho Chief Magistrate Court Civil Case No 113 of 2017.)*

**RULING**

1. The 1<sup>st</sup> respondent was involved in a road traffic accident on June 16, 2016 while on board the applicant's motor vehicle. He sustained injuries as a result of the accident and subsequently filed a suit vide Chief Magistrate Court at Kericho Civil Case No 113 of 2017 seeking damages and costs.
2. The applicant was served, however, she failed to enter appearance nor file a defence.
3. The 1<sup>st</sup> Respondent requested for interlocutory judgment which was entered on October 3, 2017 and the matter proceeded by way of formal proof and the court awarded the 1<sup>st</sup> Respondent Kshs 343,825/= with costs.
4. Soon thereafter the parties entered into a consent on how to settle the decretal sum dated September 11, 2018 on the following terms;
  - (i) That motor vehicle registration No KAV 893 Q be released on a running attachment
  - (ii) The defendant be given 60 days to pursue insurance for purposes of settling the claim



- (iii) The auctioneers fees be agreed on and/or be assessed by court
  - (iv) In default, the consent to lapse and execution to issue.
5. After the expiry of 60 days and failure to settle the claim, the 2<sup>nd</sup> respondent moved and attached the applicant's motor vehicle. The applicant filed an application whereby she sought to have the consent set aside, however, the court vide a ruling dated January 15, 2019 declined to set aside the consent stating that the applicant failed to demonstrate that the consent was entered into fraudulently and due to misrepresentation whilst relying on the case of Flora N Wasike v Destimo Wamboko [1982-88] 1 KAR 625.
  6. The court made a finding that the application to set aside the consent lacked in merit, dismissed the application and stated that the application was merely intended to deny the 2<sup>nd</sup> Respondent from enjoying the fruits of judgment.
  7. Margret Bosibori Ongangathe Applicant herein filed the instant application dated January 24, 2022 seeking leave to appeal out of time and for conservatory orders to have the subject motor vehicle released to her. The Applicant filed a supporting affidavit in support of her application stating she made several requests to her advocate to appeal against the judgment in Chief Magistrate Court at Kericho Civil Case No 113 of 2017 to no avail and further that her advocate engaged in subversive activities and entered into a consent, which contents she was not aware of.
  8. She further stated that the 1<sup>st</sup> Respondent had received compensation amounting to Kshs 300,000/= but had failed to surrender the subject motor vehicle.
  9. The Applicant alongside her application seeking leave to file an appeal, filed a draft memorandum of appeal and reiterated that should the orders sought in the application fail she stood to suffer loss and damages to wit losing motor vehicle registration No KAV 893 Q.
  10. Momanyi Mokuathe 1<sup>st</sup> Respondent herein filed a replying affidavit in opposition to the instant application dated February 9, 2023 stating that he was the plaintiff in Chief Magistrate Court at Kericho Civil Case No 113 of 2017 whereas the Applicant and one Peter Obiero were defendants in the suit. He further stated that the matter was heard and determined and judgment entered against the defendants therein and they were held jointly and severally liable for the injuries he sustained involving motor vehicle KAV 893 Q.
  11. 1<sup>st</sup> Respondent conceded to have received payment in full and was aware that Indomitable Auctioneers were instructed by his advocates to attach the moveable assets of the defendants in Chief Magistrate Court at Kericho Civil Case No 113 of 2017 and motor vehicle KAV 893 Q attached in execution of the decree, sold and some of the proceeds used to realize part of the judgment sum.
  12. The 1<sup>st</sup> Respondent further states that he does not concur with the applicant's sentiments that the consent was entered into under the influence of subversive activities between counsel and further that if the applicant had issues with her advocate this was not the correct forum to ventilate the said issues.
  13. The 1<sup>st</sup> Respondent contended that the grounds on the draft memorandum of appeal did not raise any triable issues and reiterated that the instant application was frivolous, vexatious and an abuse of court process.
  14. I have considered the application, supporting affidavit, draft memorandum of appeal alongside the replying affidavit in opposition to the instant application.



15. I find that the application does not disclose any cause of action warranting the courts intervention. I find that the parties entered into a consent on how to settle the decretal amount in the Chief Magistrate Court at Kericho Civil Case No 113 of 2017 and as such were bound by the terms of the consent dated September 11, 2018.
16. The application herein is frivolous, vexatious and an abuse of court process. I hereby dismiss the application seeking leave to appeal out of time with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT KERICHO THIS 24<sup>TH</sup> DAY OF APRIL, 2023.**

.....

**J.K. SERGON**

**JUDGE**

**In the presence of:**

**C/Assistant - Rutoh**

**Mbeche for the Respondent**

**No Appearance for the Applicant**

