



**Coast Raha Limited & another v Ayanga (Civil Appeal
E0226 of 2021) [2023] KEHC 17390 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17390 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E0226 OF 2021**

OA SEWE, J

MAY 11, 2023

BETWEEN

COAST RAHA LIMITED 1ST APPELLANT

WAMBUA KITHOME MULWA 2ND APPELLANT

AND

WILSON ASANGA AYANGA ALIAS WILSON ANYANGA RESPONDENT

RULING

1. Before the Court for determination is the appellant's Notice of Motion dated May 23, 2020. The said application was filed on May 25, 2022 under Sections 3, 3A and 79G of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 22 Rule 22, Order 42 Rules 4, 6 and 7 and Order 51 Rules 1 and 3 of the *Civil Procedure Rules*, for orders that:
 - (a) Spent
 - (b) Spent
 - (c) The Court do vary the conditions for stay of execution granted on November 26, 2021 requiring that the appellants do deposit the entire decretal sum in a joint interest earning account within 30 days, and instead order that the entire decretal amount be secured in court by way of a bank guarantee from a reputable bank within the Republic of Kenya, and the same be deemed as sufficient security.
 - (d) Spent.
 - (e) That the costs of the application do abide the outcome of the appeal.
2. The application is premised on the grounds that judgment was entered on September 29, 2020 in which the appellants were found 100% liable to the respondent; and that quantum was assessed at



Kshs 600,000/= for general damages and Kshs 7,550/= for special damages. The respondent was also awarded interest and costs. The appellants were thereafter granted stay of execution and leave to appeal out of time on condition that they deposited the decretal sum in a joint interest earning account. The appellants' insurer, on being informed of the decision of the lower court, offered to provide security by way of a bank guarantee and a proposal to that effect was made to the advocates for the respondent. Granted that the stay period was about to lapse, the appellants approached the Court for intervention, contending that the respondent would not be prejudiced in any way.

3. The grounds aforementioned were explicated in the appellants' Supporting Affidavit, sworn on May 23, 2022 by Mirembe Edmond, Advocate, in which they also averred that they are still interested in pursuing the appeal and will be highly prejudiced if the application is not allowed.
4. The respondent was opposed to the application. To that end, he relied on his Replying Affidavit, sworn on June 6, 2022. He contended that the application is incompetent in that, whereas the judgment in the suit was delivered on December 9, 2020, the application is itself dated May 23, 2020. He therefore asserted that the application is solely meant to further delay the enjoyment of the fruits of his judgment and should therefore be dismissed with costs. The respondent further averred that the application offends the provisions of Section 6 of the *Civil Procedure Act* in view of the application in Mombasa High Court Misc Application No E44 of 2021; and a non-starter for flouting the provisions of the Civil Procedure Rules.
5. At paragraphs 5, 6 and 7 of the Supporting Affidavit, the respondent averred that the application is incompetent in so far as it was premised on the affidavit of an advocate in respect of contentious matters. In this regard, the respondent cited Order 19 Rule 3 of the Civil Procedure Rules and urged the Court to dismiss the application.
6. The application was canvassed by way of written submissions pursuant to the directions given herein on June 8, 2022. Accordingly, Mr Mirembe for the applicant relied on his written submissions dated June 27, 2022 and contended that the Court has unlimited discretion to vary its orders under Order 12 Rule 7 of the Civil Procedure Rules. He relied on *Philip Kiptoo Chemwolo & Another v Augustine Kubende [1982-88] eKLR* and *Stephen Ndichu v Monty's Wines and Spirits Ltd [2006] eKLR* and added that there has been no inadvertence or laxity on the part of the appellants.
7. The respondent's written submissions were filed on October 27, 2022 by Mr Ndungu. He essentially amplified on the averments set out in the respondent's Replying Affidavit and set out the authorities in support of each argument. I note too that both counsel made copious submissions on stay of execution, yet that prayer is clearly spent.
8. The brief background to the application is that the appellants filed the instant appeal on November 26, 2021 against the judgment and decree passed in Mombasa CMCC No 2561 of 2018 by Hon E Muchoki, RM. The learned magistrate had found the appellants liable in respect of injuries sustained by the respondent in a road traffic accident and awarded him Kshs 600,000/= as general damages and Kshs 7,550/= as special damages. The appellants were also granted conditional stay pending appeal. It appears that the appellants failed to comply in time. Consequently, they filed Mombasa High Court Miscellaneous Civil Application No E044 of 2021: Coast Raha Limited & Another v Wilson Asanga Ayanga, seeking extension of time to appeal. The application was allowed on November 26, 2021 and orders granted by Hon Chepkwony, J as hereunder:
 - (a) That the Applicants be and are hereby granted leave to file and serve their appeal out of time within 30 days.



- (b) That there be a stay of execution and proceedings of the Judgment done vide the Decree and Certificate of costs emanating from Mombasa CMCC No 256 of 2018 pending the hearing and determination of the appeal on condition that the Applicant deposit the decretal sum on a joint interest earning account within 30 days, failure to which execution to issue.
- (c) Costs to abide the outcome of the appeal.
9. While the appeal was timeously filed, it appears the condition to deposit the decretal sum in a joint interest earning account within 30 days was not complied with. Hence, the appellant filed the instant application on May 25, 2022 seeking the variation of that order in favour of security by way of a bank guarantee. In the premises, the only issue for determination is whether the appellants have made out a good case to warrant the variation of the order for security.
10. [10] I note that the application was brought under Section 79G of the *Civil Procedure Act*, which limits the time for filing appeals from subordinate courts to 30 days; which period may be extended for sufficient cause. Order 22 Rule 22 and Order 42 Rules 4, 6 and 7 of the Civil Procedure Rules on the other hand relate to stay of execution; which is not the issue in contest in the instant application. It is therefore curious that counsel for the appellants, in his written submissions resorted to Order 12 Rule 7 of the Civil Procedure Rules, which states:
- ' Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.'
11. That Order is applicable to matters that have been prepared for hearing and provides for the consequences of non-attendance. That is not the case herein. Perhaps the most appropriate application would have been for review under Order 45 of the Civil Procedure Rules; but even then it is significant that the order sought to be varied was not made in this appeal. It is an Order that preceded the filing of this appeal; having been made in Mombasa High Court Miscellaneous Civil Application No E44 of 2021. Moreover, no justification has been given as to why the order of November 26, 2021 was not complied with in the first place.
12. In the premises, I take the view that the application dated May 23, 2020 is devoid of merit and is therefore hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 11TH DAY OF MAY 2023

OLGA SEWE

JUDGE

