



**Mumma v Kenya Anti-Corruption Commission (Civil Appeal
E240 of 2020) [2023] KEHC 18097 (KLR) (Civ) (23 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18097 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E240 OF 2020

AN ONGERI, J

MAY 23, 2023

BETWEEN

CATHERINE MUMMA APPELLANT

AND

KENYA ANTI-CORRUPTION COMMISSION RESPONDENT

*(Being an appeal from the ruling of Hon. L. Gicheba (CM) in Milimani
Commercial Court Civil Suit no. 5018 of 2005 delivered on 15/09/2020)*

JUDGMENT

1. The appellant was the defendant in Milimani CMCC no. 5018 of 2005 where she was sued by the Respondent for refund of kshs.903,000 which the appellant allegedly unlawfully received from the respondent in respect of sitting allowances in a Task Force which was appointed to look into issues in relation to HIV AIDS pandemic in Kenya where the appellant was a member.
2. The appellant was granted time to file her witness statement but having failed to do so, the court gave directions on 15/9/2020 declining to set aside orders of the court dated 15/5/2014 which locked out the defendant's witness statement.
3. The appellant has appealed to this court against the ruling delivered on 15/09/2020 on the following grounds;
 - i. That the learned magistrate erred in law and in holding that the delay in making the application was inordinate and in disregarding the fact that the application was necessitated by the Respondent raising on objection on the date of the defence hearing.



- ii. That the learned magistrate erred in law in disregarding that the order made on February 15, 2015 prohibiting the Appellant from filing a witness statement or other pleadings was made without jurisdiction and was therefore a nullity in law.
 - iii. That the learned magistrate erred in law by failing to properly evaluate the witness statement and establishing its relevance to the suit and the Appellant's defence already on record.
 - iv. That the learned magistrate erred in law and exercised her discretion wrongly by disregarding the fact that the Appellant's witness statement was premised on the statement of defence filed on June 26, 2006 and therefore the Respondent could not be prejudiced in any way.
 - v. That the learned magistrate erred in holding that the Respondent will be prejudiced by the filing of the Appellant's witness statement after it had closed its case and in disregarding the fact that the Respondent has the right to recall any witness to address any issues arising from the Appellant's statement.
 - vi. That the learned magistrate erred in law and exercised her discretion wrongly by failing to consider the reasons tendered by the Appellant for the delay in filing the witness statements.
 - vii. That the learned magistrate erred in law by failing to consider whether the alleged prejudice to be suffered by the Respondent outweighed the Appellant's right to a fair hearing and to defend the claims made against her in the suit.
 - viii. That by dismissing the Appellant's application, the learned magistrate subjected the Appellant to injustice and subverted her right to a fair hearing.
 - ix. That in disallowing the application the learned magistrate acted on wrong principles and disregarded the binding decisions of the High Court and the Court of Appeal cited to her and as a result arrived at a wrong decision.
4. The parties filed submissions as follows; the appellant submitted that in the event of failure to comply with the provisions of order 11 of the *Civil Procedure Rules* 2010 the court is entitled to order costs against the defaulting party as provided for under order 11 rule 7 (3) of the Civil Procedure Rules. The delay in filing the witness statement which was occasioned by the appellants long absence from the country was explained to the court and supported with documentation of the same. Thus the delay was not intentional and she should not suffer injustice of not having her defence heard.
 5. It was submitted that the trial court had discretion to extend time to file the documents as sought. That the supporting affidavit sworn on July 9, 2020 contains a detailed explanation of the delay in filing the witness statement and list of documents. That the appellant's long absence was because she was out of the country on official duties as a commissioner in the commission for implementation of *the constitution* for long periods in 2014 and 2015.
 6. It was argued that the learned magistrate erred in law by failing to consider the reasons tendered by the appellant for the delay and this was not a proper exercise of judicial discretion. That if the orders sought were granted the respondent would not suffer any prejudice as it would have the right to recall any of its witnesses to answer any issues arising from the contents of the witness statements and documents.
 7. The appellant contended that the denial by the trial court to admit the witness statements was a violation of the right to fair hearing which is granted under article 50 of *the Constitution* of Kenya 2010.



In support she cited *Chairman, Secretary & Treasurer Suing as the officials/on behalf of House of Hope v Wotta - House Limited* [2018] eKLR where the court held that;

“ Even after the Pre-trial conference, the court has the power to allow the parties to call further witnesses or produce further documents. This power, encapsulated in the provisions of Order 18 rule 10 of the Rules and section 146 of the *Evidence Act*, is intended to ensure that each party is afforded a fair trial guaranteed under article 50 (1) of *the Constitution*. But a fair trial does not exist in a vacuum, it is governed by rules which by themselves ensure that each party is given the opportunity to present or defend his case fairly. What these rules must not do is to become an end in themselves and impede a fair trial and that is why article 159(2) (b) of *the Constitution* provides that justice shall be administered without undue regard to technicalities. The constitutional imperatives are further supplemented by the overriding objective enacted in sections 1A and 1B of the *Civil Procedure Act* (chapter 21 of the Laws of Kenya).”

8. The respondent in its submissions argued that the appeal herein is incompetent in law as it was filed without leave of the court and therefore this court has no jurisdiction to determine the appeal herein. That the appellants application was made under order 11 of the *Civil Procedure Rules* and an order of the court made under the same cannot be appealed against without leave of the court. in support the respondent cited *Nyutu Agrovet Limited v Airtel Networks Limited* [2015] eKLR where Mwera J. A held that;

“ It is not in dispute that jurisdiction as well as the right of appeal must be conferred by law, not by implication or inference. If the power and authority of or for a court to entertain a matter (jurisdiction) is not conferred by law then that court has no business to entertain the matter (see Owners of the Motor Vessel “Lilian S” vs Caltex Oil (Kenya) Ltd [1989] KLR 1. This Court has jurisdiction to hear any matters coming on appeal from the High Court and any other court or tribunal prescribed by law. But a party who desires his appeal to be heard here has a duty to demonstrate under what law that right to be heard is conferred, or if not, show that leave has been granted to lodge the appeal before us. However, be it appreciated that such leave does not constitute the right to appeal. The right must precede leave.”

9. The respondent further argued that the order having been made on May 15, 2015 the appellant should have sought to set aside such order within reasonable time. The delay is over 5 years so the appellant is guilty of laches and a court of equity cannot aid her. That it is apparent that the appellant by her conduct waived her right to file any witness statement or document. That in *Sita steel Rolling Mills Ltd v Jubilee Insurance Co. Limited* [2007] eKLR Maraga J (as he then was) held
10. It was the respondent’s argument that the appellant was guilty of inordinate delay in bringing the application and in the interest of justice cases should be concluded without unreasonable delay. That the failure to comply with pre-trial orders could not be attributed to the alleged long absence of the appellant because the appellant was not permanently out of Kenya.
11. The issues for determination is this appeal are as follows;
- i. Whether this court should review and set aside the ruling delivered on 15/09/2020
 - ii. Whether this appeal is properly before this court
12. On the issue as to whether this court should review and set aside the ruling delivered on 15/09/2020, the said Application was seeking review of an order made on 15/5/2018.



13. The law governing review is Order 45 which states as follows;

“ 1.

- (1) Any person considering himself aggrieved—
 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”

14. I find that order 45 of the [Civil Procedure Rules, 2010](#) is very explicit that a court can only review its orders if the following grounds exist;

- (a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
- (b) There was a mistake or error apparent on the face of the record; or
- (c) There were other sufficient reasons; and
- (d) The application must have been made without undue delay.

15. The order the Appellant was seeking to set aside was made on 15/5/2018. The application to set aside the said order was made on 9/7/2020.

16. I find that there was inordinate delay in seeking to review and set aside orders made on 15/5/2018. The Applicant had been granted an extension of time on 11/12//2014 but did not file any statement until 15/5/2018 when the Trial court refused to extend time.



17. Equity does not assist the indolent but comes to the aid of the vigilante. In the case of *Ibrahim Mungara Mwangi v Francis Ndegwa Mwangi* [2014] eKLR the court quoted the following passage from *Snell's Equity* by John MC Ghee Q.C. (31st Edition) at page 99:

“The Court of equity has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these want the court is passive, and does nothing.”

18. I find that at the time the Appellant was seeking to set aside and review the order of the court, the plaintiff/Respondents had testified and closed its case.

19. The Appellant did not make any attempt to seek to set aside the order before the close of the Respondent's case.

20. I agree with the trial court that the Respondent would not be in a position to cross examine the Appellant on the issues raised in the statement. Setting aside the said ruling would occasion injustice to the Respondent.

21. On the issue as to whether this appeal is properly before this court, I find that this being an interlocutory appeal, the appellant ought to have sought leave of the court to file the same.

22. There is nothing on record to show that the appellant sought leave to appeal against the Ruling delivered on 15/09/2020.

23. The record shows that the appellant was not in court when the Ruling was delivered.

24. I therefore find that this appeal is incompetent and I accordingly dismiss it with costs to the Respondents.

25. I direct that the file be taken back to the Trial court for the hearing to proceed.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 23RD DAY OF MAY, 2023.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

