Nyeri Motor Services Ltd v Kanuti & 2 others (Miscellaneous Application 25 of 2023) [2023] KEHC 17734 (KLR) (18 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17734 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

MISCELLANEOUS APPLICATION 25 OF 2023

RK LIMO, J

MAY 18, 2023

BETWEEN

NYERI MOTOR SERVICES LTD ..... APPLICANT

AND

MBEVO KANUTI ..... 1ST RESPONDENT

MWAURA JAMES ..... 2ND RESPONDENT

SAMUEL MUTISYA T/A SAMUMU AUCTIONEERS ..... 3RD RESPONDENT

RULING

1. Nyeri Motor Services Ltd the applicant herein, *vide* a notice of motion dated May 8, 2023 has moved this court under sections, 3A, 79G and 95 of *Civil Procedure Act* cap 21 and order 42, rule 6 and 51 rule 1 & 3 of *Civil Procedure Rules*, for the following reliefs namely: -

    i. Spent

    ii. That this honourable court be pleased to extend the time and grant leave to the applicant to lodge a memorandum of appeal out of time against the judgment and decree entered against the applicant by Hon S. Mbungi in civil suit No 121 of 2013 delivered on June 13, 2022.

    iii. That this honourable court be pleased to stay execution of the judgment and decree in Chief Magistrate's Court civil suit No 121 of 2013 pending the hearing and determination of the application herein.

    iv. That this honourable court be pleased to stay execution of the judgment and decree in Chief Magistrate's Court civil suit No 121 of 2013 pending the hearing and determination of the intended appeal.

    v. That the costs of this application be in the cause.

vi. Costs of this application be provided for.

2. The application is premised on the following grounds;

   i. That judgment was delivered on June 13, 2022 in the absence of the applicant and that the 30 days within which an appeal is to be filed had lapsed.

   ii. The applicant is dissatisfied with the judgment delivered on June 13, 2022 by Hon S. Mbungi and seek leave to appeal out of time.

   iii. That this application is timely and without unnecessary delay as the applicant came to learn of the judgment of the subordinate court on May 5, 2023.

   iv. That the applicant stands to suffer substantial and irreparable loss and damages as there is a likelihood that the applicant will be made to pay the sum awarded to the 1st respondent.

   v. That unless this application is allowed, the applicant's intended appeal will be rendered nugatory

   vi. That the applicant has a strong arguable appeal which has a high chance of success.

   vii. That the 1st and 3rd respondents have begun to levy execution against the applicant.

3. This application is supported by the affidavit of Tajdin Alibhai Nathoo, a director of the applicant company sworn on May 8, 2023 where he has majorly reiterated the above grounds. The same director has also filed a further supporting affidavit sworn on May 12, 2023 insisting that they were not served with notice of judgement and that if their former counsel was at fault, they should not be penalized and denied access to justice.

4. The 1st respondent opposes this application *vide* a replying affidavit of his counsel on Caroline Kaindi Ngala sworn on May 10, 2023. The deponent avers that the applicant has failed to advance a good enough reason for failing to file its appeal on time. Secondly, the deponent avers that the application is a nullity as the applicant's advocate is not properly on record as the notice of change of advocates was not done properly. Thirdly, it has been averred that the court should disallow the application on the basis that the applicant has failed to offer security for due performance of the decree passed.

5. The first preliminary issue in this application is whether the applicant's counsel is properly on record and if not whether their application is competent.

6. The 1st respondent avers that the application is a nullity and ought to be struck out as the counsel for the applicant is not properly on record.

7. The applicant avers was that he was represented by the firm of Ms Kalili and Company Advocates in the trial court *vide* a notice of appointment dated July 24, 2014 and filed in court the same day. A consent dated May 11, 2023 was filed in this court on May 12, 2023 by the firm of Midikira & Company Advocates indicating that the firm was taking over this matter and acting for the applicant in the place of the firm of Ms Kalili & Company Advocates.

   That consent was in respect to this miscellaneous application and is filed herein.

8. Order 9 rule 9 of the *Civil Procedure Rules* provides that change of advocate can only be effected by order of court or consent of parties provided as follows;

> "When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court
>
> a. upon an application with notice to all the parties; or
>
> b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

9. Two issues emerge from the above provisions in regard to this matter

   i. What mischief did the rule (order 9 rule 9 of *Civil Procedure Rule*) intend to cure?

   ii. Whether the rule applies only to a particular case or a trial finalized in the lower court or any other step taken in an appellate court.

10. This court will first look at the mischief that the rule was intended to cure and there is doubt that order 9 rule 9 of *Civil Procedure Rules* was introduced by parties committed to protect advocates who are retained by a client until the tail end of a case and sack them immediately judgement is delivered with a view to reaping the fruits of labour in total disregard of the labourer who is the advocate that conducted the trial. That mischief was aptly captured in the case of *Connection Joint v Appollo Insurance* [2006] eKLR where Fred Ochieng J (as he then was) observed as follows:-

> " ....Furthermore, it may be recalled that the mischief which was targeted by the introduction of that rule, was the replacement of advocates who had worked hard to enable a case get to the stage of judgment. In my understanding, some unscrupulous persons used to either appoint new advocates or take over the personal conduct of cases, as soon as judgment had been granted in their favour. Thereafter, the advocates who had been replaced were left chasing after their legal fees, which was not fair to them, especially when the said advocates only learnt about their own replacements, after the same had taken effect.
>
> By making it mandatory for the party who seeks to replace his advocate, after judgment was passed, to apply to the court, with notice to his said advocate, the rules committee addressed two concerns. First, it was no longer possible for the advocate to be taken by surprise, by his ouster, as he had to be served with the application seeking to remove him from record: secondly, the fact that the court had the opportunity of giving due consideration to the reasons for and against the application, implied that the court was able, if necessary, to impose terms and conditions. For instance, if it transpired that the advocate's fees had not yet been paid, the court could impose appropriate conditions to the order enabling the party to either act in person or alternatively, to engage another advocate..."

11. The essence of that rule is the need for leave to change an advocate after judgment has been delivered. It is only meant to cater for the interests of the advocate from a mischievous client who might have the intention of not paying legal fees.

12. The rules committee in my considered view in drafting that rule had no intention of impeding or placing obstacles to a litigant interested in pursuing an appeal.

13. An appeal or proceedings in an appellate court is different because it is another court. An advocate ordinarily would require fresh instructions to pursue an appeal. In the same way, a party who had

previously engaged an advocate is at liberty to proceed in person in pursuing an appeal or even engage a new advocate in the appellate court without having to comply with the provisions of order 9 rule 9 of the *Civil Procedure Rules* because the rules do not provide for such and it makes sense because the proceedings in an appellate court though they relate to the lower court proceedings are different. In answering the second question paraphrased above, this court makes no hesitation in finding which I hereby do that the rules under order 9 rule 9 of *Civil Procedure Rules* does not provide that the applicant's counsel could only file an appeal or application to appeal in this court with the consent of the previous counsel engaged by the applicant in the lower court or through an application with notice to the former counsel.

14. The objection is a mere technicality with no legal basis.

15. In any event, even if this court had found that this application was filed by an advocate who is not properly on record or an advocate with a practicing certificate, it would not shut the door of justice on the applicant because that is an extreme action which at the end of the day would not serve the interest of substantive justice or meet the overriding objectives clearly stipulated under sections 1A & 1B of the *Civil Procedure Act*.

16. In the case of *Kamlesh Mansukhlal Damji Pattni v Nasir Ibrahim Ali & 2 others* [2005] eKLR the court when faced with an application to strike out applications filed by an advocate who had not properly filed a notice of change of advocate, the court held as follows;

> "Such an extreme order would not serve the cause of justice" as the respondents in that case would "merely ensure that their current or new advocates filed appropriate notices of appointment and would refile the same application. Justice would not have been achieved but rather time, delay and a little expense would have been sacrificed."

17. Similarly, in the case of *Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR the Court of Appeal stated as follows;

> "Raising the issue at the hearing cannot aid the respondents because nowadays pendulums have swung and the courts have shifted towards addressing substantive justice and no longer worship at the altar of technicalities."

18. The other issue in this application is enlargement of time and stay of execution.

The applicant has invoked the provision of order 42 rule 6, and order 50 rule 6 of *Civil Procedure Rule* in addition to section 79 G and section 95 of *Civil Procedure Act* in seeking these reliefs.

19. Time for filing of appeals from the sub-ordinate court is provided for under section 79 (G) of the *Civil Procedure Act* which provides.

> "Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
>
> > Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time"

20. The applicant is seeking for enlargement of time to file an appeal under order 50 rule 6 of *Civil Procedure Rules* which provides;

> "Where a limited time has been fixed for doing any act or taking any proceedings under these rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

21. Extension of time to carry out any act or step in the court proceedings is a matter of discretion to the court entertaining the prayer. The principles applicable in exercising the discretion are now well established. In *Nicholas Kiptoo Korir Arap Salat v Independent Electoral and Boundaries Commission & & others* [2017]eKLR the principles were clearly laid out as follows:-

i. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;

ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court

iii. Whether the court should exercise the discretion to extend time, is a consideration to be made a case- to-case basis;

iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

v. Whether there will be any prejudice suffered by the Respondent if the extension is granted;

vi. Whether the application has been brought without undue delay

22. In the present case, judgment was delivered on June 13, 2022, the prescribed time for filing of the appeal lapsed on July 25, 2022. The applicant has attributed the delay to the fact that the judgment was delivered in the absence of their counsel and that it only became aware of the judgment after the 1st and 3rd respondent begun to levy execution proceedings.

23. The 1st respondent on his part refutes the claim insisting that the former counsel was aware of the delivery of the judgement because an email was reportedly sent to him. That contention is however, not supported. The record of the lower court, which record I have perused. There is no evidence that an email was sent to the parties in respect to judgment delivered.

24. From the court record, parties appeared in court on March 8, 2022 where the court directed that judgment would be delivered on May 27, 2022. On the same day, it is recorded that the plaintiff had filed submissions but the defendants were not submitting on the matter. There is no record of any proceedings taking place on May 27, 2022 before the trial court or on June 13, 2022 when the judgment was delivered. The only proceedings recorded in the court file are of March 15, 2023 and they are on assessment of the plaintiff's bill of costs.

25. The provisions under order 21 rule 3 of the *Civil Procedure Rules* requires judgement to be delivered in the open court with notice to the parties of course it is now open for courts to deliver judgement virtually since era of covid Covid times. But the virtual delivery of the same must be done with notice to the parties with a view to protecting the rights of parties to either appeal or review and even know

the outcome of their litigation. It is also not a must that judgements or rulings can only be delivered in presence of parties or counsel. But notice of judgement is mandatory for the aforestated reasons.

26. In *Ngoso General Contractors Ltd v Jacob Gichunje* [2005] eKLR the Court of Appeal made the following useful observations: -

> "
>
> i. *Ngoso General Contractors Ltd v Jacob Gichunge* civil appeal No 248 of 2001 [2005] 1 KLR 737, the Court of Appeal held that;
>
> > "The failure by the superior court judge in an application for extension of time to file an appeal, to consider, as a matter of law, whether the appellant, who was admittedly absent when the judgement was delivered, was served with notice of delivery of the judgement was a misdirection...The law under order 20 rule 1 of the Civil Procedure is explicit in terms and mandatory in tone that a judgement which is not delivered ex tempore must be delivered on a subsequent date only upon notice being given to all parties or their advocates and where only the successful party in the judgement had prior knowledge of the delivery of the judgement and no apparent reason was advanced for the failure to serve or to attempt to serve the appellant or his advocate, the appellant's right of appeal was grossly compromised."

27. It is also incumbent, though not a legal requirement for the opposing advocate to inform the advisory about the delivery and the contents of a judgement when the same is delivered in their absence even where prior notice had been issued.

In *Kisumu Paper Mills Ltd v National Bank of Kenya Ltd & 2 others* (Kisumu HCC No 413 of 2001), the court held as follows:-

> "A party not invited to a date when an important and essential determination is made against him is usually not afforded an opportunity on its case...The court as a matter of obligation was required to issue and serve a notice on all the parties to the suit and the advocate for the applicants ought to have been given an opportunity to be present so that he could represent his client's interest including applying for leave to appeal as it is not the business of an advocate to keep checking with a judge or a magistrate about the delivery of a particular judgment as rulings and judgments of the court must ordinarily and as a matter of good practice be delivered on the due date and if not delivered parties must be sufficiently and adequately notified of the date of delivery by issuing a notice...The practice, procedure and regulation of the court where a judgment/ruling is not delivered on its due date is to notify all parties involved and their respective advocates and the notice is issued in accordance with the rules of proper service which must be in tandem with the requirement in the Civil Procedure otherwise there would be a serious breach of procedure amounting to a denial of the right to be heard...As a matter of protocol and good advocacy, an advocate is obligated to inform an absent advocate immediately of the delivery of the judgment/ruling."

28. This court finds that the reasons for the delay advanced by the applicant that he was unaware about when and/if the judgement was delivered are sufficient and persuasive enough to make this court invoke its discretion by enlarging time so that the applicant can pursue his right of appeal.

Respondent in that event suffers no prejudice.

29. On the stay of execution, order 42 rule 6 of the *Civil Procedure Rules* provide as follows:-

> "
>
> 1. No order for stay of execution shall be made under sub rule (1) unless
>
> a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
>
> b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

30. The principles applicable in granting or refusing an order of stay pending appeal or intended appeal were well illustrated in the case of *Butt v Rent Restriction Tribunal* (1979) where the Court of Appeal made the following observations: -

> "
>
> i. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
>
> ii. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
>
> iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
>
> iv. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal."

The applicant has raised issues regarding ownership of the accident vehicle in the intended appeal and that issue in my view, shows that the intended appeal is not frivolous or out to buy time. I am alive to the requirement of deposit of security and find that the offer by the applicant to deposit half decretal amount in the joint names of both the advocate on record in an interest earning account meets the threshold taking all circumstances in this matter into consideration.

In short, and from the foregoing, this court finds merit in the application dated May 8, 2023 the same is allowed in the following terms;

i. The applicant is granted leave to lodge and serve his appeal within 14 days from today.

ii. There shall be a stay of execution of the judgement and decree in Kitui CMCC No 121 of 2013 pending the determination of the intended appeal.

iii. The applicant is directed to deposit half decretal amount in the joint names of both the advocate on record and in an interest earning account within 21 days from date of this ruling.

iv. In default of any of the above conditions the orders herein stand discharged and the respondent will be at liberty to execute.

v. Costs shall be in the intended appeal.

DATED, SIGNED AND DELIVERED AT KITUI THIS 18TH DAY OF MAY, 2023.

HON. JUSTICE R. K. LIMO

JUDGE