



REPUBLIC OF KENYA



**Onyiego & another v Wambua (Miscellaneous Application
E458 of 2021) [2023] KEHC 3839 (KLR) (Civ) (2 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 3839 (KLR)

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

CIVIL

MISCELLANEOUS APPLICATION E458 OF 2021

JN MULWA, J

MAY 2, 2023

BETWEEN

TOM MIRANYI ONYIEGO 1ST APPLICANT

EMBASSAVA SACCO 2ND APPLICANT

AND

JOHN MUINDE WAMBUA RESPONDENT

RULING

1. By the application dated 16/09/2021 the Applicants seek two orders: -
 - i. Leave to appeal out of time; and
 - ii. Stay of execution pending hearing and determination of the intended appeal.
2. The judgment sought to be appealed against was delivered on the 9/07/2021 in Milimani CMCC No. 3456 of 2018, whereof the trial court awarded to the Respondent Kshs. 3,530/= in special damages and upon review by the court, the special damages were enhanced to Kshs. 99,550/= on the 1/04/2022. Thus the cumulative decretal sum as stated by the applicants is Kshs. 1,811,754/=.
3. The application is based on the provisions of the Civil Order 42 Rule 6 of 2, 4, 6 and Procedure Rules, 2010; Order 50 Rule Sections 3A, 79G and 95 of the *Civil Procedure Act*; and supported by an affidavit sworn by Tom Miranyi Onyiego on the 13/09/2021.
4. In opposing the application, the Respondent swore a replying affidavit on the 7/06/2022. Both parties proceeded to file submissions on the 4/10/2022 and 28/09/2022 respectfully; from which both parties identified two issues for determination thus:
 - a. Whether leave to file appeal out of time should be granted to the Applicant.



- b. Whether an order of stay of execution should be granted pending hearing and determination of the intended appeal.
5. The court has considered the parties supporting and opposing affidavits to the application, as well as the submissions.

Leave to appeal out of time

6. Section 79G of the *Civil Procedure Act* provides for 30 days upon which an appeal may be filed from the subordinate court's judgment, ruling or order.

The proviso thereto allows extension of time for admission of an appeal out of time if the applicant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

7. The court of appeal has rendered itself on the parameters for consideration in regard to the above in numerous decisions among them, *Mwangi v. Kenya airways Ltd* (2003) KLR thus: -

- a. The period of delay
- b. The reason for the delay
- c. The arguability of the appeal
- d. The degree of prejudice which could be suffered by the Respondent if extension is granted.
- e. The importance of compliance with time limits to the particular litigation or issue
- f. The effect if any on the administration or justice of public interest if any is involved.

8. The impugned judgment was delivered on the 9/07/2021 and an order of review issued on the 1/04/2022. The review order was not appealed from. It related to only one arm of the judgment, being on special damages only, not on the whole of the judgment.

9. Looking at the Memorandum of Appeal annexed to the supporting affidavit, dated 16/09/2021, the applicant's grievances are on the award of general damages of Kshs. 1,200,000/= as being too high as per the judgment delivered on the 9/07/2021.

That being the case then, the intended appeal is only on general damages and has no bearing on the special damages.

10. To that extend, the delay in filing the appeal on general damages runs from the 7/08/2021 upto the 16/09/2021, after giving allowance of the statutory 30 days when the application was filed, thus a delay of 37 days. The only reason given by the applicant is Covid 19 pandemic and the restrictions placed in accessing court registry to peruse and obtain the judgment; citing the case *Kenya Power & Lighting Co. Ltd v Rose Anyango & Another* [2020] eKLR where the court appreciated the limits placed in court processes during the period. The court is satisfied that, given the circumstances, the delay is not inordinate and is explainable.

11. On the arguability of the appeal, I have considered the grounds raised in the Memorandum of Appeal and the judgment of the trial court; and not interrogating the merits or otherwise of the intended appeal. The court's concern at this stage is the arguability, and not the success of the appeal – see *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Another* [2018] eKLR.

The Applicants never testified in support of their defence before the trial court. The Respondent, then the Plaintiff was a passenger in the appellant's vehicle. The issue of liability therefore did not arise



as the defence remained on record, but as hearsay- *Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya) Kisumu* [2007] eKLR. The issue of is therefore a none issue.

12. That being the case, the only issue that may be said to be arguable is on quantum of general damages. The court notes that the applicants did not file submissions on the probable quantum of damages also.

In the case *Portreiz Maternity v James Karanga Kabia*, [1997] eKLR, the court rendered that: -

“the right of appeal must be balanced against an equally weighty right that of the plaintiff to enjoy the fruits of the judgment in his favour. There must be a just cause for depriving the plaintiff of that right”.

13. Equally to consider is that a party cannot be allowed to benefit from its own wrong, and cause prejudice to the other party.

In *Kenya Red Cross Society v Mbondo Katbeke Mwanja* [2019] eKLR, the court rendered itself that; -

“A party cannot rely on an awkward situation created by itself as a ground for seeking favourable orders from the court-----”

14. When the applicants opted not to tender evidence in support of their defence; and to file submissions thereafter before the trial court, it cannot come to the High Court to seek favours out of their own failures to disadvantage the other party.

The court is therefore not persuaded to exercise its discretion in favour of the Applicants to grant the orders sought, while the Respondent has been kept away from its fruits of judgment for no fault of his own.

15. It is also trite that parties ought to comply with statutory limits in any litigation and if not, plausible reasons to be offered. Failure without a doubt slows the administration of justice and prejudices the interests of the parties involved. Justice is two way and ought not be bend to favour a party who for no plausible reasons tries to slow the wheels of justice.

16. For the above reasons, the court finds that the applicants have failed to meet the threshold suggested by the Court of Appeal in the *Mwangi v Kenya Airways Ltd case* (Supra).

17. The application dated 16/09/2021 is therefore without merit.

Having come to the above conclusion, it would be a waste of the court’s precious and limited time to delve into the second arm of the application; whether the applicants should be granted stay of execution orders against the trial court’s judgment.

18. The upshot is that the application dated 16/09/2021 is dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF MAY, 2023

J. N. MULWA

JUDGE

