



**Africa Merchant Assurance Co. Ltd & another v Mwaniki (Civil Appeal
E035 & E038 of 2022 (Consolidated)) [2023] KEHC 19565 (KLR) (3 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19565 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E035 & E038 OF 2022 (CONSOLIDATED)**

LM NJUGUNA, J

JULY 3, 2023

BETWEEN

AFRICA MERCHANT ASSURANCE CO. LTD 1ST APPELLANT

FAMILY BANK OF KENYA 2ND APPELLANT

AND

ABEL MWANIKI RESPONDENT

JUDGMENT

1. The appeal herein was instituted *vide* a memorandum of appeal dated July 4, 2022 and wherein the appellant challenged the Ruling of the trial court (Hon. J. W. Gichimu) SPM in Civil Suit No. 118 of 2021 and which ruling was delivered on May 31, 2022. The appellant raised the following grounds of appeal that:
 - i. The learned trial magistrate erred in law and fact when he made orders that the appellant would only be allowed to defend the suit on condition that it deposits the whole decretal sum amounting to Kes. 971,220/- in court within 14 days.
 - ii. The learned trial magistrate failed to exercise his discretion by dismissing the application judiciously and by imposing hard conditions and thereby applying wrong legal principles.
2. The appellant thus prayed that:
 - i. Leave be granted to the appellant to file this appeal out of time.
 - ii. The appeal be allowed.
 - iii. The orders of the Honourable Court in the Ruling dated May 31, 2022 be vacated.
 - iv. The appellant be unconditionally allowed to defend the suit herein.



- v. The cost of the appeal and the application be borne by the respondent.
 - vi. Any other order that this court deems fit to grant.
3. The respondent herein was the plaintiff while the 1st and 2nd appellants herein were the defendants before the trial court. The appeal was necessitated by the ruling by the trial court wherein the appellant was granted conditional leave to defend the suit in Runyenjes SPM's Court Civil Case No. 118 of 2021 *Abel Mwaniki v African Merchant Co. Ltd.* and to deposit the entire decretal sum in court amounting to Kes. 971,220/-.
 4. The appeal was canvassed by way of written submissions.
 5. The 1st appellant submitted that the trial court erred in fact and law by granting it conditional leave to defend the suit. That article 50 (1) of the [Constitution](#) provides for a fair hearing in regards to any dispute that has to be resolved in accordance to the law. Reliance to support the proposition herein was placed on the case of [Pinnacle Projects Limited v Presbyterian church of East Africa, Ngong' Parish & another](#) 2018 eKLR. It was submitted that the defence raised several triable issues and further, the 1st appellant did not receive a statutory notice as alleged by the respondent and therefore, the appeal herein ought to succeed. It was contended that it is not clear why the Honourable trial magistrate used his discretion in pegging conditions of the appellant's right to defend itself as the same denied it a proper forum to defend itself. This court was therefore urged to allow the appeal herein.
 6. The 2nd appellant submitted that the appeal herein is pegged on order 23 of the [Civil Procedure Rules](#) and as a garnishee, it is required to appear before the court to confirm whether it can satisfy the decree from any funds they hold belonging to the judgment debtor. That in this case, when the matter came up for hearing of the garnishee application, the 2nd appellant informed court of the need for it to file a replying affidavit to the application and further requested for seven days to make a response to the application to no avail. Further, the pleadings had been served upon it only a week before the matter was scheduled for hearing and that no directions had been issued for the 2nd appellant to file its replying affidavit. That the refusal by the learned trial magistrate to grant the 2nd appellant time to file a reply was unjust and as a result, it was condemned unheard. Reliance was placed on the case of [Altana Corporation v Clarence Matheny Leadership Training Institute; National Land Commission & another \(Interested Party\)](#) [2019] eKLR. It was submitted that the objective for the courts in dispensing justice is to ensure expeditious, fair just and proportionate disposal of cases. Further reliance was placed on the case of [Pelesia Atieno Wamidha v Co-Operative Bank of Kenya Limited & 4 others](#) [2014] eKLR. As a result therefore, this court was urged to allow the appeal herein.
 7. The respondent submitted on two issues that it raised to wit: whether the appeal is incompetent and fatally defective and whether the court has jurisdiction to hear the appeal filed out of time and without the leave of court. On the first ground, it was submitted that court orders are not made in vain. Reliance was placed on the Court of Appeal case of [Shimmers Plaza Limited and National Bank of Kenya Limited](#) in Civil Appeal No. 33 of 2012 and a decision by the Supreme Court of Kenya in the case of [Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others](#) [2015] eKLR. That failure by the 1st appellant to file its record of appeal is fatal rendering the intended appeal incompetent.
 8. On the second ground, it was submitted that this court has no jurisdiction to entertain the appeal herein and reliance was placed *inter alia* on the case of [Patrick Kiruja Kithinji v Victor Mugira Marete](#) [2015] eKLR. That the ruling being appealed against was delivered on May 31, 2022 and the memorandum of appeal filed on 05.07.2022 outside timelines set out in section 79 G of the [Civil Procedure Act](#). Per the provisions of order 50 rule 8 of the [Civil Procedure Rules](#), it was contended that the appeal herein does not lie as a matter of right in that the appellant ought to have sought leave before



the trial court before lodging the appeal. Reliance in support of that proposition was placed on order 42 rule 1 (3) of the [Civil Procedure Rules](#) and the case of [Nyutu Agrovet Ltd v Airtel Networks Ltd](#) [2015] eKLR. On that premise therefore, this court was urged to down it tools.

9. The respondent filed further submissions and averred that failure by the appellant to seek leave to file the appeal out of time is fatal to the appeal herein; he further reiterated his prior submissions that the court ought not entertain the appeal herein as the same was filed out of the stipulated time and without the leave of court and as such, the appeal is incompetent and ought to be struck out.
10. I have considered the appeal, submissions by counsel for the parties and the authorities relied on and I find that the issue for determination is whether the appeal herein is merited. This being a first appeal, parties are entitled to expect a rehearing, reevaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. In [Gitobu Imanyara & 2 others v Attorney General](#) [2016] eKLR, the Court of Appeal stated that;

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”

[See also [Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates](#) [2013] e KLR].

11. In re-evaluating the decision of the lower Court, this court will heed to the principles set out in the case of [Mbogo & another v Shah](#) [1968] EA where the Court held as follows;

“An appellate Court will not interfere with the exercise of the trial Courts discretion unless it is satisfied that the Court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous or unless it is manifest from the case as a whole that the Court has been clearly wrong in the exercise of judicial discretion and that as a result there has been injustice.”

12. The appellant was expected to file his appeal within thirty (30) days of the judgment, he did not do so; and for that reason, the respondent avers that the appeal is incompetent and that the same ought to be struck out. In [Abdirahman Abdi v Safi Petroleum Products Ltd & 6 others](#) [2011] eKLR, in which a notice of appeal was served on the respondent out of time and without leave of the court, and upon urged to strike it out, the Court of Appeal (Omolo, Bosire and Nyamu JJ.A) observed that:-

“The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice...”

In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of sections 3A and 3B of the [Appellate Jurisdiction Act](#), cap 9 Laws of Kenya, and later, article 159 (2) (d) of the [Constitution](#) of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and



prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion." (emphasis added).

13. From the above, it is clear that the court held the view that rarely was such substantive justice served before the enactment of the Constitution of Kenya, 2010 in cases with procedural shortcomings and want of form. The art work provided in the Constitution , inter alia article 159(2)(d), is most precious in resolution of disputes and administration of justice between the parties; that a party may not be injured by a vicious arrangement and approach that leans back to the old habits where courts were eager and readily provoked to strike down a suit action on technicalities.
14. Although the case by the Court of Appeal dealt with the striking out of the notice of appeal for the reason that it was served on the respondent out of time and without leave of the court, the jurisprudence coming through is that, in exercise of discretion to strike out a pleading or document, in this case, the memorandum of appeal, the court has to weigh the prejudice that is likely to be suffered by the innocent party against the prejudice to be suffered by the offending party if his pleading or document is struck out. A perfect exposition of the core of the overriding objective of the court in section 1A and 1B of the Civil Procedure Rules as well as the principle in article 159(2)(d) of the Constitution towards serving substantive justice.
15. The striking out of the appeal means striking down the case for the appellant in a summary manner, striking down a party's suit is only comparable to proverbial drawing of the sword of the Damocles, in effect, driving such party away from the seat of judgment unheard. It is against that backdrop that the court in answering to a higher calling finds that the appeal herein is proper before the court.
16. On the averment by the respondent that the appellants did not seek leave before appealing this matter. In controverting the same, the 2nd appellant submitted that the appeal herein is pegged on order 23 of the Civil Procedure Rules and as a garnishee, it's only duty is to appear before the court to confirm whether it can satisfy the decree from any funds they may be holding belonging to the judgment debtor. That in this case, when the matter came up for hearing of the garnishee application, the 2nd appellant informed court of the need for it to file a replying affidavit to the application and further requested for seven days to make a response to the application to no avail. In other words, it was condemned unheard.
17. In reference to the above, I seek for guidance from order 23 rule 7 which is in relation to the trial of claim of a third person. It stipulates:

After hearing the allegations of any third person under such order, as in rule 6 mentioned, or of any other person who by the same or any subsequent order the court may order to appear, or in case of such third person not appearing when ordered, the court may order execution for levying the amount due from the garnishee, together with the costs of the garnishee proceedings, or order any issue or question to be tried or determined according to the preceding rules of this Order, and may bar the claim of such third person or make such other order as the court shall think fit.



- 18. It therefore means that the appeal herein is properly before the court and that it was not necessary for the 2nd appellant to seek leave before the trial court before filing the appeal herein.
- 19. On to the merits of the appeal, the appellant faulted the trial court for giving it conditional leave to defend the suit.
- 20. In the case herein, the trial court noted that the matter ought to have been canvassed by way of oral evidence for the reason it found the annexed proof of payment as doubtful and in the end, found that it was proper for the appellants herein to deposit the entire decretal sum amounting to Kes. 971,220.00 in court within fourteen days for the parties to be heard in relation to the claim that the decretal sum had been satisfied.
- 21. It is therefore proper that court orders must be obeyed but bearing in mind the circumstances herein, I find that the orders that are commendable should be as follows:
 - i. The appeal partially succeeds.
 - ii. The 1st appellant to deposit in court the entire decretal sum of Kes. 971,220/= as ordered by the trial court and the amount be deposited within 21 days from the date of this judgment.
 - iii. The matter be returned back to the trial court for the determination of satisfaction or otherwise of the decree as alleged by the appellant.
 - iv. Each party to bear its own costs of the appeal.
- 22. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....for the Appellants

.....for the Respondent

