



REPUBLIC OF KENYA



**Ngugi v Gitonga & 3 others (Miscellaneous Application E116 of 2022)  
[2023] KEHC 20867 (KLR) (Civ) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20867 (KLR)

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

**CIVIL**

**MISCELLANEOUS APPLICATION E116 OF 2022**

**JN MULWA, J**

**JULY 25, 2023**

**BETWEEN**

**JULIUS THIONG'O NGUGI ..... APPLICANT**

**AND**

**DAMARIS WANGUI GITONGA ..... 1<sup>ST</sup> RESPONDENT**

**PETER MUTHEE KAMAU ..... 2<sup>ND</sup> RESPONDENT**

**HURUMA SACCO ..... 3<sup>RD</sup> RESPONDENT**

**MARTIN GATHONI MWEA ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. By an application dated November 7, 2022 the applicant Julius Thiong'o Ngugi sought orders of stay of execution of this court's ruling dated September 22, 2022 as well as review and or variation of the same in respect of the application dated March 10, 2022, and in particular Order number 3 and 4, whereof the court ordered the applicant to pay 50% of the decretal sum and balance of 50% to be deposited in a joint interest earning account in the parties Advocates names as a conditional stay of execution and security for the due performance of the decree pending hearing and determination of an appeal to this court vide HCCA No E820 of 2022 arising from Milimani CMCC No 9492 of 2018 in which judgment was delivered on the November 26, 2021.
2. The application is premised on provisions of Order 45 Rule I and 2 and Rule 22 of the *Civil Procedure Rules* as well as Section 80 of the *Civil Procedure Act*.

The Supporting Affidavit is sworn by Kelvin Nguni the Deputy Claims Manager, Direct Line Assurance Company the Insurer of the accident motor vehicle in this matter.



3. Grounds for the application are stated that the trial court in its judgment found that the four Defendants who were sued jointly and severally were held jointly and severally liable at 100% for the accident, and to the extent of the general and special damages in the sum of Kshs 213,700/= plus costs and interest.
4. The grievous by the Applicant is that there was a mistake or error apparent on the face of the ruling in the conditions given to the Applicant as a conditional stay of execution pending hearing and determination of the then intended Appeal that the court by its orders granted him to file Appeal out of time, which he did.
5. In particular, at paragraph 3 of the ruling, the Applicant was ordered to pay to the 1st Respondent (Plaintiff in the trial court) 50% of the decretal sum within 45 days of the ruling, which order is the subject of this application for review.
6. The Applicant avers that he is apprehensive that if the said sum is paid to the 1st Respondent and the pending Appeal is successful, the Applicant may never be able to recover the same considering that Interlocutory Judgment had been entered against the 2nd, 3rd and 4th Defendants in the trial court; and thus seeks variation or review to the extent that this court allows the Applicant, as the applicant/1st defendant in the trial court to pay 50% only, of the decretal sum as liability was shared amongst the Defendants.
7. It is important to state here that the Applicant has partly complied with the conditions set out by the court by depositing 50% of the decretal sum into court as security for the due performance of the decree as exhibited in “KNI”, as well as filing the Memorandum of Appeal within the stipulated period in their impugned ruling.
8. In opposing the application, the 1st Respondent filed a Replying Affidavit sworn by his Advocate Musili Mbiti on the December 6, 2022 and attached a copy of the judgment of the trial court as an exhibit. It is his position that the application is an abuse of the court process, a nonstarter and baseless and only made to prevent the 1st Respondent from enjoying fruits of his judgment and that it fails to meet the threshold for review as there is nothing ambiguous therein.
9. I have perused the trial court’s judgment which the applicant in his application dated March 10, 2022 failed to attach, for reasons best known to himself or his advocates.

Contrary to the assertion in the supporting affidavit at Paragraph c of the grounds for the application on the trial court’s judgment that “...liability held at 100% jointly and severally as against the plaintiff and the defendants” I confirm that the trial court at page 4 of its judgment held as follows: -

“--Judgment is entered in favour of the Plaintiff against the Defendants jointly and severally for Kshs 200,000/= general damages for pain and suffering; the Plaintiff is also awarded special damages of Kshs 13,700/= as pleaded and proved----”

10. The above completely is different from what the Applicant wants the court to believe by its failure to provide the court with the said judgment.
11. What therefore is for determination is whether indeed there is an error on the face of the ruling of this Court dated September 22, 2022 in directing the Applicant, having been the 1st Defendant in the trial court, to settle the decretal sum pursuant to the judgment that held him and the other three Defendants “Jointly and severally liable at 100%”.



12. Before going into determination of the above issue, the Applicant has not demonstrated in any way why he states that should he pay the 50% decretal sum to the 1st Respondent and the Appeal is successful, the 1st Respondent may not be able to pay back.

It is trite that he who alleges must prove. No such prove has been tendered to the court.

13. In the case *Caneland Ltd & 2 others Vs Delphis Bank Ltd* Civil Application No Nairobi 344 of 1999 and Cited in *Indus Trading Limited and another vs Charles Aricha* (2021) eKLR, the court, Odunga J as he then was, rendered on the contention that the Respondent would not be able to refund the decretal sum if paid to him pending hearing and determination of the Appeal; that at paragraph 24 of the ruling held that: -

“----- The law, however appreciates that it may not be possible for the Applicant to know the Respondent’s financial means. The law is therefore that all an Applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent, will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there.”

14. In such circumstances then, the legal burden remains upon the Applicant. see also *Kenya posts and Telecommucations Corporation vs Paul Gachanga Ndarua*; Civil Application No Nairobi 367 of 2001.

15. In the instant matter, it is important to state that, as per the trial court's judgment, the 1<sup>st</sup> Respondent(Plaintiff) was a lawful passenger in the 1<sup>st</sup> Applicant's/ Defendants motor vehicle registration no KBK 218U which was driven by the 4<sup>th</sup> Respondent, his driver, while the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were the owner and driver of another vehicle registration No KCC 342C that collided with it; from which accident the 1<sup>st</sup> Respondent was injured.

16. By the trial courts’ finding, and holding both vehicles owners and drivers jointly and severally liable, it was persuaded that damages flowing therefrom was to be paid by either of the Defendants or by all of them jointly and thus the phrase “jointly and severally liable”.

17. The meaning of the legal phrase jointly and severally above is well captured in my judgment in *Ndeti & Another (suing on their own behalf and as Administrators of the Estate of Gerald Ndeti Mutua, deceased) Vs Mwangangi & another* (2022) eKLR, and *R vs PS in charge of Internal Security ex-parte Joshua Paul* (2013) eKLR, *Dubar Electronics V Total Kenya & 2 others* Nairobi High Court Civil Cases No 870 of 1998 as hereunder: -

“...Clearly therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liabilities, each tortfeasor is only liable to settle the sum due to the tune of liability. Where however, the liability is joint and/or several, the plaintiff has the option to either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability.

Either way, he cannot recover more than the total sum decreed. However, the defendants and entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them”.

18. By the above, the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents and the Applicant having been found by the trial court to have been jointly and severally liable, the 1<sup>st</sup> Respondent is legally in order to call for settlement of



the decretal sum from any of the tortfeasors, including the Applicant. Depending on who the decretal holder chooses, the other Respondents have options and in this case, upon their Appeal being successful, to recover what is paid by the Appellant or any of them from the Co-Appellants (Respondents) as the case may be.

19. It is also instructive to note that the two accident vehicles were duly insured, and therefore, upon conclusion of the Appeal, the successful party will have full recourse and or compensation by or from their respective insurance companies; and in the event that the claim is not settled by the insurance company, the particular party found liable will have to deal with the payment and or refund of what the 1<sup>st</sup> Respondent would be paid as per court order.
20. In the circumstances therefore, I find and hold that the Applicant has not met the threshold under Order 45 of the *Civil Procedure Rules* for an order of review or variation of the said orders. Nothing has been demonstrated in terms of the alleged error on the face of the ruling which in my view is plain and clear, and left no room for further clarification or anything if at all. If the applicant was dissatisfied with the terms of the ruling, he was at liberty to move to the higher court for redress. In the circumstances, I am not persuaded to rule in favour of the Applicant.

The application is dismissed for lack of merit, with costs to the 1st Respondent only – Damaris Wangui Gitonga.

Orders accordingly.

**DELIVERED DATED AND SIGNED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JULY 2023.**

**JANET MULWA**

**JUDGE.**

