



**Indasi v Mwanzia (Miscellaneous Application E030 of 2023)
[2023] KEHC 23531 (KLR) (13 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23531 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
MISCELLANEOUS APPLICATION E030 OF 2023
TM MATHEKA, J
OCTOBER 13, 2023**

BETWEEN

ROCHELLE INDASI APPLICANT

AND

SHADRACK MULINGE MWANZIA RESPONDENT

RULING

1. Rochelle Indasi filed the notice of motion dated April 28, 2023 under sections 3A, 79G, and 95 of the [Civil Procedure Act](#) and orders 22 rule 22, 42 rules 4,6, and 7, 50 rule 6 and 51 rule 1 and 3 of the [Civil Procedure Rules](#), against the Respondent Shadrack Mwinzi Mulinge.
2. The orders sought are an order of stay of execution of the Judgement delivered on February 20, 2023 in Makueni MCCC no E175 of 2021 (Hon. E Kemei RM) where the learned trial magistrate is said to have awarded the respondent the sum of Ksh 600,000 general damages, Ksh 300,000 future medical costs, Ksh 101,180 special damages, pending the hearing and determination of an intended appeal, leave to appeal out of time , leave to furnish the court with a bank guarantee as security pending the hearing and determination of the intended appeal and costs of the application to abide the appeal.
3. The supporting affidavit is sworn by the applicant where reference is made to the underwriter having instructed the law firm of Kimondo Gachoka & Co advocates lodging the appeal herein and filing the application. The deponent makes reference to information from counsel about the outcome of the suit in the lower court.
4. The application is opposed vide the replying affidavit of the respondent to the effect that the application is fatally defective as it is supported by the affidavit of a person who is not a party to the suit. That in addition the said insurance company or underwriter is not a party to the proceedings and the applicant cannot be heard to seek to use a bank guarantee not issued to the applicant. In any event



the purported bank guarantee is expired, further that the application as filed has not met the threshold of the law to warrant the orders sought.

5. Parties filed submissions.
6. For the applicant reliance is made on order 42 rule 6(2) of the [Civil Procedure Rules](#). That the appeal will be rendered nugatory if the orders sought are not granted because firstly the applicant's appeal has triable issues, that the award is substantive and the respondent has not demonstrated the ability to refund the money should the appeal be successful after he has executed- see [G.N Muema P/A \(sic\) Mt. View Maternity and Nursing Home v Miriam Bisbar & another](#) [2018]eKLR ; that a bank guarantee is acceptable as security see [Justin Mutinga David v China Road & Bridge Corporation \(K\) Limited](#) [2019]eKLR
7. The Respondent begins with a summary of brief facts of the case: that the matter arose out of a road traffic accident that took place on the July 24, 2021 when the respondent was hit by a m/v registration no. KCW 334K along the Wote Machakos Road; that the m/v was registered in the name of Stephen Kavoi Kiletu. The suit in the lower court was instituted on the October 27, 2021. It was amended on the March 4, 2022 and the applicant's name was removed from the suit. Hence the judgment the applicant is seeking to appeal against was made against the said Stephen Kavoi Kiletu and the said Rochelle Indasi was not a party.
8. It is argued that for the foregoing reason the application is fatally defective. See [Moijo Matanya ole Keiwua v Chief Justice of Kenya & 6 others](#) [2018] eKLR where the court of appeal stated that an affidavit sworn by a person who is not a party to the proceedings before the court is incompetent and ought to be expunged from the court record; [David Gichiri & 3 others v Emmah Kerubo Sese](#) [2020] eKLR where the High Court dismissed an application in which the supporting affidavit was sworn by a stranger to the proceedings as that rendered it incompetent.
9. It is also argued that the application for stay of execution is not merited because the applicant has not fulfilled the requirements of order 42 rule 6 of the CPR and relied on [Jeny Luesby v Standard Group Ltd](#)[2014]eKLR as cited in [Medula Academy v Jacklyne Atieon Otieno & Another](#) [2018]eKLR on the fact that the applicant must prove sufficient cause, substantial loss, and furnish security. He also relies on [James Wangalwa & Another v Agnes Naliaka Cheseto](#) Misc. Application no 42 of 2011 where it was held that the applicant must establish that the execution if carried out will result in a state of affairs that will irreparably affect the core of the appeal.
10. With respect to leave to appeal out of time it is argued that the applicant must establish the reason for delay to the satisfaction of the court; [Mwangi v Kenya Airways Limited](#) (2003) KLR . In addition it is argued that it is expected that the applicant would have filed the appeal then sought to have it admitted out of time as is the position of s. 79G of the [Civil Procedure Act](#). See [Gerald M'limbine v Joseph Kangangi](#) [2008]eKLR also cited in [Evans Kiptoo v Reinhard Omwonyo Omwoyo](#) [2021]eKLR
11. Further, that extension of time is an equitable remedy reserved for the deserving applicant who had established a good and sufficient cause for not filing the appeal out of time. See [Mombasa County Government v Kenya Ferry Services & Anor](#) [2019]eKLR.
12. Finally it argued that no ground has been established for exercise of this court's inherent powers in favour of the applicant see [Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints](#) [2016]eKLR on what the inherent power of court is and when it is to be exercised- to ensure the ends of justice. It is argued that the applicant has not established any circumstances to support the exercise of the court's inherent powers.
13. I have carefully considered all the submissions, the record and the affidavits on record.



14. The issues for determination are whether the application for stay of execution and extension of time to file the appeal out of time is merited.
15. On the first issue it is not contested that the applicant is not a party to the suit in the lower court and therefore cannot swear an affidavit in support of the proceedings herein. The applicant did not annex the impugned judgment to the application. I find therefor that the affidavit of the applicant ought not to have been filed in the first place, the same is expunged from the record rendering the application incompetent.
16. In addition, there are no grounds laid under order 42 rule 6. There is nothing to show that the applicant will suffer substantial loss if the orders sought are not granted. The document annexed as a bank guarantee is incomplete and the same has expired.
17. On the second issue there is no explanation for the delay to file the appeal out of time but more importantly no explanation why the appeal was not filed as envisaged by s, 79G and an order sought for admission out of time.
18. What the applicant has done is simply file an application and support it with an affidavit devoid of the details of the identity of the applicant as a party to the suit. Was the applicant a party to the suit in the subordinate court? What is the locus standi of the applicant in this application? These positions are challenged by the plaintiff respondent who clearly demonstrates that the applicant is a complete stranger to the suit in the subordinate suit and could not have brought the application. The applicant did not dislodge the claims by the respondent. In addition, it was pointed out that the Insurance Company referred to in the applicant's affidavit is not even a party to the suit and in any case this is not a declaratory suit.
19. The upshot is that the applicant has mixed up these issues rendering the application incompetent. In the mix the applicant has not established the required threshold for injunctive orders sought or stay pending appeal.
20. Taking into consideration the foregoing the application is devoid of merit and is dismissed with costs.

DATED, SIGNED THIS 13TH OCTOBER 2023

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MUMBUA T MATHEKA

JUDGE

DELIVERED VIA EMAIL THIS 16TH OCTOBER 2023

CA Mwiwa

Kimondo Gachoka & Co Advocates, for the Applicant

Stanely Nthiwa & Co Advocates, for the Respondent

