



**Africa Merchant Assurance Company Ltd v Joel (Civil Appeal E052 of 2023)
[2024] KEHC 14325 (KLR) (Civ) (18 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14325 (KLR)

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

CIVIL

CIVIL APPEAL E052 OF 2023

JM OMIDO, J

NOVEMBER 18, 2024

BETWEEN

AFRICA MERCHANT ASSURANCE COMPANY LTD APPELLANT

AND

PRISCILLA KATHEU JOEL RESPONDENT

RULING

1. The present appeal was filed pursuant to the orders made on 13th February, 2023 by this court (Meoli, J.) in HCCMISC No. E034 of 2023 Africa Merchant Assurance Company Ltd v Priscilla Katheu Joel where the court ordered as follows:
 1. That leave is hereby granted to the firm of Cheboryot & Co. Advocates to come on record for the Applicant/Intended Appellant.
 2. That leave is hereby granted to the Appellant to appeal out of time against the judgement of the Honourable Magistrate E. Kagoni, Principal Magistrate in Milimani Commercial Civil Suit No. E945 of 2021 and judgement delivered on 9th November, 2022.
 3. That there be an order to stay execution of the judgement and decree in Milimani Commercial Civil Suit No. E945 of 2021 pending the hearing and determination of this application and the intended appeal herein.
 5. That order 1, 2 and 3 are granted on condition that the Applicant shall deposit into court a joint interest earning account the sum of Ksh.1,256,758/- within 45 days from 13th February, 2023.
 5. That costs be in the cause.



2. The application in the miscellaneous cause was in precise sought for orders: that the firm of Cheboryot & Co. Advocates be granted leave to come on record for the Applicant (the Appellant herein) in the place of the firm of L.A. Chemeli Advocates LLP; that leave be granted to the Appellant to appeal out of time against the judgement and decree issued in Milimani Commercial Civil Suit No. E945 of 2021; and that stay execution of the judgement and decree in Milimani Commercial Civil Suit No. E945 of 2021 be granted pending the hearing and determination of the intended appeal (the present appeal).
3. One will notice from the orders reproduced above that the three prayers and/or orders were all granted subject to the condition that the Applicant (the Appellant herein) deposits into court or into a joint interest earning account the sum of Ksh.1,256,758/- within 45 days from the date of the order, i.e. 13th February, 2023. The Memorandum of Appeal and Record of Appeal in the present matter were filed on 26th January, 2023 and 28th October, 2024, respectively.
4. When the matter was placed before me on 13th November, 2024 for the Appellant to show cause why the appeal should not be dismissed for want of prosecution, Mr. Mayiah, learned Counsel for the Appellant addressed the court and stated that the only issue that remained outstanding from the order reproduced above was that the amount of Ksh.1,256,758/- was yet to be deposited as ordered.
5. The reason counsel gave was that the joint account could not be opened as the firm of Cheboryot & Co. Advocates had reached out to the firm of Nzavi & Co. Advocates, who are on record for the Respondent requesting that the latter executes the account opening documents but were given the response that the person who had the authority to execute the documents was not present at the time.
6. I sought to know from Mr. Mayiah when the joint account opening documents were forwarded by the firm of Cheboryot to the firm of Nzavi and the response counsel gave was that the forms were first forwarded vide a letter dated 3rd April, 2023 and later on 12th, November, 2024, a day before the Appellant was required to show cause why the appeal should not be dismissed for want of prosecution. As such, counsel urged that the failure to deposit the money could not solely be blamed on his client, but on the Respondent too.
7. In response to Mr. Mayiah's submissions, Mr. Nzavi, learned counsel for the Respondent stated that the present appeal is incompetent as the conditions granted by the court in the miscellaneous cause, particularly the order to deposit the security, were not satisfied by the Appellant.
8. Counsel for the Respondent denied ever receiving the letter alleged to have been sent to his law firm and account opening documents from the Appellant's counsel and stated that the first time that the same were forwarded to his firm was on the eve of the hearing of the Notice to Show Cause for dismissal.
9. I have considered the record and the submissions by the two sides. What is for determination is whether there is material presented by the Appellant that sufficiently explains the delay in prosecuting the present appeal and subject thereto, whether there is a competent appeal before this court.
10. From the order reproduced above issued in the miscellaneous cause, one will notice that all the three substantive prayers were granted on the condition that the Ksh.1,256,758/- was to be deposited by the Appellant, either in a joint interest earning account in the names of the law firms on record for the parties or in court.
11. What is not in dispute is that the said amount had not been deposited in either of the alternative places ordered by the court as at the 13th November, 2024 when the matter came up before me for Notice to Show Cause.



12. The Appellant attributes the delay to deposit the security on the allegation that the Appellant's Advocates did not get a positive response when they reached out to the Respondent's Advocates on 3rd April, 2023 and on 12th November, 2024, seeking that the account opening forms be executed by the latter.
13. The Respondent's Advocates rejoinder was that the law firm representing the Respondent only contacted them on 12th November, 2024, a day before the matter would come up before the court.
14. As I have observed above, the three substantive prayers were granted on the condition that the Ksh.1,256,758/- was to be deposited by the Appellant, either in a joint interest earning account in the names of the law firms on record for the parties or in court within 45 days from 13th February, 2023.
15. That then means that the last day for compliance with the order was on 30th March, 2023, the said day being the 45th day from the date of the order. As at that date, there was no compliance by the Appellant. The Appellant states that they reached out to the Respondents with a view of complying with the order to deposit the security on 3rd April, 2023, when the 45 days had obviously already lapsed.
16. Any delay occasioned cannot therefore be attributed to non-execution of the forms by the firm of Nzavi as the presentation of the forms (if the same was done), was clearly outside the 45 days that the court granted.
17. In any event, the court order provided the Appellant with the alternative of depositing the said security in court, which would not have required any input from the Respondent, if indeed (which from the foregoing is doubtful) the latter delayed the execution of the account opening documents.
18. It is instructive from the record that no orders were sought by the Appellant for the extension of the 45 days period. That then meant that all the three prayers that were granted on the condition that the security be deposited automatically lapsed when the 45 days period ended and there was no compliance.
19. It is to be noted that the appeal was already out of time and failing to comply with the conditions of the court only served to compound the delay.
20. From the orders that the court issued, the position that resulted when the Appellant failed to comply with the attached condition is as follows:
 - a. That the leave that was granted to the firm of Cheboryot to come on record for the Appellant in the place of the firm of L.A. Chemeli stood vacated.
 - b. That the leave that was granted to the Appellant to appeal out of time stood vacated.
 - c. That the order of stay of execution of the judgement and decree of the lower court stood vacated.
21. The above position then means, inter alia, that the firm of Cheboryot is not properly on record for the Appellant and that the appeal herein is one that was filed out of time.
22. The obtaining position then is that there is no competent appeal that is capable of being determined by this court. The plight that then befalls the appeal is that the same must be struck out. I proceed to strike it out with costs to the Respondent, which I assess at Ksh.20,000/-.
23. Orders accordingly.

J.M. OMIDO



JUDGE.

DELIVERED (VIRTUALLY), DATED AND SIGNED THIS 18TH DAY OF NOVEMBER, 2024.

For the Appellant: Mr. Mayiah.

For the Respondent: No appearance.

Court Assistant: Ms. Njoroge.

