



REPUBLIC OF KENYA



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**Lutta v Wafula & another (Civil Appeal 42 of 2019) [2024] KEHC 14440 (KLR)  
(Commercial and Tax) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14440 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL 42 OF 2019  
MA OTIENO, J  
NOVEMBER 14, 2024**

**BETWEEN**

**BEATRICE MUKWANA LUTTA ..... APPELLANT**

**AND**

**JOHNSON MASIKA WAFULA ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH K. WATENGA T/A FRONT BENCH AUCTIONEERS .... 2<sup>ND</sup>  
RESPONDENT**

*([An appeal from Ruling and Order of Hon. A.N. Makau (Ms.) SRM  
delivered on 22nd November 2019 in the Milimani CMCC No. 2596 of 2015])*

**JUDGMENT**

**Introduction**

1. This is an Appeal from the Ruling and order of the magistrate's court delivered on 22<sup>nd</sup> November 2019 in the Milimani CMCC No. 2596 of 2015 in which the lower court dismissed the Appellant's application for stay of execution.
2. The background of the matter is that by a plaint dated 8<sup>th</sup> May 2015, the 1<sup>st</sup> Respondent herein instituted a suit against the Appellant for the recovery of monies advanced to the Appellant.
3. On 12<sup>th</sup> March 2019, the lower Court delivered its Judgement in the dispute and found that the 1<sup>st</sup> Respondent had proved his claim against the Appellant. The court consequently awarded the 1<sup>st</sup> Respondent an amount of Kshs. 700,000/- as against the Appellant. Costs and interests were also awarded to the Respondent.



4. Following the delivery of the Judgment, the Appellant filed an application dated 2<sup>nd</sup> October 2019 seeking stay execution of the decree.
5. On 22<sup>nd</sup> November 2019, the lower court delivered its ruling on the Appellant's application dated 2<sup>nd</sup> October 2019 and dismissed the same. The court however granted the Appellant a temporary stay of execution, but limited only for a period of 21 days.

### **The Appeal**

6. Aggrieved by the lower court's Ruling of 22<sup>nd</sup> November 2019 dismissing her application for stay of execution, the Appellant lodged an appeal to this court vide her memorandum of appeal dated 6<sup>th</sup> December 2019 raising grounds that; -
  - i. The learned magistrate erred in law and fact by failing to consider the terms of the agreement between the parties with payment of monthly rent.
  - ii. The learned trial magistrate erred in law and fact by failing to consider the Appellant's submissions.
  - iii. The trial magistrate erred in law and fact by failing to consider the evidence tabled before him.
  - iv. The learned trial magistrate erred in law and fact by failing to award the Appellant damages incurred by default of notice.
  - v. The learned magistrate erred in law and fact by aiding the Respondent's case.

### **Submissions**

7. Directions were given for the appeal to be canvassed by way of written submissions. While the 1<sup>st</sup> Respondent filed his submissions dated 15<sup>th</sup> October 2024, the Appellant failed to file any submissions within the timelines directed by the court.
8. Indeed, no submissions by the Appellant had been placed on record as of the time of writing this decision.
9. For the Respondent, it was submitted that the Appellant's appeal dated 6<sup>th</sup> December 2019 stood dismissed by operation of law on the basis that the Appellant failed to take any steps to prosecute the appeal. That no record of appeal was filed by the Appellant.
10. The Counsel for Respondent cited the decision in the case of *Gateway Insurance Co. Ltd v Simon W. Gakuru [2016] eKLR, Civil Appeal No. 195 of 2005*, in support of his submissions and reiterated the Respondent's position that the Appeal stands dismissed by operation of the law, the Appellant having failed to file the record of appeal.
11. Counsel for the 1<sup>st</sup> Respondent nevertheless proceeded to submit on the merits of the appeal. It was submitted on behalf of the 1<sup>st</sup> Respondent that contrary to the allegation by the Appellant under grounds 1,2 and 3 of the memorandum of appeal that the Appellant was condemned unheard, evidence on record demonstrated otherwise.
12. The 1<sup>st</sup> Respondent submitted that the Appellant was granted every opportunity to present her case. That the Appellant appointed an advocate who entered appearance and filed defence on her behalf and that her Advocate duly participated in the proceedings. The case of *Savings and Loans Limited Vs Susan Wanjiru Muritu, Nairobi (Milimani) HCCC No 397 of 2002* was cited by the Respondent in support of his argument.



13. On the allegation by the Appellant in her memorandum of appeal that the trial court erred in failing to allow the Appellant to liquidate the decretal sum by way of monthly instalments at the rate of Kshs. 20,000/- per month, the 1<sup>st</sup> Respondent's Counsel submitted that the proposal was too low and that the trial court was right in rejecting the same.

14. In the premises, the 1<sup>st</sup> Respondent therefore urged this court to dismiss the appeal with costs.

### Analysis and determination

15. This court has considered the Appellant's memorandum of appeal dated 6<sup>th</sup> December 2019 and lodged in this court on 11<sup>th</sup> December 2019. I have equally considered the Respondent's submissions dated 15<sup>th</sup> October 2024.

16. From the 1<sup>st</sup> Respondent's submissions in this appeal, I note that the Counsel also argued the 1<sup>st</sup> Respondent's Notice of Motion Application dated 23<sup>rd</sup> October 2023 seeking to strike the appeal. I will in this judgment consider and determine both issues as raised in the 1<sup>st</sup> Respondent's submissions.

17. The first issue is the argument by the 1<sup>st</sup> Respondent is that the notice of change of advocates dated 12<sup>th</sup> February 2024 by the law firm of DRO Ngala & Partners Advocates violates the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010.

18. According to the 1<sup>st</sup> Respondent, the Appellant having been presented by the law firm of Ario & Company Advocates in the lower court proceedings until 12<sup>th</sup> March, 2019 when the judgment thereat was delivered, it therefore follows that the law firm of DRO Ngala & Partners could only properly come on record upon appropriate application being made to the court in that regard, or upon a consent being filed between the outgoing Advocates and the incoming Advocates.

19. Order 9 Rule 9 of the Civil Procedure Rules, 2010 provides as follows; -

9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

effected by (a) upon an application with notice to all the parties; or

order of (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

20. I have carefully reviewed the lower court file and I have not cited any application by the law firm of DRO Ngala & Partners seeking to come on record for the Appellant in place of the law firm of Ario & Company Advocates. I have equally not seen any consent on record between the two law firms on the change of advocates.

21. In the case of *Another v Kuria & Another (Appeal E001 of 2022)* [2024] KEELC 88 (KLR) (24 January 2024) (Ruling), the court had the following to say in a similar situation; -

9.]  
26. As per Order 9 Rule 9, the correct procedure to be followed was for the counsel to seek leave to come on record, then file and serve the notice of change of advocates and thereafter file the instant application. Whereas the counsel acknowledges the error on their part to omit the said documents, if at all there were any, the route taken clearly offends the express provisions of Order 9 Rule 9. The procedure set out above is mandatory and thus cannot be termed as a mere technicality.”



22. In the circumstances and as rightly submitted by the 1<sup>st</sup> Respondent, this offends the clear provisions of Order 9 rule 9 of the Civil Procedure Rules, 2010.
23. The second and even more fundamental issue is the argument raised by the 1<sup>st</sup> Respondent on the competency of this appeal. In his submissions, the 1<sup>st</sup> Respondent's Counsel pointed out that since filing the memorandum of appeal on 11<sup>th</sup> December 2019, the Appellant has not taken any steps in prosecuting the appeal and has not filed any record of appeal in the matter.
24. I have perused this file and note that as rightly pointed out by the Counsel for the 1<sup>st</sup> Respondent, no record of appeal has indeed been filed in this matter. Further, as pointed out above, no submissions have equally been filed by the appellant despite the clear directions of this court the appeal proceeds by way of written submissions.
25. A cursory perusal of the proceedings in this case reveals that the Ruling the subject of the appeal was delivered on 22<sup>nd</sup> November 2019 and on 11<sup>th</sup> December 2019, the Appellant lodged her memorandum of appeal dated 6<sup>th</sup> December 2019. No record of appeal has been filed since then. Further, no submissions were filed by the Appellant in this appeal.
26. I am alive to the fact that there is no prescribed time limit as to when a record of appeal should be filed. Section 79 G of the *Civil Procedure Act* applies to the filing of the memorandum of appeal. The record of appeal can always be filed later after the memorandum of appeal has been served on the respondent and before the appeal is listed for directions under Order 42 Rule 13 of the Civil Procedure Rules.
27. However, that rule leaves no doubt that ideally, the record of appeal should be filed soon after service of the memorandum of appeal to pave way for fixing of a mention date for the purpose of giving directions on hearing of the appeal. Further, the Appellant having failed to file any submissions in this matter, there is nothing for this court to consider.
28. In the case of *Kimathi alias Kimathi Murithi v KWK (Minor suing through FKR) (Civil Appeal E037 of 2022) [2024] KEHC 776 (KLR) (31 January 2024) (Ruling)* where no submissions were filed as is the case herein, the court stated as follows; -

“The record is clear that the Appellant did not file any submissions and therefore, as aptly put by the Respondent, there was nothing for the trial court to consider.”
29. In this case, the appeal is simply not prosecuted by the Appellant and is hereby dismissed with costs to the 1<sup>st</sup> Respondent who participated in this appeal.
30. It so ordered.

**SIGNED DATED and DELIVERED IN VIRTUAL COURT THIS 14<sup>TH</sup> DAY OF NOVEMBER 2024**

**ADO MOSES**

**JUDGE**

In the presence of:

Moses – Court Assistant

..... for the Appellant

.....for the Respondent

