



Britam General Insurance Limited v Musili t/a Musili Mbiti & Associates Advocates (Civil Appeal E1312 of 2023) [2024] KEHC 15756 (KLR) (Civ) (6 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15756 (KLR)

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

CIVIL

CIVIL APPEAL E1312 OF 2023

RC RUTTO, J

DECEMBER 6, 2024

BETWEEN

BRITAM GENERAL INSURANCE LIMITED APPELLANT

AND

**RADFORD MBITI MUSILI T/A MUSILI MBITI & ASSOCIATES
ADVOCATES RESPONDENT**

(Being an Appeal from the Ruling of Hon. C. K. Cheptoo (P.M) dated and delivered on 7/11/2023 at Nairobi Chief Magistrate's Court in CMCC No. E12069 of 2021)

JUDGMENT

1. The appellant seeks to set aside and/or vary the ruling in CMCC NO. E12069 OF 2021, Nairobi rendered on 7/11/2023, and to have its list and bundle of witnesses and documents in Milimani Commercial Court Suit No. E12069 of 2021 be deemed to have been filed out of time.
2. In the said case, the appellant, in order to stop execution process, issued payment remittance advice of Kshs. 3,448,086.96/= as payment of the decretal amount owed to the Estate of the late Isika Musili (the respondent's client) in Milimani Civil Suit No. E6340 of 2020 Musili Malonza & Makasi Musili v Britam General Insurance Co Ltd. As a result of this, the respondent proceeded to inform its client that the claim was settled and invited the family members of the Estate to attend chambers on 7/5/2021 for collection of the sums recovered.
3. The family members attended chambers as advised but when the respondent attended to his Banker's for transfer of the money to its clients, it was informed that no money had been paid into the account by the appellant as represented. That the clients were furious and accused the respondent of lying, misusing and stealing the money and caused havoc at the respondent's chambers. The respondent thus filed the suit at the lower court and contended that the appellant's fraudulent issuance of the payment



remittance defamed the respondent. The respondent prayed for damages, aggravated damages, costs and interest.

4. When the matter came up for hearing on 7/11/2023, the appellant informed court that they had filed their documents out of time and prayed that they be part of the record. Further they stated that the documents were a replica of the plaintiff's list of documents and were filed as per the court's order issued on 15/3/2023. The respondent opposed the application on grounds that on 15/3/2023, the appellant was granted leave to file their documents within 14 days and failed to do so and did not subsequently seek to extend the leave.
5. Vide a ruling delivered the same day, the trial court declined to admit the documents and proceeded to expunge the documents filed on 6/11/2023 for reasons that the same were filed out of time and without leave of court. The trial court then proceeded with hearing of the plaintiff case to conclusion and subsequently closed the defendant's case and gave directions on filing of submissions.
6. The appellant being dissatisfied with the proceedings file this instant appeal on grounds, THAT;
 - a. The trial court erred in law and in fact by striking out the appellant's list of witnesses and bundle of documents for having been filed without the leave of the court.
 - b. The trial court erred in law and in fact by failing to allow that the filed and served bundle of documents and witness statement dated 3rd November 2023 be considered as having been properly on record.
 - c. The trial court erred in law and in fact when she allowed for the hearing to proceed without having the Appellant's witness statement and bundle of documents on record thereby prejudicing the appellant's case.
7. This appeal was canvassed by way of written submissions. The appellant filed submissions dated 19th June 2024 in support of the appeal whereas the respondent's were dated 8th July 2024. The submissions are summarised below;

a.Appellant's submissions

8. The appellant sets out three issues for determination namely; whether the court has discretion to allow the appellant's list of witnesses and bundle of documents to be filed out of time; whether the filing of appellant's list of witnesses and bundle of documents is prejudicial to the respondent and whether the evidence in question is relevant to the facts in issue.
9. Articles 50(1) and 159(2) of *the Constitution*; Sections 1A, 3A and 95 of the *Civil Procedure Act* as well as the case of Nicholas Kiptoo arap Korir Salat v IEBC & 6 Others (2013)eKLR to urge that the court is mandated to consider the overriding objective in civil litigation. That courts should consider aspects like delay, costs, and prejudice likely to be occasioned to the parties should the court strike out the offending documents. While relying upon the case of Githere v Kimungu (1976-1985) E.A 101 they urged this court not to be far bound by the rules but focus on justice and allow the appellant's list of witness and bundle of documents to be filed out of time
10. On the second issue the appellant submitted that no prejudice will be suffered since the respondent can be allowed time to peruse the documents and further that the documents are a replica of the respondent's list and cannot therefore be prejudicial to their case.
11. On the third issue, the appellant submitted that the case is hinged on the expunged list of witnesses and bundle of documents hence it will be in the best interest of justice for this court to allow the expunged documents as the same are relevant in determining the issue before the trial court. To buttress this point



reference was made to numerous authorities including *Nicholas Randa Owano Ombija v Judges and Magistrates Vetting Board* (2012)eKLR; *Okiya Omtata Okoiti & 2 Others v Attorney General & 4 Others*(2021) eKLR and *John Muriithi & 8 others v Registered Trustees of sisters of mercy (Kenya) t/ a the Mater Misericordiae Hospital & another* (2012) eKLR. They urged the court to allow the prayers in the memorandum of appeal.

a. Respondent Submissions

12. In response, the respondent submitted on several issues as follows: On whether the appeal is properly on record, it was their submission that this appeal is against Order 42 Rule 1 (1) and (2). They contended that such an appeal does not lie as of right. That the Order is couched in mandatory terms and required the appellant to seek leave of the court before filing the appeal and since this was not done, this court should strike out the appeal in limine. To support this, reference was made to the case of *Gitau v Kamau* ([*Civil Appeal E067 of 2021*](#)) (2022)KEHC 10337 (KLR) (14 March 2022) ruling.
13. The respondent also submitted that the trial court's exercise of her discretion was fortified by the law and facts of the case. Further that the enlargement of time to allow documents out of time is an equitable relief and the principles of equity should apply. It was their submission that in this instance, the appellant does not deserve the equitable relief due to his previous conduct. They urged the court to be guided by the holding in the case of *Jayatilaiya Kakaiya v Cheruiyot & 5 others* (Environmental & Land Case E394 of 2021)(2022)KEELC 2669 (KLR) (23 June 2022).
14. Further, it was submitted that the important issue to interrogate was whether the appellant's right to be heard in the suit was infringed vide the ruling that expunged the documents filed out of time and without leave. They contended that the appellant was granted sufficient opportunity to file their documents and the failure to file was a conscientious election by it not to present any evidence during trial. They urged the court not to interfere with the decision of the trial court and dismiss the appeal.

Analysis and determination

15. This being a first appeal, this Court is reminded of the provisions of section 78 of the [*Civil Procedure Act*](#) and its duty is to re-evaluate and assess the evidence in order to make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. The foregoing duty was succinctly stated by the Court of Appeal in the case of *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 and *Peters v Sunday Post Limited* [1985] EA 424).
16. After a careful analysis of the record of appeal and the parties' submissions, the main issue for for determination is whether the trial court erred in declining to admit the documents filed on 6/11/23 out of time and for proceeding to expunge them from the court record.
17. From the record it is evident that on 15/3/2023, the appellant was granted 14 days leave to file and serve their documents and a hearing date was set for 16/8/2023. On the said hearing day of 16/8/2023, it is noted that the 14 days leave granted had lapsed yet the appellant had not complied with the directions. While being the party at fault, he sought an adjournment not to proceed with the hearing. The adjournment was granted, and hearing was rescheduled to 7/11/2023. Notably, no application was made by the appellant for fresh leave to file their documents.
18. On, the 7/11/2023 when the matter came up for hearing, the appellant informed court that it had filed and served the witness statements and bundle of documents the previous day (6/11/2023) without leave and wanted the same to be considered properly on record.



19. This court takes notice of the none compliance with the court’s direction by the appellant. In the case of B vs. Attorney General [2004] 1 KLR 431 when Ojwang, J (as he then was) opined as follows on this blatant disregard of court directions: -

“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”

20. Based on the above, it is trite that court orders are not made in vain. The appellant herein was granted leave to file the documents within 14 days from 15/3/2023. Instead of complying, it went into slumber for almost 8 months and only filed the documents hours before the hearing commenced and provides no explanation for such delay. The time they had been granted within which to file, had even lapsed when they ‘sneaked in’ their documents. Upon that un-procedural filing, the appellant then moved the court to ‘sanitize its improperly filed documents by ‘deeming them duly filed!’ The trial court exercised its discretion and declined that invitation and this Court finds no fault in it.

21. This court makes reference to the binding jurisprudence in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR where the Supreme Court opined that an act done beyond the time set out and without leave of court is a nullity. Further where time has lapsed, a party has to first seek extension of time and only after such extension has been granted, that which ought to have been done within the lapsed time-frame can now be done. In essence, the apex court cautioned against the crafting and invocation of the “deem principle”. It stated:

“By filing (an appeal) out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.”

22. Consequently, I do agree with the trial court that the appellant had a chance to file their documents and failed to do so without giving any reason for non-compliance of the timeline given. It would have indeed been prejudicial to the respondent to allow the documents at the last minute when their witnesses were already in court noting that the appellant had already been granted two previous adjournments.

23. For those reasons, I find no good reason to interfere with the trial court’s ruling. Noting that the appellant had not filed any documents, the trial court was right in closing the defendant’s case at that juncture. It is trite that he who comes to equity must do equity. The appellant was over-indulgence but remained complacent. It sought several adjournments, but when granted, it went to sleep and failed to comply with court directions and timelines. It then turned around and filed documents hours before the hearing and expect them to be admitted on record as a matter of right and still be granted yet another adjournment. The trial court rightfully found that justice delayed is justice denied and allowed the appellant to continue its slumber. Having made its bed, the appellant had no choice but to lay in it.

24. I also note that before this Court, the appellant submitted that “no prejudice will be suffered since the respondent can be allowed time to peruse the documents and further that the documents are a replica of the respondent’s list and cannot therefore be prejudicial to their case”. It therefore emerges that part of the documents that the appellant sought to introduce, it admits that they were already on record.

25. The upshot is that the memorandum of appeal dated 29/11/2023 is with out merit and the same is dismissed with costs to the respondents. It naturally follows that the ruling delivered on 7/11/2023 is upheld.

Orders accordingly



RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 6TH DAY OF DECEMBER 2024

For Appellant:

For Respondent:

Court Assistant:

