



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL DIVISION

CIVIL APPEAL NO. 314 OF 2019

STEPHEN NDUNGU KAMANDE.....1ST APPELLANT/APPLICANT

DURGA FEEDS LIMITED.....2ND APPELLANT/APPLICANT

VERSUS

STEPHEN MURIUKI GEORGE

MONICAH IGOKI M'ITHINJI (Both suing as Administrators Ad litem of the Estate of

JOSPHINE MWENDWA and for Dependents.....RESPONDENT

RULING

The respondent Josephine Mwendwa was involved in a fatal accident on 13th October 2015. The respondent filed suit before the Chief Magistrate's Court Milimani seeking damages arising from the accident. The trial court found in favour of the respondent and awarded him over Kshs.3million as damages. The applicant filed this appeal. The respondent filed an application dated 6th July, 2020 seeking the dismissal of the appeal and release of Kshs.1,100,000 deposited in court. Justice L.N. Njuguna dismissed the application on 22nd October, 2020 and made the following order:-

- a) The Deputy Registrar-Civil Division/Civil Appeals to call for the lower court file to be forwarded to the High Court Civil Appeals Division within 14 days from this day.**
- b) The appellants shall prepare, file and serve their record of appeal within 14 days from the lapse of the 14-day period in order a).**
- c) Thereafter, the appellants shall move the Deputy Registrar for listing of the appeal for directions on hearing and shall ensure to prosecute their appeal within 90 days from the**
- d) date of the directions failing which the appeal shall stand dismissed.**
- e) Costs of the Motion to abide the outcome of the appeal.**

The record of appeal was filed by the firm of Kimondo Gachoka & Co. Advocates. In her ruling, Justice L.N. Njuguna observed that the firm of advocates was improperly on record and struck out all documents filed by the said firm. The respondent filed an application dated 11th December 2020 seeking the following orders:-

- 1. THAT a declaration does and hereby issues that the Appellants have failed to comply with the Ruling of this Honourable Court dated 22nd October, 2020.**
- 2. THAT the Appeal be and is hereby dismissed for want of prosecution.**
- 3. THAT the sum of Kenya Shillings One Million and One Hundred Thousand (Kshs. 1,100,000/=) deposited in this Honourable Court as security be released immediately to the Applicants herein.**

4. THAT the costs of this Application and of the Appeal be awarded to the Applicants.

There was no response to the application by the appellant who was served and on 4th March 2021 the court granted the respondent's application dated 11th December 2020.

The appellant has now filed the application dated 10th May 2021 seeking the following orders:-

- 1. THAT this Application be and is hereby certified urgent and heard ex parte on priority basis in view of its urgent nature and service of the same be dispensed with in the first instance**
- 2. THAT the Honourable Court be pleased to grant leave to the firm of KIMONDO, GACHOKA & COMPANY ADVOCATES to come on Record as Advocates for the Appellants/ Applicants herein in place of the firm of KAIRU AND MCCOURT ADVOCATES.**
- 3. THAT pending the hearing and determination on this Application *inter-partes* there be a stay of execution of the Judgment of the Honourable A.M. Obura Senior Principal Magistrate on 24th May, 2019 in Cmcc No. 2331 of 2017 Nairobi; (Stephen Muriuki and Anor. V. Stephen Ndung'u Kamande and Anor.) and all consequential and incidental orders and proceedings.**
- 4. THAT there be a stay of orders for release of security deposited in court issued on 04.03.2021.**
- 5. THAT this appeal being CIVIL APPEAL 314 OF 2019 STEPHEN MURIUKI & DURGA FEEDS LIMITED V MONICAH IGOKI (Suing as the Administrators of the Estate of the Late JOSEPHINE MWENDWA (DCD) be and is hereby reinstated for hearing and determination in the normal way.**
- 6. THAT this Honourable Court do make any such further Order (s) and issue any other relief it may deem just to grant in the interest of justice.**
- 7. THAT the costs of the application be in the cause.**

The application is supported by the affidavit of Fredrick Ragui Kariuki advocate sworn on even date. Counsel for the respondent filed a notice of preliminary objection dated 14th may, 2021 raising the issue that the firm of Kimondo Gachoka & Co. Advocates are improperly on record and a replying affidavit sworn on 14th May 2021 by Edwin Omulama Onditi.

Counsel for the applicant submitted that when Justice Njuguna delivered her ruling relating to the dismissal of the appeal on 22nd October, 2020 he just heard the orders dismissing the application and did not hear the other orders on the processing of the appeal. The appeal was later struck out as the firm of Kimondo Gachoka was not on record. There was delay in obtaining the ruling. The appellant is now ready to prosecute the appeal as the record of appeal is ready. It is further submitted that counsel for the respondent has been serving the firm of Kimondo Gachoka & Co. Advocates with documents.

Counsel for the respondent opposed the application. It is submitted that Justice Njuguna read the entire ruling and that it was the duty of counsel for the appellant to have extracted the orders as per the ruling. The firm of Kimondo Gachoka had not filed an application seeking to come on record and that is why the appeal filed by that firm was struck out. The proper firm of advocates was that of Kairu & McCourt. It is submitted that the application is an abuse of the court process.

The application seeks two main orders namely that the firm of Kimondo Gachoka be allowed to come on record and that the appeal be reinstated. The effect of the ruling by Justice L.N. Njuguna is that the firm of Kimondo Gachoka & Co. Advocates was to approach the court through the correct procedure and that a fresh record of appeal was to be filed. Further, the deputy registrar was directed to call for the lower court file within 14 days and the appellant was to file the record of appeal within 14 days. Directions on the appeal were to be given and the appeal was to be prosecuted within 14 days. The final orders of Justice L.N. Njuguna's ruling are given at paragraph 45(page 18) while the orders striking out the documents filed by the firm of Kimondo Gachoka & Co. Advocate are stated at paragraph 31 (Page 13). It is not clear whether the Honourable Judge read the entire ruling or not. Paragraph 45 indicated that the motion was struck out but continued to state the other orders meant to expedite the determination of the appeal.

The record shows that parties herein entered into a consent whereby part of the decretal sum totaling Kshs.1,900,000 was paid directly to the respondent while the balance of Kshs.1,100,000 is deposited in court. In my view, the appeal has been affected by technical procedures as to which firm of advocates is properly on record. The current application seeks to rectify the anomaly and have the appeal heard on its merit. I see no prejudice on the part of the respondent as the balance of the decretal sum is already deposited in court. The respondent has already tested the fruits of his judgment having been paid Kshs.1.9million. The allegation that the application is meant to delay the enjoyment of his judgment cannot be true. The record of appeal has been filed and directions on the appeal can be given.

I do find that there is no attempt to frustrate the respondent from accessing the balance of the decretal sum. The appeal ought to be heard on its own merit in the interest of justice. Counsel for the appellant cannot be faulted for the delay in prosecuting the appeal. I do further note that counsel for the respondent served the firm of Kimondo Gachoka & Co. Advocates with the application dated 11th December, 2020 which sought the release of the amount deposited in court. The said firm of advocates was not properly on record. The consent which led to the part payment of the decretal sum to the respondent and deposit of the balance in court was recorded on 15th August 2019. The said consent was procured by the firm of Kimondo Gachoka advocates whose documents were later struck out from record. The best way forward is for the firm of Kimondo Gachoka & Co. Advocates to come on record and prosecute the appeal. It will be illogical to disallow the advocates to come on record yet counsel for the respondent has all along dealt with that firm.

The upshot is that the application dated 10th May 2021 is merited and the same is granted as prayed. Costs shall follow the outcome of the appeal.

Dated and Signed at Nairobi this 13th day of **July**, 2021.

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S. CHITEMBWE

JUDGE