



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 60 OF 2018

CONSOLATA MUTHONI KARIUKI.....APPELLANT/RESPONDENT

VERSUS

MARTIN MUTEMBEI KABURU.....1ST RESPONDENT/APPLICANT

CHRISTOPHER MURIITHI NJERU.....2ND RESPONDENT/APPLICANT

JAMES MWANGI.....3RD RESPONDENT/APPLICANT

R U L I N G

A. Introduction

1. This ruling is for the application dated 24th September 2019 in which the applicants seek to have this appeal struck out with costs or in the alternative the respondent be directed to deposit the judgement amount of Kshs. 842,525/= already paid to her by the applicants in a joint interest earning account pending the determination of the appeal.
2. A brief background of this case is that the trial court on the 28th September 2018 delivered judgement in favour of the respondent awarding Kshs. 723,900/= as damages as well as the costs of the suit. The same were settled by the applicants vide two cheques number 053378 and 053471 for Kshs. 723,900/= and Kshs. 118,625/= which the respondent's advocate took but refused to sign consent marking the matter as settled.
3. Being dissatisfied with the trial court's judgement, the respondent filed her memorandum of appeal dated 25th October 2018 based on 5 grounds that can be summarised as challenging the trial court's decision on the quantum awarded as being very low.
4. It is the applicants' case that by accepting the payments made to them, the respondent is subsequently stopped from making a further claim against the applicants and as such the filing of an appeal is frivolous, vexatious and an abuse of the court process.
5. In rejoinder it is the respondents case that the instant application is an afterthought as the instant appeal has been pending before court for more than a year with both parties attending court for that period and the applicant did not raise an issue.
6. The respondent further states that there is no law that stops a plaintiff from appealing if the decretal sum is settled and further that the settlement of the decretal amount was not conditional on the respondent not appealing especially where the appellant feels that the awarded sum was inordinately low.
7. The respondent states that it would be technically impossible to deposit the decretal sum in a joint interest earning account as the same has been appropriated for the benefit of the minor.
8. It is further stated that an order for security of costs is purely a discretion of the appellate court and further the applicants have not demonstrated that the respondent will not be able to meet the costs in the unlikely event the appeal does not succeed.
9. The parties filed submissions to dispose of the matter.

B. Applicants' Submissions

10. It is submitted that the respondent is stopped from re-opening the matter in appeal having accepted the cheques paid towards settlement of the decretal amount. Reliance is placed on the case of **Nairobi Civil Appeal No. 162 of 2015, John Mburu v Consolidated Bank of Kenya [2018] eKLR.** It is further submitted that the respondent by their conduct waived their right to appeal as their conduct signified to the

applicants herein that they wanted the judgement decree settled.

11. It is further submitted that the respondent's conduct led the applicants to believe that the settlement was final and conclusive and thus for her to turn around and feign dissatisfaction with the judgement is extremely malicious and consequently the appeal ought to be struck out with costs.

12. It is submitted that the respondent has not offered any security in respect of the appeal yet she admits to have utilised the decretal sum and this exposes the applicants in case the instant appeal is not successful.

C. Respondent's Submissions

13. It is submitted that there is no requirement in law that the party who thinks the monetary award is fair cannot settle the amount if the judgement creditor wishes to appeal and further that the settlement of the amount was not conditional on the fact that the respondent should not appeal.

14. It is further submitted that the applicants' ought to have sought stay of execution of the decree failure to which the respondent was not liable for accepting the payment pending appeal considering that she is taking care of an orphaned child who is in need.

15. It is further submitted that the applicants are not equitable litigants as they do not seem to have regard to the welfare of the minor and expect the respondent to have declined the payment of the ward.

16. It is also submitted that the appeal has been in court for over two years and that the applicants had not explained why they waited for the appeal to be admitted and record of appeal filed before filing the instant application.

17. It is submitted that the affidavit in support of the instant application is sworn by the applicants' advocate which makes him a witness and thus personalises the case making it a ground for dismissal of the instant suit. Reliance is placed on the case of **Nairobi HCCC No. 1632 of 1997 Simon Isaac Ngui v Overseas Courier Services Co. Ltd.**

D. Analysis & Determination

18. I have considered the application dated 24th September 2019, the response and submissions filed by the parties herein as well as the authorities relied on. Two issues, in my considered view, emerge for determination;

a) Whether an advocate can swear an affidavit on behalf of his client and therefore whether the supporting affidavit by the applicant's counsel is sustainable in law.

b) Whether the appeal should be struck out for being incompetent.

c) Whether the respondent's acceptance of the decretal sum settled fetters her right to appeal.

19. On the issue number one, the established principle of law is that advocates should not enter into the arena of the dispute by swearing affidavit on contentious matters of fact. By swearing an affidavit on contentious issues, an advocate thus makes himself a viable witness for cross examination on the case which he is handling merely as an agent which practice is irregular. In **Simon Isaac Ngugi v Overseas Courier Services (K) Ltd 1998 eKLR and Kisya Investments Ltd & Others v Kenya Finance Corporation Ltd**, it was held that .

“.....it is not competent for a party's advocate to depose to evidentiary fact at any stage of the suit”.

20. In addition, Rule 9 of the Advocates Practice Rules prohibit advocates from appearing as an advocate in a case where he might be required to give evidence either by affidavit or even orally. By swearing an affidavit on behalf of his client where issues are contentious, an advocate's affidavit creates a legal muddle with untold consequences.

21. However, where an affidavit by an advocate raises issues of law and fact which are within his knowledge having been an advocate handling the suit on behalf of the party on whose behalf the affidavit is sworn there is absolutely no mistake or error in the affidavit that can render it defective.

22. Under ***Order 19 Rule 3 of the Civil Procedure Rules:***

3(1) “affidavits shall be confirmed to such facts as the deponent is able of his own knowledge to prove.”

23. The respondent has not, as I have stated above, demonstrated that the said affidavit of Mr. Martin Njeru Nyaga advocate offended the best rule evidence of Order 19 Rule 3(1) above.

24. Further, it is not shown which of the specific matters contained in the said affidavit of Mr. Martin Njeru Nyaga advocate would require him to be cross examined on under Order 19 Rule 2 of the Civil Procedure Rules, thereby offending Rule 9 of the Advocates Practice Rules and or which of the matters deposed qualify as being scandalous, irrelevant or oppressive to warrant being struck out under Order 19 Rule 6 of the Civil Procedure Rules.

25. In addition, it was never contended that the affidavit of Mr. Martin Njeru Nyaga advocate contained arguments thereby being technically unsound.

26. That the facts deposed to by Martin Njeru Nyaga the advocate for the respondent are within knowledge, being the advocate seized of this case on behalf of the applicants. Furthermore, there is no law expressly prohibiting an advocate from swearing an affidavit on behalf of his client, on matters the said advocate has personal knowledge of, whether informed by his client or arising from the proceedings in the cause. Provided the matters deposed are not controversial and are within the knowledge of the counsel, swearing an affidavit on behalf of the client is in order.

27. It is my considered opinion that the affidavit of Martin Nyaga Njeru is properly on record and is hereby retained.

28. Should the respondent be estopped from pursuing her appeal? Estoppel is said to be a principle of justice and equity. In the case of **748 Air Services Limited v Theuri Munyi (2017) eKLR**, the Court of Appeal considered estoppel by conduct and estoppel by election or waiver. The latter is an intentional relinquishment or abandonment of a known right or privilege. A person who is entitled to rely on a stipulation existing for his benefit in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. In the case of **Sita Steel Rolling Mills Ltd v Jubilee Insurance Company Ltd [2007] eKLR**, Maraga, J. (now Chief Justice) stated: -

“A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one’s guard and leading one to believe that the other has waived his right.”

29. As for estoppel by conduct, in **D & C Builders vs Sidney Rees (1966) 2 QB 617** Lord Denning, M.R. stated: -

‘It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms involving certain legal results, afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or be kept in suspense, or held in any event, the person who otherwise might have enforced those rights will not be allowed to enforce them when it would be inequitable having regard to the dealings which have taken place between the parties.’

30. It is the applicants’ case that by accepting the payments made to them, in terms of settlement of the decretal sum, the respondent is subsequently estopped from making a further claim against the applicants in the form of advancing the instant appeal and as such the filing of this appeal is frivolous, vexatious and an abuse of the court process.

31. In my considered view, that the estoppel referred to in the **D & C Builders case (supra)** is a situation where parties have on their own volition entered into a contractual obligation. In this application, the applicants were judgement debtors who chose to settle the decretal amount which in itself does not preclude the respondent herein from pursuing her appeal where she feels dissatisfied with the trial court’s judgment.

32. The right to appeal is a constitutional right enshrined under Article 50 of The Constitution that provides for the right to a fair trial and to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court and thus the same cannot be fettered by the settlement of a decretal sum where the dissatisfied party feels the same was inordinately low.

33. In my considered view, the applicant has not demonstrated sufficient reason for striking out this appeal.

34. The upshot of the above is that the application dated 24th September 2019 lacks merit and it is hereby dismissed.

35. Costs to be in the cause.

36. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF JANUARY, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Mugambi for Respondents

Ms. Muriuki for Njeru Nyaga for Applicants