



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J)

MISC APPLICATION NO. 45 OF 2018

SAMMY MBUGUA NJUGUNA.....PLAINTIFF/RESPONDENT

VERSUS

WAKALABA AGENCIES LIMITED.....1ST DEFENDANT/ RESPONDENT

JONATHAN KIIO.....2ND DEFENDANT/ RESPONDENT

SAMTERRY INVESTMENT LIMITED.....3RD DEFENDANT/ APPLICANT

PAUL GITHAMBO.....4TH DEFENDANT/ APPLICANT

JUDGMENT

1. The plaintiff/ respondent was injured in an accident on 21st January, 2008, and sued all four defendants in CMCC No 534 of 2008. In a judgment delivered by Hon R Kitagwa on 24th August 2017 the trial Magistrate found all the defendants 100% liable for the accident jointly and severally.
2. The 3rd and 4th defendants filed an application for review of the judgment, but the application was dismissed on 23rd April, 2018 by Hon V. Chianda. They are the applicants in this application.
3. The 1st and 2nd defendants have been named as applicants, but they are not involved in this application having never entered appearance and judgment in default having been entered against them. They should correctly be referred to as respondents in this application, and I direct that they are so referred to.
4. Dissatisfied with the said ruling, the applicants seek to appeal against the same, and they have annexed to the application a draft memorandum of appeal against the said ruling.
5. The applicants' motion dated 10th July, 2018 seeks a mixed-bag of orders as follows:
 1. *Leave to appeal out of time against the ruling delivered on 23rd April 2018 by Honourable V. Chianda, Senior Resident Magistrate, in respect to the judgment delivered on 24th August, 2017 and all consequential orders thereto.*
 2. *Stay of execution of the judgment and decree in Naivasha Chief Magistrate Court Civil suit No. 534 of 2008 pending hearing and determination of this application.*
 3. *Stay of execution of the judgment and decree in Naivasha Chief Magistrate Court Civil suit No. 534 of 2008 pending hearing and determination of the appeal.*
 4. *Interpretation on the issue of liability as apportioned in the judgment/decree delivered on 24th August, 2017 in Naivasha CMCC 534 OF 2008 as against the Defendants / Applicants herein.*
6. The applicants state that the plaintiff was awarded a total sum of Kshs, 213,000/=, which in addition to costs, amounts to a total award of Kshs. 305,000/=. The 3rd and 4th applicants state that they have already paid an amount of Kshs. 152,750/= which they deem to be their half share of the judgment award, and that the rest of the amount should be settled by the 1st and 2nd defendants. They seek stay of execution to

prevent the Plaintiff from executing against them for the balance of 50% of the judgment award.

7. They argue that that having settled the part of the judgment it was fully discharged from liability and, therefore, the plaintiff should pursue the 1st and 2nd defendants for the balance of the decretal sum of apportioned by the trial court.

8. The plaintiff's position is simply that he was entitled to pursue any of the defendants against whom the judgment was rendered to settle the decree in full.

9. From a perusal of the lower court file, the 1st and 2nd defendants did not enter appearance or file a defence. Thus, interlocutory judgment was entered against them. The applicants argue that the 1st and 2nd defendants should be compelled to pay the remaining sum of money. They also seek interpretation of the judgment on the issue of liability as apportioned by the judgment delivered on 24th August 2017.

10. At the same time, the applicants being dissatisfied by the Ruling of Hon V Chianda issued on 23rd April 2018 seek to appeal out of time against that ruling.

11. Having considered the submissions of the parties and upon perusal of the lower court file, I think the central issue concerns the meaning of the terms '*jointly and severally*' used in the judgment.

Meaning of joint and several

12. This question was addressed in the case of **Republic v PS in Charge of Internal Security ex parte Joshua Paul [2013] eKLR**. The court held as follows:

“Clearly therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them.” (Emphasis supplied)

13. Joint and several liability entitles a judgment creditor to elect to recover the full amount of the debt from any one of the defendants or recover a share from each or any of them. By joint and several liability the defendants are each placed in law in the position where they are all exposed to the full amount or any share sought by the judgment creditor. If the creditor chooses to recover from only one defendant, such defendant is entitled to recover by way of reimbursement from the other defendants.

14. In this case the plaintiff was within his right in seeking the entire settlement from the 3rd and 4th defendant. Equally, the 3rd and 4th defendants have a right to seek reimbursement from their co-defendants once they have settled the entire decretal sum.

15. Accordingly, the applicants have no remedy against the plaintiff/ respondent from the judgment as worded unless the judgment were appealed from. Here, no appeal has been filed although there is an indication of an intention to appeal against the judgment.

Review and Appeal

16. The applicants state in their grounds supporting the application as follows

“e) the applicants are aggrieved by the Ruling seeking Review which was delivered on 23rd April, 2018, by the Honourable Magistrate V. Chianda, Senior Resident Magistrate in Naivasha Court Civil Suit No 534 of 2008 and now seek leave to appeal against both the Ruling and the Judgment out of time”

17. The 3rd and 4th applicants sought a review of the judgment of the lower court vide an application dated 29th September, 2017. It was argued before Hon Chianda who dismissed it with costs on 23rd April, 2018. The review was sought under the provisions of **Order 45** of the **Civil Procedure Rules**.

18. There is clear indication on the situations in which a review is tenable under **Order 45 Rule 1** which provides as follows:

“Order 45 Rule 1.

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some

mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

19. From the above provision it is clear that a party cannot seek to appeal both against a Judgment and also against a Ruling which reviewed that judgment. The applicants herein had an unimpeded right to either appeal against the said Judgment or apply to have it reviewed. Having exercised the right to a review, they lost the right of appeal against the same order.

20. Simply put, the applicants' application lacks merit and is for dismissal. The court further notes that this matter is fairly old having been first filed in 2008, about eleven years ago. This court will not entertain applications for leave to file matters out of time in suits which are old as that would result in encouraging undue delay in settling matters in court, contrary to the express expectation of expedition in the exercise of judicial authority under the Constitution

Disposition

21. In light of the foregoing, the application is dismissed with costs.

22. Orders accordingly.

Dated and Delivered at Naivasha this 14th Day of March, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. No representation for Kairu McCourt for the 3rd and 4th Defendants/Applicants
2. Chelangat holding brief for Mboga for the Plaintiff/ Respondent
3. No representation for 1st and 2nd Defendants/Respondents
4. Court Clerk - Quinter Ogutu