



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO.25 OF 2014**

**FRANCIS KIRWA MAGUT.....1<sup>ST</sup> APPELLANT/APPLICANT**

**SOLOMON KINOTI.....2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**GRACE AGISO.....RESPONDENT**

**RULING**

The Notice of Motion dated 20<sup>th</sup> February, 2014 brought by way of Notice of Motion under Order 12 Rule 7, Order 22 Rule 22(1) and Order 51 Rule 1 and 3 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act seeks the following orders:-

- a. That this appeal be consolidated with Eldoret HC Civil Appeal No.19 of 2014, Eldoret HC Civil Appeal No.20 of 2014, Eldoret HC Civil Appeal No.21 of 2014, Eldoret HC Civil Appeal No.22 of 2014, Eldoret HC Civil Appeal No.23 of 2014 and Eldoret HC Civil Appeal No.24 of 2014 for purposes of hearing and determination of this application and appeal.
- b. That this Honourable Court be pleased to set aside the ruling delivered by the Honourable Mosiria Principal Magistrate, Kapsabet given on the 28<sup>th</sup> February, 2014 in Kapsabet CMCC No.23 of 2008.
- c. That this Honourable Court be pleased to order a stay of orders granted in the said ruling in this suit as well as in all those suits listed under paragraph 1(above), pending the hearing and determination of this application.
- d. That the costs of this application abide the outcome of the intended appeals.

The application is premised on the following grounds:-

- a. That this suit and the aforementioned suits arose from the same cause of action being the alleged road traffic accident which occurred along Kapsabet Chavakali road near Tindiyo area involving Motor Vehicle Registration Number KAE 213F on 24<sup>th</sup> November, 2007 in which the plaintiffs alleged to have been passengers at the time of the alleged accident.
- b. Judgments were delivered on 24<sup>th</sup> September, 2013 and the appellants/applicants herein were held 100% liable.

- c. **The appellants/applicants herein having been dissatisfied with the said judgments filed Memorandum of Appeals.**
- d. **The appellants/applicants herein filed an application to stay the said judgments pending the outcome of the appeal of Honourable Mosiria Principal Magistrate Kapsabet, allowing the application on condition that the appellants/applicants do pay the respondent herein half decretal amount plus costs and deposit the balance of the decretal sum in a joint interest earning account.**
- e. **If the appellants/applicants pay the sum ordered by the Honourable Magistrate to the respondents the appeals will be rendered nugatory as the appellants/applicants are seeking to dispute the respondents involvement in the said accident.**
- f. **If the decretal amount is paid over to the respondents, they would be in no position whatsoever to refund the same if the intended appeals are successful as they are of unknown means.**
- g. **The appellants/applicants are ready, willing and able to furnish such reasonable security as this Honourable court may deem fit or in a joint account with the respondent.**
- h. **The stay of execution lapses on 27<sup>th</sup> February, 2014.**
- i. **The appeal has a high chance of success.**
- j. **This application ought to be granted in the interest of Equity of Justice.**
- k. **This application will not occasion any prejudice to the respondent.**
- l. **This application has been done without any unreasonable delay.**

The application was further supported by the annexed supporting affidavit of **Olive Njugunaa** legal officer with Directline Assurance Company Ltd who were the insurers of motor vehicle registration No. KAE 213 F at whose instance the suit was defended. In brief she deposed that the applicants were ready and willing to deposit the entire decretal sum in court or in a joint interest earning account with the respondent. She added that the application was brought without unreasonable delay and unless the same is heard and the orders stayed the applicants would suffer irreparably and the appeal would be rendered nugatory.

In opposing the application, the respondent filed a replying affidavit sworn by one Francis Omondi Advocates on the 10<sup>th</sup> March, 2014. He has the conduct of the instant matter on behalf of the respondent. He deposed that the appellants were liable to compensate the respondent for injuries suffered in a road accident on the 24<sup>th</sup> November, 2007 as clearly set out in the judgment of the Principal Magistrate of Kapsabet. That further the applicants acknowledged that they were aware of the Civil Appeals filed at the Eldoret High Court being Appeal Nos. 134, 135, 136, 137, 138, 139 and 140 of 2013 against the judgments and decrees in Kapsabet PMCC Nos. 23, 24, 25, 26, 27, 28 and 29 of 2008. That after filing the said appeals the applicants made an application for stay of execution pending the hearing and determination of the said appeals at Kapsabet in PMCC No. 29 of 2008.

The said application was heard inter partes and a ruling delivered on 28<sup>th</sup> January, 2014 in which the learned trial magistrate granted a stay of execution on condition that:-

***“The appellants to pay to each of the respondent half of the decretal sum within 30 days of the order and the other half to be deposited in an interest earning account in the joint names of counsel for the parties within 30 days and the assessed costs of the suit be paid to the respondents within 30 days of the order.”***

The applicants were aggrieved by the above order which gave rise to the instant application. On the part of the respondent, she contends that the remedy for the applicants would have been to seek to set aside this conditional order for stay in the subsisting appeals rather than file fresh appeals. That in any event, even if the stay order was appealable, the applicants failed to obtain leave to lodge such appeal and when they did it, it was out of time rendering it incompetent. This precipitated the respondent to raise a preliminary objection seeking the appeals to be struck out and the interim orders discharged.

The application was disposed of by way of filing written submissions. Those of the applicants are dated 12<sup>th</sup> May, 2014 and were filed on 24<sup>th</sup> June, 2014. They have submitted that the main prayer is for setting aside the ruling delivered by the learned magistrate on 28<sup>th</sup> February, 2014 giving a stay of execution with the conditions therein. To this end, the application ought to be allowed by virtue of **Order 42 Rule 6 of the Civil Procedure Rules** which sets out the conditions which an applicant must satisfy for an order of stay of execution to issue. In this regard, it was submitted that they have demonstrated they stand to suffer substantial loss if the order is not granted, that the application has been brought without undue delay and that they are ready and willing to deposit security for the due performance for the decree. They further submit that the issue at hand is not whether the respondent will be in a position to repay the entire decretal sum in the event that the appeal(s) is/are successful. That what is at stake as was held in the case of **Kenya Hotels Properties Ltd. Vs Willisden Investments Ltd. and 4 others (2013) @ KLR** is that the evidential burden shifts to the respondent to show her ability to refund the decretal sum.

On the issue of delay, the applicant submitted that they were only one day late to lodge the application which cannot be considered as unreasonable delay and that in any even procedural technicalities should not be used as a bar to administering justice.

The respondent's submissions are dated and filed on 30<sup>th</sup> June, 2014. It was submitted that the appeal was filed out of time citing that the 30 day period within which it would have been filed lapsed on 26<sup>th</sup> February, 2014 while the same was filed on 27<sup>th</sup> February, 2014. That there was no indication that leave was sought to file the appeal out of time in which case Article 159 of the Constitution cannot bail them out. It is submitted that no appeal lies from the ruling or order of the Magistrate of 28<sup>th</sup> January, 2014. In that respect, **Order 42 Rule 6** did not provide that an appeal would be preferred in another appeal file. And that the proper procedure would have been to file afresh application to the same court that issued the orders seeking to set aside the orders issued therein. The respondent shall, in that regard be seeking to have the appeal struck out.

On the merit of the application, the respondent submitted that, the application is incompetent by virtue of prayer No.3 as drafted in the Notice of Motion which seeks to set aside a ruling that was delivered on 28<sup>th</sup> February, 2014 whereas the application is dated 20<sup>th</sup> February, 2014. And effectively the order of the learned trial magistrate had lapsed by an effluxion of time by the time the appeal was being filed hence there is nothing to set aside.

The respondent further submitted that the applicants are precluded from seeking to set aside the orders of 28<sup>th</sup> February, 2014 because by a letter they had expressed their intention to comply with the said orders.

On the whole, the respondent submitted that the balance tilted towards not granting the orders as was held in the case of **M/S Portreitz Maternity –Vs- James Karanga Kabia Civil Appeal No.63 of 1997** where the court had this to say:-

***“that right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”***

I will first highlight on issues raised on the Notice of Preliminary Objection by the respondent dated 8<sup>th</sup> March, 2014. The same highlights the following three issues:-

- i. **The instant appeal was filed out of time without leave of court and is therefore incompetent.**
- ii. **The ruling delivered on 28<sup>th</sup> January, 2014 against which this appeal has been preferred was pursuant to an application for stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules from which no appeal lies.**
- iii. **Without prejudice to (2) above the appeal herein was filed without leave of court as envisaged under Order 43 Rule 2 of the Civil Procedure Rules as read with Order 43 Rule 1(w) of the said rules.**

On the first aspect, it is noteworthy that no party to this application is consistent on the dates of the ruling of the learned trial magistrate that is subject of the same. From the Memorandum of Appeal filed on 27<sup>th</sup> February, 2014, it is clearly indicated that the appeal is arising from a ruling delivered on 28<sup>th</sup> February, 2014 in Kapsabet CMCC NO.29 of 2014. On the same note, the word February against the date is cancelled and replaced with the word January in hand. In the Notice of Motion, the applicants have clearly indicated under prayer 3 that the magistrate's order sought to be set aside is one given on 28<sup>th</sup> February, 2014. But in the submissions they have referred to an order of 28<sup>th</sup> January, 2014. The respondent on the other hand, has referred to an order of 28<sup>th</sup> January, 2014 both in the replying affidavit and Notice of Preliminary Objection. In her submissions, she refers to an order of 28<sup>th</sup> February, 2014. This leaves the court totally uncertain of the exact date of the order appealed against and sought to be set aside in this application. My start point is from the Memorandum of Appeal. If indeed the printed date of the order appealed against is 28<sup>th</sup> February, 2014 and the amendment effected by pen to reflect 28<sup>th</sup> January, 2014 the attention of the court ought to have been drawn to that amendment. In lieu thereof, an application for amendment of the dates in the Memorandum of Appeal ought to have been sought. Moreover, there is no signature against the amendment which leaves the court doubtful as to who could have effected the amendments. Again even the applicants themselves appear not certain about that date as they bothered not to bring to the attention of the court of those anomalies. For the reasons I have indicated the court will go by the date of 28<sup>th</sup> February, 2014 because that is the date in print in the Memorandum of Appeal and also for the reason that nowhere in the application or this file the court has been furnished with a copy of the order against which to verify the dates the order was issued.

Having said so, it follows then that the order having been issued on 28<sup>th</sup> February, 2014, and the appeal having been filed on 27<sup>th</sup> February, 2014 ultimately renders the appeal incompetent. I vindicate this point with the fact that it is not clear how the appeal would have been filed a day before the ruling was delivered. And although Article 159 (2) (d) of the Constitution urges the court in exercising its judicial authority to administer the same without undue regard to procedural technicalities, the facts presented by the scenario herein cannot be salvaged by the said provision of the Constitution. That is to say, justice must be administered objectively and must be balanced such that the court does not appear to lean to salvage a dead case at the expense of dispensing impartiality. In this respect doubts are cast as to how the applicants learnt that an order would be issued against them prior to the date of the order which precipitated them to file an appeal a day before that order was issued. Without much ado then I need not delve into other issues raised comprehensively in the Preliminary Objection, safe to say that I do not think that the issue of filing the appeal out of time arises because I have already observed that the appeal was filed prior to the order being issued.

On merit of the application, under **Order 12 Rule 7** of the Civil Procedure Rules, the court may set aside or vary a judgment or order on such terms and conditions as may be just. In the present case, the applicants already expressed an intention of settling the judgments. In their submissions they indicated that they were to release three quarters of the decretal sum and deposit half of it while the respondent submitted that half was to be released and half was to be deposited. Let me state that these are assertions not capable of being ascertained as the court was not provided with documentary evidence. Be that as it may, this court has not been furnished with evidence that the respondent would not be in a position to refund the decretal sum as ordered by the trial magistrate. I think she carries the day because as observed by the then Hon. Justice Musinga in **Express Kenya Ltd. & Ano. -Vs- Charles Kipkoech Leting Civil**

**Appeal No.44 of 2005 (Kericho)** there appears not to be any dispute on liability as the appeal is preferred against the order on the amount payable to the respondents. I see no reasons then why the applicants should not adhere to the conditions set out by the learned trial magistrate.

In the result, the application herein must fail. The same is dismissed with costs to the respondent. The appeal herein is also struck out with costs to the respondent.

**DATED and SIGNED** on 22<sup>nd</sup> June, 2015.

**G. W. NGENYE – MACHARIA**

**JUDGE**

**DELIVERED** at **ELDORET** this 6<sup>th</sup> day of July, 2015.

**By G. K. KIMONDO**

**JUDGE**

**In the presence of:-**

1. No appearance for the appellants/applicants
2. Mr. Mwinamo for Mr. Omondi for the respondent