



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

Miscellaneous Civil Application 2 of 2009

DAKIANGA DISTRIBUTORS CO. LTD.....APPLICANT

VERSUS

JANE WANGUI MURAGE.....RESPONDENT

RULING

The applicant sought leave to appeal against the decree in **Kisii CMCC No.705 of 2005, Jane Wangui Murage vs Dakianga Distributors Ltd**, out of time. The judgment was delivered on 17th November, 2008, in the presence of Mr. Mbicha holding brief for Mr. Mbunde for the plaintiff and Mr. Kaburi holding brief for Mr. Omogeni for the defendant.

According to an affidavit sworn by Mr. Cosmas Chahenza, an advocate in the firm of Okong'o Omogeni & Co.Advocates, and who had the conduct of the aforesaid suit on behalf of the defendant, he learnt about the judgment on 18th December, 2008 which was the last working day for their firm for the year 2008. Subsequent to that he telephoned Mr. Kaburi advocate who informed him that he inadvertently failed to advise them of the judgment date and the outcome thereof. An affidavit by Mr. Kaburi advocate was also filed in support of the application and Mr.Kaburi stated that due to an oversight on his part he did not notify M/s Okong'o Omogeni about the date of the judgment and the contents thereof.

In the aforesaid suit, the plaintiff/respondent stated that she was a fare paying passenger in motor vehicle registration number KAM 107 G when the defendant's servant, agent and/or driver negligently managed the defendant's motor vehicle registration number KAP 829 W that he caused the same to lose control and collide with the motor vehicle in which she was travelling in. As a result the plaintiff sustained the following injuries:

- (a) Bruises on the face.**
- (b) Cerebral concussion.**
- (c) Bruised left arm.**
- (d) Crush injury to the left leg.**
- (e) Traumatic above knee amputation.**

The plaintiff claimed general damages, and the trial court was urged to award ksh. 1.2 million as well as special damages in the sum of ksh. 212,757/=. The plaintiff testified and called a doctor as a witness. The

defendant did not adduce any evidence but filed written submissions.

The defendant did not dispute the plaintiff's injuries. The defendant's advocate submitted that an award of ksh. 200,000/= would be sufficient for general damages. He also conceded that special damages of ksh. 208,257/= had been proved but according to him, the plaintiff had failed to establish her case against the defendant. He urged the trial court to dismiss the plaintiff's case altogether.

In a considered judgment, the trial court awarded the plaintiff general damages in the sum of ksh. 400,000/= and special damages of ksh. 211,457/= plus costs and interest.

The defendant's advocate stated in his affidavit that he has been instructed to file an appeal against the aforesaid judgment on both liability and quantum of damages. The appeal can not be filed without leave of the court, he added. He urged the court not to penalise the applicant for the mistake of counsel as aforesaid. Mr. Kaburi made brief submissions in support of the application.

The plaintiff/ respondent opposed the said application and filed a replying affidavit through Mr. Bunde Advocate. In the said affidavit, Mr. Bunde deposed, **inter alia**, that the intended appeal is a sham, has no chances of success and is not arguable. That is because the defence did not adduce any evidence and so the plaintiff's evidence was uncontroverted and that the trial court gave a fair award of damages based on the injuries sustained by the plaintiff. He added that the alleged reason for failure to file the intended appeal in time was not sufficient. Mr. Ochillo, who appeared for the respondent amplified the aforesaid issues in his submissions.

I have considered the aforesaid submissions. There is no dispute that Mr. Kaburi held brief for the defendant's advocate during the hearing and delivery of the judgment. He failed to notify his principal about the date of delivery of the judgment and the outcome thereof. **IN CHARLES GICHINA MWANGI VS HENRY MUKORA MWANGI**, civil application number 89 of 1999 at Nairobi, it was held that failure by an advocate to inform his client of the date of delivery of the judgment is reason for extending time to file an appeal out of time.

However, reasons for delay is not the only test which an application of this nature must pass before it is granted. The court should also consider whether the appeal has chances of success, that is, whether it is arguable and whether the respondent is likely to suffer any prejudice if the application is allowed; see **JOYCE MUTHONI NJAGI VS ELIZABETH M. NYAGA & ANOTHER**, Civil application No. 168 of 1997 at Nairobi.

The applicant chose not to adduce any evidence before the trial court. The plaintiff's evidence regarding the occurrence of the accident was unchallenged. On what basis can the applicant now argue, as intimated in the draft memorandum of appeal, that:

“The Honourable Magistrate erred in finding the appellant liable in negligence for the road traffic accident relating to the suit despite evidence to the contrary.”

There was no “**contrary**” evidence that was adduced by the applicant. The applicant also intends to argue that the damages awarded were excessive in the circumstances of the case. Where an adult has suffered, among other injuries, amputation of a leg above the knee, can it be said that ksh. 400,000/= for general damages is excessive? I don't think so. Awards for such injuries are usually well above kshs. 400,000/= and on the face of it, the trial court did not make an excessive award.

The appellant's advocates admitted that special damages amounting to ksh. 208,257/= were proved. The learned trial Magistrate awarded ksh. 211,457/= as special damages. Can the difference of nearly ksh.3,000/= be said to have been awarded erroneously? I do not think so.

In my view, the intended appeal is not arguable. On the other hand, the plaintiff/ respondent sustained serious injuries and filed a suit nearly three years ago and has been kept out of the fruits of her judgment for well over six months. She will be prejudiced by an unwarranted delay if the application by the

appellant is allowed.

For the aforesaid reasons, I dismiss with costs the applicant's application dated 8th January, 2009.

DATED, SIGNED AND DELIVERED at Kisii this 6th day of July, 2009.

D. MUSINGA

JUDGE.

6/7/2009

Before D. Musinga. J

Mobisa – C.c

Mr. Kaburi for the Appellant.

Mr. Ochillo for the Respondent.

Court: Ruling delivered in open court on 6th July, 2009.

D. MUSINGA

JUDGE.

Mr. Kaburi

I pray for stay of execution for a period of 30 days to enable the applicant comply with the court order.

D. MUSINGA. J

Mr. Ochillo

I have no objection as long as the purpose of the stay is to facilitate the applicant settle the decree.

D. MUSINGA.

Court

For purposes of enabling the applicant make appropriate arrangements to settle the decree, a stay of execution for a period of 30 days is granted.

D. MUSINGA

JUDGE.