



Warahu & another v Nduati & another (Suing as the Legal Representatives of the Estate of Paul Kamau) (Civil Appeal 38 of 2017) [2025] KEHC 14665 (KLR) (2 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14665 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL 38 OF 2017
TW OUYA, J
OCTOBER 2, 2025**

BETWEEN

PETER MWANGI MACHARIA WARAHU 1ST APPELLANT

DANSON MAINA THUO 2ND APPELLANT

AND

MARY WANJIKU NDUATI 1ST RESPONDENT

MOSES MWANGI KIRIIRI 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF PAUL
KAMAU**

*(Being an Appeal from the Judgment delivered by the Honourable M.W. MACHARIA
Chief Magistrate on 3rd August, 2017 in MURANG'A CMCC NO. 20 of 2016.)*

RULING

1. Before the Court for consideration is the Respondents' Notice of Preliminary Objection dated 23rd November 2021, filed on even-date seeking that the Appellants' Record of Appeal filed on 22nd November 2021, be struck out with costs, on the following grounds:
 - i. The appeal already stands dismissed because the Order of 25th February 2020 (issued on 19th November 2021) was disobeyed in that by 10th March 2020 payment of throw away costs had not been done.
 - ii. That the record of appeal dated 18th November 2021 is therefore incompetent and abuse of the Court process and needs to be struck out with costs as it is based on a non-existent appeal. Annexed are al letter dated 20th March 2020 and an Order issued on 19th November 2020.



2. The appeal before the Court arises from the decision of the trial Court delivered on 3rd August 2017 in Murang'a Cmcc No. 20 of 2016 originated by the Respondents herein (then Plaintiffs) through a Plaint dated 1st February 2016 in their capacity as legal representatives of Paul Kamau Kariiri (deceased) pursuant to a Limited Grant of Letters of Administration Ad Litem issued on 26th June 2015, while the Appellants herein defended the suit.
3. The suit at the trial Court was brought against the 1st Appellant (then 1st Defendant), under the doctrine of vicarious liability in his capacity as the owner of motor-vehicle registration number KBT 372J which was being driven by the 2nd Appellant on 8th May 2013 along the Murang'a-Kangema Road, resulting in a fatal accident involving Paul Kamau Kariiri (deceased) who was riding a motorcycle registration number KMCZ 436K.
4. At the trial Court, the Respondents averred that on 8th May 2013 along the Murang'a-Kangema Road, the 2nd Appellant drove motor-vehicle registration number KBT 372J recklessly, at a high speed and on the wrong side of the road resulting in a road accident and the death of the deceased who was 28 years old at the time of the accident.
5. The 1st and 2nd Appellants jointly filed a Defence dated 11th April 2016 in response to the Respondents' suit wherein they denied liability for the deceased's death as claimed. They averred that the deceased was negligent and failed to take adequate precautions while riding motorcycle registration number KMCZ 436K along the Murang'a-Kangema Road on 8th May 2013, resulting in the accident which caused his death.
6. In its decision delivered on 3rd August 2017, the trial Court found in favour of the Respondents and held that the 1st Appellant's denial of ownership of motor-vehicle registration number KBT 372J amounted to a mere denial as the record of ownership of the aforesaid vehicle produced by the Respondents which demonstrated that the 1st Appellant was the registered owner. The trial Court awarded the deceased General Damages in the amount of Kshs.4,464,000, basing the preceding award under the *Law Reform Act*. The trial Court found that the deceased was earning Kshs.1200 per day and would have worked for another 31 years but for the accident in question. Furthermore, the trial Court awarded Kshs.137,550 being Funeral expenses and special damages. The entire amount granted to the deceased by the trial Court is Kshs.4,601,550 exclusive of interest at Court rates.
7. Being aggrieved with the trial Court's holding, the Appellants approached this Court through a Memorandum of Appeal dated 29th August 2017 seeking inter alia, the setting aside of the impugned decision and fresh assessment of the damages awarded to the deceased by the trial Court.
8. Through a Chamber Summons Application dated 31st December 2018, the premised under Order 41 Rules 11, 12 and 13 of the Civil Procedure Rules the Respondents sought the dismissal of Appellants' appeal for failure to list the appeal for hearing despite serving the Memorandum of Appeal on the Respondents on 5th September 2017.
9. On 25th February 2020, this Court (differently constituted) upon hearing both counsel for the appellants and the Respondents in open Court, in respect of the Respondents' Chamber Summons Application dated 31st December 2018, entered the following Order by Consent:

“ 1. That application dated 31st December 2018 be and is hereby withdrawn on the following terms.



- a. That the appellants do pay to the Respondents throw away costs of Kshs.15,000/- within 14 days of today's date in default of which the appeal will stand dismissed.
 - b. That the appellants be granted leave to file a supplementary record of appeal so as to include the Decree within 30 days of today's date.
 - c. That the lower court file no. 20 of 2016 be returned temporarily to lower court to enable the appellant to extract the decree.”
10. The gist of the Respondents' Notice of Preliminary Objection dated 23rd November 2021 is that the Appellants failed to deliver throw away costs of Kshs.15,000 within thirty (30) days from 25th February 2020 as directed by this Court, therefore, their appeal stands dismissed as per clause/paragraph 1(a) of the Consent Order dated 25th February 2020 as reproduced hereinabove.
 11. The Appellants did not resist the Respondents' Notice of Preliminary Objection dated 23rd November 2021.
 12. The Respondents contended that the Appellants appeal stands dismissed as per clause 1(a) of the Order of the Court dated 25 February 2020 for failure to deliver throw away costs of Kshs. 15,000 to the Respondents as directed by this Court.
 13. The Court in *Kenya Commercial Bank Ltd v Specialized Engineering Company Ltd* [1980] KEHC 11 (KLR) cited with favour the reasoning of the former Court of Appeal for East Africa in *Brooke Bond Liebig (T) Ltd v Mallya* [1975] EA 266 concerning the legal import of a Consent Order as follows:

“...prima facie any order made in the presence and with the consent of counsel is binding on all parties to the proceedings and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient materials or in misapprehension or ignorance of material facts in general for a reason which would enable the court to set aside an agreement.”
 14. It is trite that the Orders or directives of the Court are not issued in vain. In the case of *Samuel M. N. Mweru & Others v National Land Commission & 2 Others* [2020] KEHC 9233 (KLR), the Court proclaimed as hereunder:

“A court order is binding on the party against whom it is addressed and until set aside remain valid and is to be complied with. Article 159(1) of *the Constitution* provides that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under *the Constitution*.”
 15. The Court has carefully inspected the several Returns of Service on record supplied by Counsel for the Respondents in support of the subject Notice of Preliminary Objection bearing various dates namely: 30th January 2025, 5th February 2025, 11th April 2025 and 15th April 2025. From the foregoing, the Court is satisfied that counsel for the Respondents was notified via email that the instant matter was scheduled for Mention on 10th April 2025; and, on 23rd June 2025.



16. The Court is alive to the phraseology of Clause 1(a) in the Order of the Court dated 25 February 2020, particularly the use of the term “shall” therein, which carries a mandatory effect. According to Black’s Law Dictionary 9th Edition at page 1499, the word “shall”, is defined as follows:

“Has a duty to; ...This is the mandatory sense that drafters typically intend and that courts typically uphold”.
17. The interpretation of Clause 1(a) of the Order of the Court dated 25 February 2020 which the Court finds apposite is as follows: that the Appellant’s appeal would stand dismissed in the event throw away costs of Kshs.15,000 were not delivered to the Respondents within 30 days from 25th February 2020.
18. Furthermore, the Court is satisfied that the Respondents have demonstrated, on a balance of probabilities, that the Appellants failed to deliver throw away costs of Kshs.15,000 within 30 days from 25th February 2020 as directed by the Court.
19. In this event, the court finds the subject Notice of Preliminary Objection dated 23rd November 2021 to be merited.
20. Accordingly, same is allowed in terms of the prayers numbered (1) and (2) there above. Because the Respondents did not defend the instant Notice of Preliminary Objection, each party to bear own costs.
21. Thirty (30) days stay of execution to apply.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 2ND OCTOBER, 2025.

HON. T. W. Ouya

JUDGE

