



REPUBLIC OF KENYA



**Kora Construction Company & 2 others v RM (Suing through her mother and next friend JM) (Civil Application E145 of 2022) [2023] KECA 658 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KECA 658 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E145 OF 2022**

**M NGUGI, JA**

**MAY 26, 2023**

**BETWEEN**

**KORA CONSTRUCTION COMPANY ..... 1<sup>ST</sup> APPLICANT**

**PATRICK ANDAYI ..... 2<sup>ND</sup> APPLICANT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> APPLICANT**

**AND**

**RM (SUING THROUGH HER MOTHER AND NEXT FRIEND  
JM) ..... RESPONDENT**

*(Being an application for extension of time to file appeal and stay of execution pending the hearing and determination of an intended appeal against the judgment and decree of the High Court of Kenya at Kakamega (W.M. Musyoka J.) dated 4th November, 2022 in CMCC No. 224 of 2016)*

**RULING**

1. In the application brought by way of notice of motion dated December 15, 2022 brought under Rule 4 of the *Court of Appeal Rules, 2010*, the applicant, Kora Construction Company Limited, seeks the following orders:
  - i. That the time allowed for the filing of the appeal be extended for 14 days from the date hereof;
  - ii. That the costs occasioned by this u be costs in the appeal.
2. The application is supported by an affidavit sworn by Jackson Mutimba Lutta, the Managing Director of the applicant, sworn on December 14, 2022. It is based on the grounds that the respondent, RM (suing through her mother and next friend, JM) filed an appeal on September 9, 2022 against the decision delivered on March 26, 2022 by Hon W Lopokoyit (RM) in which the trial magistrate found the respondent 100/% liable, dismissed the prayer for general damages for reasons that the applicant



did not produce any medical report to ascertain the degree of injury, and awarded Kshs 20,550/= as special damages.

3. The background to this application is that the respondent had, on 13<sup>th</sup> July 2016, filed suit against the applicant and one Patrick Andayi, a driver, claiming damages and costs arising out of an accident caused by motor vehicle registration Number KBL 519W. According to the applicant, the vehicle was a project vehicle under the Ministry of Transport, Infrastructure, Housing and Urban Development under contract Reference No. PWO/WET/T/5/3(128). It is averred that the said vehicle was surrendered back to the Chief Mechanical and Transport Engineer on July 6, 2011 as the contract had been completed. The accident involving the vehicle occurred on August 6, 2015, four years after the vehicle had been surrendered back to the Government.
4. Dissatisfied with the decision of the trial court, the respondent appealed, filing its appeal out of time, which was admitted, *ex parte*. The applicant also cross-appealed on the ground that it did not own the vehicle involved in the accident, nor was the vehicle under its management or beneficial use at the time of the accident. It is its case, therefore, that attributing liability to it was an error.
5. The first appellate court allowed the respondent's appeal, set aside the trial court's decision and substituted it with an award of Kshs 300,000 plus the costs of the suit both in the lower court and in the superior court. The cross-appeal was dismissed.
6. The applicant contends that the judgment of the High Court was delivered without notice to it, and it did not therefore have an opportunity to file its notice of appeal on time.
7. The applicant maintains that the subject motor vehicle was a government project vehicle which was surrendered back to the Ministry of Works in July 2011 upon completion of the project. The accident had occurred on 6<sup>th</sup> August 2015, four years after the surrender of the vehicle to the government. The judgment of the first appellate court was therefore an error and the applicant intends to appeal against it. It therefore seeks extension of time and has also applied for stay of execution so as to preserve the substratum of the appeal.
8. The applicant avers further that the intended appeal is arguable as can be discerned from the grounds set out in the memorandum of appeal. It further avers that the respondent has taken out warrants before a decree has been extracted and has already proclaimed its goods. There is therefore imminent danger that unless the orders for extension of time are granted, the applicant will suffer substantial loss and the intended appeal will be rendered nugatory as the respondent will have sold the applicant's attached properties. The applicant argues, finally, that the respondent, who is a minor, will not be in a position to reconstitute the decree and costs should execution be concluded.
9. The applicant contends that the NTSA Certificate of ownership is the only prima facie evidence of ownership but it is not conclusive as pleaded and proved in all the circumstances of this claim. It is its case therefore that the decision of the High Court goes against the established law of motor vehicle ownership and vicarious liability in motor accident claims.
10. Though the applicant appears, in its averments, to seek both an order for extension of time and for stay of execution, its application is lodged under Rule 4 of the *Court of Appeal Rules*. The Rule empowers the Court to extend time for the doing of any act under the Rules. In its decision in *Imperial Bank Limited (In Receivership) & another v Alnashir Popat & 18 others* [2018] eKLR, this Court held that:

“Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court



exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, *prima facie*, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be born in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal.”

11. In the affidavit sworn by Counsel for the applicant, Vincent Mukoya, on December 14, 2022, it is averred that the judgment of the High Court was scheduled for delivery on June 24, 2022. It was not delivered on that date, being rescheduled to the 22<sup>nd</sup> of July 2022, July 29, 2022, August 5, 2022 and September 23, 2022. It was thereafter scheduled for delivery on notice, and was eventually delivered on November 4, 2022.
12. Mr. Mukoya avers that he had attended court on all the days the judgment was scheduled for delivery. He did not, however, receive notice of the delivery date of November 4, 2022, and he only came to learn that judgment had been delivered on December 5, 2022 when his client informed him that its goods had been attached. He visited the registry on December 7, 2022 where he obtained a copy of the judgment.
13. The judgment that the applicant seeks to appeal against was delivered on November 4, 2022. The applicant was required, under Rule 77(2) of the [Court of Appeal Rules](#), to file the notice of appeal within 14 days of that date. The present application seeks extension of time as the applicant only learnt that the judgment had been delivered upon execution, one month after delivery of the judgment. The application has been made within a week or so after learning that the judgment has been delivered. I am therefore satisfied that the delay is not inordinate.
14. The second issue to consider is whether the applicant has demonstrated that it has an arguable appeal with the possibility of success. It is not the duty of a single judge to inquire definitively into the merits of the appeal, and whether or not the appeal will ultimately succeed. That determination is made by the full court when the appeal is presented before it.
15. While the memorandum of appeal annexed to the application sets out eight grounds of appeal, the main ground that the applicant seeks to take on appeal relates to the ownership of the vehicle involved in the accident. Its case is that the vehicle was a project vehicle which was surrendered back to the government some four years prior to the accident. The High Court therefore erred in finding that it was the owner of the vehicle by virtue only of being so registered by the Registrar of Motor Vehicles.
16. Taking all matters into consideration, I am satisfied that the delay in filing the notice of appeal was not inordinate, and that the applicant has an arguable appeal. I am therefore satisfied that this is a matter that is deserving of the exercise of the Court's discretion under Rule 4 of the [Court of Appeal Rules](#). The application dated December 15, 2022 is allowed in terms of prayers 1 and 2 thereof.

**DATED AND DELIVERED AT KISUMU THIS 26<sup>TH</sup> DAY OF MAY, 2023**

**MUMBI NGUGI**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*



*Signed*

**DEPUTY REGISTRAR**

