Mathenge t/a Imperial Water Services v Juma (Employment and Labour Relations Appeal E210 of 2023) [2025] KEELRC 21 (KLR) (14 January 2025) (Ruling)

Neutral citation: [2025] KEELRC 21 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E210 OF 2023

JW KELI, J

JANUARY 14, 2025

BETWEEN

PETER MATHENGE T/A IMPERIAL WATER SERVICES ..... APPELLANT

AND

JAMES MALOBA JUMA ..... RESPONDENT

RULING

1. The Applicant brought an Application by way of Notice of Motion dated September 25, 2024 under Order 22 Rule 25; Order 42, Rule 6 of the *Civil Procedure Rules*; Sections 1A, 1B, 3A of the *Civil Procedure Act* and all other enabling provisions of the law seeking for the following Orders:-

    1. Spent .

    2. Spent

    3. That this Honourable Court be pleased to review the orders made on the 28th day of June 2024 and extend the time to comply with all other orders thereto.

    4. That an order is issue directing that the Appellant/Applicant deposit the judgment sum of Kshs. 895,383/- in a joint interest-earning account in the names of Counsels for the parties herein within 21 days from the date of this order.

    5. That in the alternative the Honourable Court be pleased to reinstate the orders made on the 28th day of June 2024 herein and be pleased to grant leave to the Appellant/Applicant to deposit out of time the judgment sum of Kshs. 895,383/- in a joint interest-earning account in the names of Counsels for the parties herein within 21 days from the date of this order.

    6. That costs of this Application be in the cause.

    7. Any other or further orders that this Honourable Court may deem fit.

2. The application was based on the grounds on the face of the application and was further supported by the affidavit of Peter Mathenge who averred that the failure to comply with the Orders of the Court of 28th June 2024 was due to a mistake of the previous advocate and that he was ready to deposit the decretal amount if allowed by the court. He further annexed evidence advertisement for auction Motor Vehicle Registration Subaru Forrester (PMK being the advertisement of the auction). Mathenge further averred that the former advocate failed to inform him of the Orders of the court of 28th June 2024 for the deposit of the decretal amount within 45 days of the ruling in the joint interest-earning account and of which he was willing to deposit in court.

Response

3. The application was opposed by the respondent vide his replying affidavit sworn on the 13th October 2024. The Respondent stated that the notice of change of advocates offended the provisions of Order 9 Rule 9 of the Civil Procedure Rules and ought to be struck off. That there were no sufficient reasons for the orders of review to be granted. That the delay in seeking for the review was not explained. That after expiry of the 45 days, Pay Day Auctioneers were instructed and proceeded to issue proclamation notice (JMJ3 a-b being copies of the proclamation notice). The Respondent averred that he had been advised by his advocates that the orders sought had been overtaken by events since the auctioneers had confirmed to the advocates that the public auction proceeded as scheduled on the 25th September 2024 and the said Motor Vehicle was sold at the fall of the hammer to the highest bidder and was no longer in the possession of the auctioneers or the respondent. The Respondent contended that there was no evidence before the court to indicate the applicant was an innocent litigant deserving mercy of the court like evidence of follow-up of the case with the former advocate or complaint to the Law Society of Kenya of professional misconduct of the former advocate. That he would be prejudiced in the event the application is granted due to delay of enjoyment of fruits of his judgment.

4. The applicant filed further affidavit sworn on the 28th of October 2024 in reply to the replying affidavit and stated that he was advised by his advocate he did not require leave of the court to change advocates since the appeal operated as a fresh suit. That the respondent had not provided proof of sale of the proclaimed Motor Vehicle and that the existing court injunction prevents any transfer of ownership of the motor vehicle. That the injunction would be discharged upon reinstatement of the stay of execution and performance of the condition. That no prejudice to be suffered by the respondent as if the appeal is unsuccessful he would recover the secured decretal amount.

Decision

5. The application was canvassed by way of written submissions with each party complying. The court having perused the pleadings and written submissions of the parties was of the considered opinion that the issues for determination in the ruling were as follows: -

    a. Whether the notice of change of advocates by the applicant was proper

    b. Whether the application was merited.

Whether the notice of change of advocates by the applicant was proper

6. The Respondent contended that the applicant's new advocate came on record post-judgment. That he had neither sought leave of this court to come on record nor obtained consent from the former advocate. Nonetheless, the Applicant proceeded to file a Notice of appointment dated 10th September 2024 and to serve the respondent's advocates with the notice of change of advocates dated 25th September 2024 (see respondent's annexed and marked as JMJ1a-b are copies of notices)In the

instance application, no evidence had been adduced to show compliance with Order 9 Rule 9 of the *Civil Procedure Rules*, 2010, of which the Respondent submits is mandatory. That the Notice of Appointment dated 10th September 2024, the Notice of Change of Advocates dated 25th September 2024 and the Notice of Motion application herein were liable to be struck out for being filed irregularly and in violation of express and mandatory provisions of the Civil Procedure Rules. The Respondent to buttress his foregoing submissions relied on the decision in *James Ndonyu Njogu v Muriuki Macharia* [2020] eKLR, it was ruled in the superior court that;"6. Clearly the provisions of Order 9 Rule 9 of the Civil Procedure Rules make it mandatory that for any change of Advocates after judgment has been entered to be effected, then there must be an order of the Court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate. The reasoning behind the provision was well articulated in the case of *S. K. Tarwadi-vs-Veronica Muehlmann* [2019] eKLR where the judge observed as follows:

> " ...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....".

7. The Respondent further cited the case of Lalji Bhimji Shangani Builders & Contractors-vs-City Council of Nairobi [2012] eKLR where the Court held as follows:-

> "A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where
>
> no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate."

8. The applicant in response to this issue submitted that the change of advocates was done during the pendency of the appeal at a superior court to the trial court where the said judgment was rendered thus he was at liberty to change advocates. He relied on the decision of *Asike Makhandia J (as he then was) in Martin Mutisya Kiio & Another vs. Benson Muendo Kasyali* (Machakos HC. Misc. Application No. 107 of 2013) that: "... such a submission has no legal basis, ... that where a firm of Advocates has acted for a party in the lower court, those instructions are terminated and/or were spent or exhausted with the conclusion of the trial in the lower court. An appeal is a different ball game it can be filed by any other firm of Advocates on instructions of the Appellant without necessarily having to file Notice of Change of Advocates or filing an application to come on record in place of the previous Advocates. In other words, an appeal is fresh proceedings which can be initiated by any other firm of Advocates on instructions of the Appellant without regard to the previous Advocates who acted in the trial court" Further in *Kenya Pipeline Company Limited v Lucy Njoki Njuru* (Civil Appeal 44 of 2013) [2014] KEHC 5103 (KLR) paragraphs *para 10 10* and *para 11 11* it was stated:- "More importantly unlike the ordinary trial or review, or other interlocutory applications within the same cause or matter, an appeal is a "different ball game". The proceedings are fresh or new, and are before a Superior Court, and a party, including both the Appellant or Respondent, are at liberty to change or instruct a new set of counsel to represent them. In this case therefore, the Appellant was at liberty to change its Advocates at the appeal stage without any order of court or consent of the Advocate on record in the trial court as required under rule 9 of the said order. In that capacity such counsel has a right to access to all the proceedings in the subordinate, or the case may be in the Superior Court." Relying on the foregoing decisions the Applicant submitted that the change of advocates during an appeal is not restricted by Order 9 Rule 9 of the *Civil Procedure Rules* as the matter is before a superior court and essentially a fresh or new matter to the original trial court.

9. Order 9 Rule 9 of the *Civil Procedure Rules* provides: ''When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

   (a) upon an application with notice to all the parties; or

   (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.''

10. The court is persuaded that the proceedings before the trial court are complete and before the court is a fresh suit by way of appeal as held by *Asike Makhandia J (as he then was) in Martin Mutisya Kiio & Another vs. Benson Muendo Kasyali* (Machakos HC. Misc. Application No. 107 of 2013)that: "... such a submission has no legal basis, ... that where a firm of Advocates has acted for a party in the lower court, those instructions are terminated and/or were spent or exhausted with the conclusion of the trial in the lower court. An appeal is a different ball game it can be filed by any other firm of Advocates on instructions of the Appellant without necessarily having to file Notice of Change of Advocates or filing an application to come on record in place of the previous Advocates. In other words, an appeal is fresh proceedings which can be initiated by any other firm of Advocates on instructions of the Appellant without regard to the previous Advocates who acted in the trial court"(emphasis given) The advocate at the lower court interests are secured within those proceedings. The said advocate has already earned his fees before the trial court and is free to tax for any outstanding fees against the applicant. The court opines that securing of fees for advocates is the mischief sought to be covered by Order 9 Rule 9 of the Civil Procedure Rules. In this case it is already covered as the former advocate is at liberty to pursue his earned fees at the trial court. The appeal is a ''different ball game'' borrowing from the cited decisions above and the appellant is not bound by the trial court's legal representation. The instant application and the Notice of Change of Advocates are held as properly filed.

Whether the application is merited.

11. The issue of prayer for an injunction pending determination of the application is overtaken by events. On whether to vary the Order of the court of 28th June 2024 or extend time for compliance, the applicant submits as follows: -

12. That section 16 of the *Employment and Labour Relations Court Act*, Cap. 8E provides "The Court shall have power to review its judgements, awards, orders or decrees in accordance with the Rules." Rule 74 (1)(d) of the Employment and Labour Relations Court (Procedure) Rules, 2024 provides: "A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within a reasonable time, apply for a review of the judgment or ruling (d) for any other sufficient reason." Rule 86 of the *Employment and Labour Relations Court (Procedure) Rules*, 2024 provides: -"The Court may, upon application or its own motion Court may extend the time prescribed under these Rules of such time as may be stipulated in order of the Court."

13. The application seeks for the reinstatement of stay of execution, its variation or extension to allow for compliance and subsequent hearing or prosecution of the appeal. The applicant cited instances of reinstatement of an entire appeal by the Court of Appeal in *Harrison Wanjohi Wambugu v Felista Wairimu Chege & another* (Civil Appeal 295 of 2009) [2013] KECA 219 (KLR) paragraph *para 16 16* "From the foregoing we find that the learned Judge misdirected himself in exercising his discretion by declining to re-instate the appellant's appeal and by extension denying the appellant a hearing. Accordingly, we allow the appeal herein, set aside the ruling dated 8th July, 2008 and substitute thereto with an order allowing the appellant's application for reinstatement of the appellant's appeal in the

High Court. We further direct that the appeal in the High Court be heard on its merits. We however award costs to the respondents for the application for reinstatement of the appeal dated 7th May, 2008 in the High Court. Costs of this appeal to abide by the outcome of the appeal in the High Court." Further, the applicant relied on the decision in *Focin Motorcycle Co. Limited v Ann Wambui Wangui & Stephen Kinyua Mugo (Civil Appeal 22 of 2017*) [2018] KEHC 8358 (KLR) as follows; "...Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay..."

14. The Appellant/Applicant submitted that he had demonstrated willingness to prosecute the appeal but was severely hampered by the misdeeds of previous counsel. On the definition of sufficient cause, the applicant relied on the decision of the High Court in *Wachira Karani v Bildad Wachira (Civil Suit 101 of 2011*) [2016] KEHC 6334 (KLR) where it discussed what amounts to sufficient cause. "The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for a hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application.[14]Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause."

15. On the issue of mistake of advocate the applicant relied on case of *Belinda Murai & others vs Amoi Wainaina*, [1978] LLR 2782 (CALL) where Madan, J.A. (as he then was) described what constitutes a mistake in the following words: "A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of Junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule..."

16. The applicant relying on the foregoing, submitted that there was sufficient cause to vary or extend the Orders on stay of execution and for the appellant to be heard on merit. That the failure to comply with the Honourable Court's conditions for a stay of execution pending appeal was caused by the previous counsel's failure to issue proper information.

17. The Court on receipt of the Application under certificate of urgency issued an Order of Temporary injunction against the Respondent and his agents jointly and severally from selling or transferring or disposing off the applicant's interest in Motor Vehicle Registration Subaru Forester on the 1st October 2024. There was no evidence placed before the Court that indeed the said Motor Vehicle had been bee disposed and/ or transferred to a third party. The Respondent had opportunity to place the evidence before the court but failed to do so.

18. On whether to vary the Order for stay, the court considered the reasons advanced by the Applicant for the non-compliance. It is trite the mistake of a counsel ought not to be visited on a litigant and to further the court to exercise discretion towards sustaining right of a party to have their day in court consistent with decision of the Court of Appeal in *Harrison Wanjohi Wambugu v Felista Wairimu Chege & another* (Civil Appeal 295 of 2009) [2013] KECA 219 (KLR) paragraph *para 16 16* "From the foregoing we find that the learned Judge misdirected himself in exercising his discretion by declining

to re-instate the appellant's appeal and by extension denying the appellant a hearing. Accordingly, we allow the appeal herein, set aside the ruling dated 8th July, 2008 and substitute thereto with an order allowing the appellant's application for reinstatement of the appellant's appeal in the High Court. We further direct that the appeal in the High Court be heard on its merits. We however award costs to the respondents for the application for reinstatement of the appeal dated 7th May, 2008 in the High Court. Costs of this appeal to abide by the outcome of the appeal in the High Court."

19. The Court finds that any prejudice that may be suffered by the Respondent in allowing the application can be compensated through costs. The Court exercises its discretion to allow the Application as follows:-

    a. The court reinstates the Orders made on the 28th day of June 2024 herein and grants leave to the Appellant/Applicant to deposit out of time the judgment sum of Kshs. 895,383/- in a joint interest-earning account in the names of Counsels for the parties herein within 21 days from the date of this Order.

    b. The Applicant to pay the Respondent throwaway costs for the sum of Ksh. 15000 in 21days of this Order.

       (In case of default of any of the 3 Orders above execution may proceed).

    c. The applicant to further settle the auctioneer's costs and the Motor Vehicle Registration Subaru Forester be released to the Applicant upon the settlement.

20. Mention on the February 17, 2025 to confirm compliance and for further directions.

21. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF JANUARY , 2025.

JEMIMAH KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant : -Wayengo h/b Mbiyu Kamau

Respondent: Absent