



**Kajogi v BKM (Suing Through Father and Next Friend LMM) (Civil Appeal E174 of 2024) [2025] KEHC 2819 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2819 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E174 OF 2024  
HM NYAGA, J  
FEBRUARY 27, 2025**

**BETWEEN**

**LENET KARWITHA KAJOGI ..... APPELLANT**

**AND**

**BKM (SUING THROUGH FATHER AND NEXT FRIEND LMM) ..... RESPONDENT**

**RULING**

1. The matter for consideration in the Notice of motion dated 30<sup>th</sup> September, 2024 which seeks the following orders:-
  - a. That this matter be certified as urgent and heard ex-parte in the first instance and that service be dispersed with.
  - b. That pending the hearing and determination of this application inter-parties or further orders of the court; this court does grant the Applicant an order of stay of execution of the judgment and all the consequential orders delivered on 29<sup>th</sup> February 2024 and the decision/order made on 26<sup>th</sup> September 2024 in Nkubu Civil Suit No. E016 of 2023 BKM (suing through father and next friend LMM).
  - c. That pending the hearing and determination of this application this court does grant the Applicant an order of stay of execution of the judgment and all the consequential orders delivered on 29<sup>th</sup> February 2024 and the decision/order made on 26<sup>th</sup> September 2024 in Nkubu Civil Suit No. E016 of 2023 BKM (suing through father and next friend LMM).
  - d. That the firm of Emacar Ndeda and Onyango Advocates be granted leave to come on record and be deemed to be properly on record for the Appellant/Applicant.
  - e. That the costs of this application be provided for.



2. In a nutshell the applicant's case is that respondent unilaterally obtained a judgment against the applicant in Nkubu civil suit No. E016 of 2023 without following the due procedure as per the law. That Aggrieved by the said judgment, the applicant filed an application in the lower court dated 17<sup>th</sup> June 2024, seeking a stay of execution of the judgment and the resultant decree. That the lower court dismissed the application without satisfactorily appreciating and correctly applying the principles of setting aside the judgment and decree. That aggrieved by the said ruling, the Appellant filed this appeal and the current application.
3. The applicant states that the orders issued by the lower court were drastic and there was threat of execution, which may occasion substantial loss on the applicant.
4. In response, the Respondent filed a replying affidavit sworn on 7<sup>th</sup> October 2024.
5. In a nutshell, the respondent avers that the application is defective, helplessly incompetent and is one for sticking out.
6. It is further averred that the Applicant seeks to appeal against both the judgement and ruling of the trial court in the same application, which is unheard of. That the Application is clearly a way to circumvent the timelines for filing of the appeal against the judgement of the lower court.
7. It is further stated that a look at the application shows that save for the prayer seeking to have counsel come on record, all the others are spent.
8. It is further averred that the Memorandum of Appeal and application has been filed by a firm of advocates who are strangers and have no audience before the court. That the trial court had already made a ruling on the question of representation, which has not been set aside or overturned. That the current firm has not sought the consent of the previous firm of advocates to act in that matter.
9. The Respondent is only meant to delay the plaintiff/Respondent fruits of her judgement.

### **Applicants submission**

10. The Applicant framed the following issues for determination:-
  - a. Whether the applicant has an arguable appeal.
  - b. Whether substantial loss would emerge from refusal to grant the stay.
  - c. Whether the applicant is ready and willing to furnish security.
  - d. Whether the application done without unreasonable delay.
11. It is submitted that the memorandum of appeal filed on 30<sup>th</sup> September 2024 sets out the grounds of appeal, arguing that the same is against the finding of the court on liability and quantum. That the applicant only needs to show that he has an arguable appeal as was stated in [\*Kenya Revenue Authority vs Sidney Keitany Changole and 3 others\*](#) [2015] eKLR.
12. It is further submitted that this court's discretion is unfettered in determining whether the appeal is arguable or not, and the main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the said discretion.
13. It is further submitted that the respondent will be capable of refunding the decretal sum in the event the appeal succeeds. That the Respondent has not filed any affidavit of means to show his capacity to refund the decretal sum. To buttress this submission counsel cited [\*National Industrial Credit Bank\*](#)



*Ltd vs Aquinas Francis Wasike* (2006) eKLR and *Tabro Transporters Ltd vs Absolom David Lumbasi* [2012] eKLR.

14. On the time taken to file the application, it is submitted that this was done just 4 days after the said ruling, hence there is no delay.
15. On the question of security, the applicant states that its insurer is ready to abide by any condition/ directions as ordered by the court but they are opposed to the release of the decretal sum to the respondent as the question of liability is being challenged. Cited was the case of *Selestical Limited vs Global Rock Development* [2015] eKLR.

### **Respondents Submission**

16. The respondent reiterated that the application seeks orders that cannot be granted at this stage. That the current advocates for the applicant have not complied with the law as regards representation. That they filed the application in lower court without filing a notice of charge of advocates yet the applicant had appointed the firm of Kiruki and Kayika Advocates. Citing Order 9 Rules 9 and 10 of the *Civil Procedure Rules*, the respondent argues that every act by the current firm of advocates is a nullity. To buttress this submission, the respondent cited the case of *Bhajee and another vs Nandi and Another* Civil Appeal No. 139 of 2019 [2022] KECA 119 (KLR).
17. The respondent further submits that the appeal is frivolous as it purports to appeal against both the Judgement of the trial court delivered on 29<sup>th</sup> February 2024 and the Ruling delivered on 26<sup>th</sup> September 2024.
18. The Respondent further avers that while the applicant purports to appeal on the question of liability, it is on record that there was a consent recorded on liability. That the memorandum of appeal has not addressed any issue of quantum.

### **Analysis and Determination**

19. In my opinion, the issues for determination are as follows:-
  - a. Whether the firm of Emmacar Ndenda and Onyango Company Advocates are properly on record,
  - b. Whether the application as drawn is spent, and
  - c. Whether the applicant is frivolous for appealing against both the Judgement and Ruling of the trial court.
  - d. Whether the applicant has met the threshold for the grant of the orders sought.
20. Depending on how issues (a), (b) and (c) above are answered then the court may not need to delve into the other issue under (d) as sought by the Applicant.
21. From the material before the court, and the lower court record, the applicant was represented by the firm of Kiruki and Kayika Advocates. The said advocates participated in the trial until Judgment. It follows then that the current firm of advocates ought to have sought leave to come on record as envisaged under order 9 Rules 9 and 10, which provides as follows:
  9. 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:-

- i. Upon an application with notice to all the parties; or
  - ii. 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. An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.
22. The importance of the said rule cannot be downplayed. It serves an important process regarding representation of a party in court. From the material before me, the application was never served upon the erstwhile advocates for the applicant. The Applicant filed a notice of appointment of advocates, but that was to be filed was a notice of change of advocates. Since under order 9 Rule 5 the firm of Kiruki and Kayika Advocates are decreed to be the advocates on record for purposes of any review or appeal.
23. In *Violet Wanjiru Kanyiri v Kuku Foods Limited* [2022] eKLR the Court considered a similar situation. It held as follows;
- From the Application filed in Court there is no indication that the firm of Coulson Harney LLP Advocates served the firm of Nyandoro & Company Advocates with its application dated 16<sup>th</sup> March, 2021. No mention has been made of any attempts to obtain consent of the said firm which was declined. There is further no affidavit of service of the application upon the further advocates. The Respondent/Applicant has not met the threshold as set out in Order 9 Rule 9 of the Civil Procedure Rules, 2010. This is sufficient reason to dismiss the application. I will however also consider the substantive prayers in the application.’
24. Looking at the matter and the authorities cited, I find that the application has been drawn by a stranger and is liable to be struck out with costs.
25. The striking out of the application maybe a drastic order, and guided by *Violet Wanjiru Kanyiri v Kuku Foods Limited* (*supra*) I will consider the application on merits.
26. I still find that the application cannot succeed, for the reason of the way it is drawn. I agree with the respondent, that all the prayers will be spent upon determination of this application. The applicant never sought stay pending a determination of the appeal filed herein.
27. The Respondent has also raised another crucial issue. The Applicant’s appeal is said to be against the Ruling of the Honourable Rose Angina delivered on 26<sup>th</sup> September 2024 and the Judgement of Hon E. O. Wambo delivered on 29<sup>th</sup> February 2024.
28. Clearly the appeal is frivolous. It cannot seek to address both Ruling and the Judgement. If it was to address the Judgement, then leave would have to be obtained as the time for appealing against the Judgement has long lapsed.
29. For the foregoing reason, I find that the application cannot succeed and it is dismissed with costs.
30. As for the appeal itself under section 79B the *Civil Procedure Act*, the court has power to summarily reject it, if there are sufficient grounds. Given what I have held above, the same is hereby summarily rejected with costs to the Respondent.



31. The applicant is at liberty to file a proper appeal if he so desires.

32. Orders accordingly.

**DATED, SIGNED & DELIVERED AT MERU THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**H.M. NYAGA**

**JUDGE**

