



REPUBLIC OF KENYA



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**Luka v Riungu (Civil Appeal E073 of 2023)
[2025] KEHC 1250 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1250 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E073 OF 2023
EM MURIITHI, J
FEBRUARY 27, 2025**

BETWEEN

ALBERT GITARI LUKA APPELLANT

AND

ASHFORD GERRARD RIUNGU RESPONDENT

RULING

The 1st Application

1. By a Notice of Motion dated 14th April 2024 brought under Sections 3A and 63 of the *Civil Procedure Act*, Order 45 Rule 1, Order 42 Rule 35 of the Civil Procedure Rules and any other enabling provisions of the law, the Applicant seeks that:
 1. Spent
 2. Spent
 3. The Honorable Court be pleased to review/vary its orders issued on 13th July 2023 and extend time for the appellant to file record of appeal.
 4. Such other or further orders and/or directions be made as the Court shall deem just in the circumstances.
 5. The costs of the application be in the cause.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Albert Gitari Luka, the Applicant herein, sworn on even date. He avers that the memorandum of appeal does not provide the reliefs sought and has clerical errors and omissions that he seeks to correct. He is advised by his advocates that the amendments are necessary as they intend to raise new grounds of appeal that will help the court determine the appeal on its merits. They sought to



set aside the judgment against Al Ginza Automobiles Limited, who was joined in these proceedings by reason of being the registered owner of the motor vehicle. The delay to file the Record of Appeal was thus inadvertent and not intentional, and no prejudice will be occasioned upon the Respondent if the orders sought are granted. He has obtained the typed proceedings and decree and shall immediately file the Record of Appeal upon being granted leave. He has made huge investments in the purchase of the motor vehicle and will suffer heavy losses if he is condemned unheard.

3. The Respondent opposed the application by filing the amended Notice of Motion dated 7/5/2024 pursuant to Order 42 Rule 14 (1) and (3) and Order 42 Rule 35 (1) of the Civil Procedure Rules and all other enabling provisions of the law. In that application, the Respondent seeks that:
 1. This Honorable Court be pleased to dismiss the Appellant's Appeal for want of prosecution.
 - 1A. Alternatively, this Honorable Court be pleased to order the Appellant to furnish security for costs to the tune of Kshs.2,100,000/= cash deposit being half of the value of the subject matter in the lower court vide Meru C.M.C.C No. E424 of 2021-Ashford Gerrard Riungu v. Albert Gitari Lika and Al Ginza Automobile LTD within 14 days and the said security be deposited at a reputable commercial Bank in Meru Town in a joint interest earning account to be agreed upon between the Appellant's Advocates and the Respondent FAILURE to which the Appeal herein be dismissed with costs to the Respondent.
 2. Costs of the Appeal and this Application be borne by the Respondent/Applicant.
 - 2A. In any event the costs of this Application be awarded to the Respondent/Applicant.
4. The application is premised by the grounds on the face of it and supported by the grounds that the Applicant blatantly refused, ignored and/or neglected to pay the sum of Ksh.2,100,000 as security for costs as order by the court on 13/7/2023. The Applicant's failure to file the Record of Appeal within the stipulated time is deliberate, intentional, purposeful circumspect and an abuse of the court process. With the Applicant's unknown financial standing, it will be unduly difficult to recover the decretal sum, in the event of an unsuccessful appeal, and unless the Applicant furnishes security for costs for the due performance of the decree, the Respondent will suffer irreparable harm and financial loss.
5. The Appellant opposed the application by his replying affidavit sworn on 5/7/2024. He avers that the prayer for dismissal of the appeal for want of prosecution is premature and unmerited because the appeal is yet to be admitted in accordance with Order 42 Rule 13 of the Civil Procedure Rules. The delay in filing the Record of Appeal was occasioned by the pendency of several applications before the lower court. He will suffer substantial loss if he is condemned unheard having contributed millions of shillings towards the purchase of Motor Vehicle Registration No. KCL 689 B, the subject of this appeal.

Submissions

6. The Appellant urges that he has met the requirements of Order 45 Rule 1 of the Civil Procedure Rules, and he ought to be accorded a chance to be heard on merit. He urges that he has no financial capacity to deposit the sum of Ksh. 2,100,000 as ordered by the court on 13/7/2023 and maintains that he is willing to prosecute his appeal. He urges that the provisions of Order 42 Rule 13 (4) of the Civil Procedure Code are yet to be complied with, and beseeches the court to accord him a chance to be heard on merit. He urges that a Notice of Motion is not a pleading as envisaged under Order 8 Rule 5 of the Civil Procedure Rules and Section 2 of the *Civil Procedure Act*, and therefore incapable of being amended. He urges that the Respondent ought to have withdrawn the Notice of Motion and filed a fresh one, and cites *Jecinta Wanjiru Muiruri v Jane Wangare Mwangi & another (2006) eKLR*. He urges that no prejudice will be suffered by the Respondent if the extension of time to file and serve



the Record of Appeal is granted, and cites Hassan Nyanje Charo v Khatib Mwashetani & 3 others (2014) eKLR.

7. The Respondent faults the Appellant for failing to annex the orders ought to be reviewed, thus making the application fatally defective, and cites Hosea Nyandika Mosagwe & 2 others v County Government of Nyamira (2022) eKLR. He urges the court to dismiss the application, which has been belatedly filed 1 year after the memorandum of appeal was filed, and cites Sultan Omar Hudhefa v Ann Muthoni Ngugi (2022) eKLR and Garsu Pasaulis, UAB v Systemedia Technologies Limited (Civil Appeal E034 of 2021) [2022] KEHC 298 (KLR) (Commercial and Tax) (28 April 2022) (Ruling). He is however amenable to grant of the orders sought in the application upon provision of Ksh. 2,100,000 as security for costs.

Analysis and Determination

8. The 2 applications are the two sides of the same coin and thus a determination of one will effectively dispose of the other, and the court will start with the former.
9. The import of the review sought herein is extension of time to appeal, and therefore the Applicant must prove to the satisfaction of the court that the delay is not inordinate, reasons for delay must be plausible, that the appeal is arguable and that the Respondent will not be unduly prejudiced if the order is granted. See Nicholas Kiptoo Korir Arap Salt v Independent Electoral & Boundaries Commission & 7 others (2014) eKLR.
10. While the Applicant lodged his memorandum of appeal in time, there is no doubt that he unreasonably delayed in filing the Record of Appeal, despite the strict timelines set by the court in its ruling of 13/7/2023 as follows:

“2. The 1st Appellant/Applicant shall deposit into court the sum of Ksh. 2,100,000/- into court within fourteen (14) days of this Order. 3. In default of the deposit of the security in Order no. 2 above the stay of execution shall lapse and be of no effect. 4. The Record of Appeal to be filed within 60 days from the date hereof. 5. The costs of the application shall abide the outcome of the Appeal.”

11. In granting the conditional stay, the court noted that:

“The decree herein is not a money decree but nonetheless appreciates the 1st appellant's readiness to furnish security for its due performance. The 1st appellant shall deposit into court within 14 days the sum equivalent to half the value, according to the appellant himself (see paragraph 5 of the Further Affidavit of the 1st appellant sworn on 7/6/2023), of the motor vehicle subject of the application at ksh. 2,100,000/- as security for the due performance of the decree.”

12. The effect of the non-compliance by the Applicant with the deposit of Ksh. 2,100,000 in court within 14 days from 13/7/2023 rendered the stay therein granted inconsequential and of no effect.
13. The Applicant contends that he will be condemned unheard if his appeal is not heard on merits. He has attributed the apparent inordinate delay in filing of the Record of Appeal to the pendency of avalanche of applications before the trial court, which reason the court considers to be plausible but unsatisfactory.
14. This court notes from the grounds of appeal in the Amended Memorandum of Appeal that the appeal cannot be said to be frivolous and it is indeed arguable within the legal acceptance of that word as an



appeal which is not one that must necessarily succeed. Moreover, it not for the court to go into the merits of the intended appeal at this stage.

15. From the Respondent's response to the application, no prejudice has been disclosed. Conversely, the Respondent is amenable to the appeal be heard fully subject to provision of Ksh. 2,100,000 as security for costs.
16. The court deems it fit to grant the extension sought in view of the Applicant's affirmation that the Record of Appeal has since been compiled and is ready for filing.
17. It is urged by the Applicant that the law does not envision an amendment of a Notice of Motion, and thus the application dated 7/5/2024 is fatally defective and bad in law. With respect, that contention is manifestly unfounded because amendments which are intended to assist the court in determining the real questions in controversy are expressly permissible under Order 8 Rule 5 of the Civil Procedure Rules, and should be freely granted before hearing as held in *Eastern Bakery v Castelino* 1958 E.A 461:-

“Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other side can be compensated by costs.”
18. On the merits, the court is minded, on the test in *Ivita v Kyumbu* (1975) EA 441, 449, that justice can still be done to the parties, the prolonged time notwithstanding. Courts have innumerable held that dismissal of suits for want of prosecution is a draconian act which drives away litigants from the seat of justice, and should only be done sparingly in the clearest cases.
19. Besides, the directions contemplated under Order 42 Rule 13 of the Civil Procedure Rules have not been taken, to justify the dismissal of the appeal for want of prosecution.

Orders

20. Accordingly, for the reasons set out above, the Court finds the Respondent's application dated 7/5/2024 to be without merit, and it is dismissed.
21. The court allows the Applicant's application dated 14/4/2024 in the following terms:
 1. The Applicant is hereby granted seven (7) day's leave to file the Record of Appeal against the judgment in Meru CMCC No. E424/2021.
 2. In terms of Order 50 Rule 6 of the Civil Procedure Rules, the costs of this application shall be paid by the Applicant to the Respondent.
 3. In the event of default, the appeal shall stand as dismissed.

Order accordingly.

DATED AND DELIVERED THIS 27TH DAY OF FEBRUARY, 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. David Advocate for the Appellant/Applicant

Mr. Mwirigi K. Advocate for Respondent.

