



**Captain Motorcycle Manufacturing Co Ltd v Nzelu & another (Suing as the personal representatives of the Estate of Kenedy Ngaira Khayega (Deceased) & another (Civil Appeal E052 of 2021) [2024] KEHC 1711 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1711 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E052 OF 2021  
LM NJUGUNA, J  
FEBRUARY 23, 2024**

**BETWEEN**

**CAPTAIN MOTORCYCLE MANUFACTURING CO LTD ..... APPELLANT**

**AND**

**DOROTHY MBULA NZELU & MORDESTY SHIKANGA KHAYEGA (SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF KENEDY NGAIRA KHAYEGA (DECEASED) ..... 1<sup>ST</sup> RESPONDENT  
JULIUS NJUE NGARI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Through a notice of motion dated 18<sup>th</sup> May 2022, the 1<sup>st</sup> respondent/applicant seeks orders that:
  - a. The appeal be struck out for being non-compliant with the orders issued by this Honourable Court on 24<sup>th</sup> November 2021 in High Court Misc. Civil Application No. E001 of 2021;
  - b. The Branch Manager Bank of Africa, Ngong Road Branch be ordered to release the decretal amount held in Account number 0826xxxxxx held in the names of Ngaira & Ngaira Advocates and Kalamu Ndolo & Company Advocates being Kshs. 2,645,476/= together with interest accrued since the date of deposit, to the firm of Kalamu Ndolo & Company Advocates; and
  - c. The costs of the application be provided for.

The application is premised on the grounds set out on its face and in the supporting affidavit.

2. It is the 1<sup>st</sup> respondent/applicant's case that through High Court Misc. Civil Application No. E001 of 2021, the court granted the appellant/respondent leave to appeal out of time on condition, among others, that the appeal be prosecuted within 90 days. That the appellant/respondent did not move to prosecute the appeal within the specified period. That through the same ruling, the appellant/



respondent was granted stay of execution on condition that the decretal amount is deposited into a joint account held by the advocates on either side. It is the 1<sup>st</sup> respondent/applicant's case that the appellant/respondent is not keen on expediting the matter and is taking the court orders for granted. That at the time of filing the application herein, 174 days had lapsed since the orders were issued.

3. The appellant/respondent filed a replying affidavit stating that the appeal was not prosecuted on time because his advocate was negligent in complying with the orders of the court. That it was not his fault as he had instructed counsel to prosecute the appeal and that the mistakes of the advocate should not be visited on him. He stated that the appeal raises substantial issues and it has a high likelihood of success. That it is in the interest of justice that he should not be condemned unheard.
4. The parties were unable to resolve the issue in the application through negotiation and so the court directed them to file their written submissions. Only the 1<sup>st</sup> respondent/applicant complied.
5. It was the 1<sup>st</sup> respondent/applicant's submission that the appellant cannot blame his advocate for non-compliance with a section of the court order because it is evident that he complied with the order to deposit the decretal amount but disregarded the order to prosecute the appeal within 90 days. That the appellant as the instructing principal for his advocate, did not produce any evidence to show that it followed up with its advocate to litigate the appeal and the advocate refused. Reliance was placed on the case of *Duale Mary Ann Gurre v. Amina Mobamed Mahamood & Another* (2014) eKLR and *Equitorial Commercial Bank Limited v. Pickwel & Deal Limited & 2 Others* (2019) eKLR. That the appellant is to blame for the indolence in prosecuting the appeal and casual appreciation of the court order. That the appellant did not seek extension of time to prosecute the appeal and showed no efforts to comply with the court order within good time. They relied on the case of *Peter Kipkirui Chemoiwo v. Richard Chepsergon* (2021) eKLR where the court dismissed a similar application because the appeal was not prosecuted within the specified time.
6. The issue for determination is whether the appeal should be struck out and the decretal amount released to the 1<sup>st</sup> respondent/applicant.
7. Judgment was entered in favour of the 1<sup>st</sup> respondent/applicant in Siakago Senior Resident Magistrate's Court in Civil Suit No. 19 of 2019. The appellant sought review of the judgment and the trial court delivered its ruling on 15<sup>th</sup> September 2021, dismissing the application for review, which ruling is the subject of appeal. Through an application dated 16<sup>th</sup> September 2021, the appellant moved this court seeking stay of execution pending appeal of the ruling of the trial court dated 15<sup>th</sup> September 2021. This court heard the application and delivered its ruling on 24<sup>th</sup> November 2021, granting stay of execution on condition that the decretal amount be deposited into a joint account held by counsel for the parties within 45 days. The court also ordered that the appeal be prosecuted within 90 days from the date of the ruling. The orders given have not been reviewed or set aside.
8. In response to this application, the appellant stated that it had instructed an advocate to pursue the appeal within the 90 days but the advocate failed to follow-up on the matter. However, it is to be noted that the firm of the alleged advocate is a co-holder of the joint account where the decretal amount was deposited. Ideally, the advocate was available to secure the condition given for stay of execution pending appeal but did not pursue prosecution of the appeal. Neither the appellant nor the said advocate has demonstrated to this court that the advocate is to blame for non-compliance with the order of the court. In the case of *Branco Arabe Espanol v Bank of Uganda* (1999) 2 EA 22 the court stated that:

“The administration of justice should normally require that the substance of all disputes should be investigated on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the



appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered.”

9. It may well be possible that the advocate was present enough to secure stay of execution pending appeal and failed to complete the latter part of the orders which was to actually file a record of appeal and have the appeal prosecuted within 90 days. There are many ways in which an advocate can move the court to expedite an appeal where a timeline has been set down as was set herein, but the advocate did not take any steps to expedite on his part. This court will never understand relationship between the appellant and his advocate as far as taking instructions is concerned but, in my view, the advocate should have done better to follow up on the orders of the court. In the case of *Lucy Bosire v Kebanicha Division Land Dispute Tribunal & 2 others* in Miscellaneous Application No. 699 of 2007 reported in [2013] eKLR the court held:

“.....In this case the blame is placed at the doorstep of the applicant’s erstwhile advocates. It is true that where justice of the case mandates, mistakes of advocates even if blunders should not be visited on the clients when the situation can be remedied by costs. It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits....”

10. The court order to have the appeal prosecuted within 90 days was made in line with its discretion under Order 46 Rule 6 of the *Civil Procedure Rules* and Sections 1A, 1B and 3A of the *Civil Procedure Act*. Orders of the court are meant to be obeyed otherwise the disobeying parties are to be held in contempt. In the case of *Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County Ex Parte Stanley Muturi* [2018] eKLR it was held:

“ Court orders are not meant for cosmetic purposes. They are serious decisions that are meant to be and ought to be complied with strictly.”

11. The appellant is not permitted to choose which orders it will comply with and which ones it will not. The referenced orders were not set aside, discharged or varied in any way but they stand disobeyed. In the case of *In Hadkinson v. Hadkinson* (1952) 2 All E.R. 567, it was held that:

“It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”

12. It is trite that courts cannot and should not make orders in vain as was the sentiment in the case of *B. v. Attorney General* [2004] 1 KLR 431 where it was held thus:

“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”

13. The order staying execution pending appeal has been complied with and the decretal amount is being held in a joint account by counsel for the opposing sides. The appellant had filed a memorandum of appeal on 03<sup>rd</sup> December 2021. It is my view that the appellant has the right to be heard on the appeal. This does not in any way undermine the 1<sup>st</sup> Respondent/applicant’s right to enjoy the fruits of their judgment. I also appreciate that justice is a 2-way street meant to serve the opposing parties alike. On



the basis of Article 159 of the Constitution and Sections 1A, 1B and 3A of the Civil Procedure Act, I shall exercise my discretion on the matter.

14. I do order as follows:

- a. The time within which to prosecute the appeal is hereby extended;
- b. The appellant to file and serve a record of appeal within 14 days of this ruling;
- c. The appeal to be prosecuted within 60 days from the date of filing the record of appeal, failing which it shall stand dismissed;
- d. The appellant to pay the 1<sup>st</sup> respondent/applicant throw-away costs of Kshs. 20,000/= and the same to be paid within 7 days from the date of this ruling failing which order (a) will automatically be vacated.

15. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2024.**

**L. NJUGUNA**

**JUDGE**

..... for the 1<sup>st</sup> Respondent/Applicant

.....for the Appellant/Respondent

..... for the 2<sup>nd</sup> Respondent

