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| Case Class | Civil |
| Court | High Court at Nyamira |
| Case Action | Ruling |
| Judge | Fred Andago Ochieng |
| Advocates | - |
| Citation | Kenya Alliance Insurance Co Ltd v Eunice Nyaboke Nyaribari & Cleophas Nyamongo (Interested party) [2022] eKLR |

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**CIVIL CASE NO. 1 OF 2019**

**THE KENYA ALLIANCE INSURANCE CO. LTD.............................................PLAINTIFF/APPLICANT**

**VERUS**

**EUNICE NYABOKE NYARIBARI-........................................................................DEFENDANT/RESPONDENT**

**AND**

**CLEOPHAS NYAMONGO..................................................................................................................INTERESTED PARTY**

**RULING**

1. The application dated 7th December 2021 was brought by the plaintiff, seeking an interim stay of execution of the judgement until the application was heard and determined. The substantive relief asked for in the application is the extension of time within which the plaintiff could comply with the orders which required it to have the defendant’s motor vehicle re-inspected and repaired.

2. By the judgement dated 28th October 2021 the Learned Judge had directed the plaintiff to have the defendant’s vehicle repaired within 30 days. In support of the application, the plaintiff filed the affidavit of ANNE WAYAMBA, who is the plaintiff’s Legal Officer.

3. By the time of making the application herein, the time for complying with the judgement had already lapsed. At paragraph 8 of her supporting affidavit, Ms. Wayamba deponed thus: -

**“8. THAT delay in compliance with the judgement of the court dated 28th October, 2021 has been occasioned by the delay in obtaining the file so as to get the copy of the judgement of the court.**

**9. THAT the court file was subsequently received by the High Court registry at Nyamira on the 22nd November, 2021, whereas the judgement was delivered on 28th October 2021. (Annexed hereto and marked AWEXB1 is a copy of the correspondence dated 22nd November 2021 forwarding the copy of the judgement.”**

4. In answer to the application, the defendant filed the Replying Affidavit of her Advocate, OUMA MAURICE OTIENO. The said Advocate had been having the personal conduct of the defendant’s case. It was pointed out to the court that when the trial court was delivering its judgement, both the plaintiff and the defendant were duly represented by Advocates.

5. Furthermore, the Advocate for the plaintiff did file a Notice of Appeal dated 28th October 2021. It was the understanding of the defendant that the conduct of the plaintiff was a clear demonstration of the plaintiff’s resolve to challenge the judgement.

6. However, the plaintiff explained that as it is a body corporate, it required a copy of the judgement, before it could comply with the terms thereof. The plaintiff pointed out that it could not take action on the basis of hearsay. I fail to comprehend what it is that the plaintiff is describing as hearsay. I say so because the plaintiff’s Advocate was present in court at the time when the learned trial Judge was delivering her judgement.

7. For all intents and purposes, the plaintiff is deemed to have been present in court, through their Advocate. But even if the plaintiff was not physically present, through either a director or the Company Secretary, I consider the information and advise which their Advocate provided to them, as being anything other than hearsay.

8. It would be a sad day in the justice system were it to be said that even though a body corporate was represented in court by its duly appointed Advocate, it could still be said that the said corporate body was absent from court. It must be borne in mind that once a limited liability company passes a resolution to appoint an Advocate, the said Advocate has actual authority to appear for and on behalf of the said company.

9. I believe that it was on the basis of the authority from his client that the plaintiff’s Advocates lodged the Notice of Appeal. If the plaintiff had made a decision to challenge the judgement, through an appeal, it cannot have simultaneously decided to give effect to the very terms of the same judgement that it was challenging.

10. As the defendant has stated, the plaintiff appears to be suggesting that he was approbating and reprobating. By law, a party cannot be allowed to approbate and reprobate, simultaneously. The decision to appeal against the judgement was wholly inconsistent with an intention and desire to execute the judgement. To my mind, the failure by the plaintiff, to withdraw its Notice of Appeal is a manifestation of the plaintiff’s decision to continue to pursue two diametrically opposed steps.

11. The plaintiff has failed to satisfy this court that it is deserving the exercise of the court’s discretion in its favour. The case must come to an end, at this level. I find no justification to further delay the realization of the fruits of the decree. If indeed the plaintiff had the intention of giving effect to the judgement, nothing could have stopped it from commencing the necessary process of re-inspection of the defendant’s vehicle, immediately after the plaintiff received a copy of the judgement.

12. The plaintiff could even have continued giving effect to the judgement whilst the application herein was being canvassed; nothing could have stopped the plaintiff from doing so. Had the plaintiff demonstrated its bona fides, by doing what the trial court had directed, this court might have been inclined to grant an extension of time, so that that which may have been done, would be deemed to have been done within time, as would have been extended by the court.

13. In the final analysis, I find that the application dated 7th December 2021 lacks merit: it is therefore dismissed. The costs of the application are awarded to the defendant.

**DATED, SIGNED AND DELIVERED AT NYAMIRA**

**THIS 2ND DAY OF MARCH 2022.**

**FRED A. OCHIENG**

**JUDGE**



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