



**Makhastsa v Mutuku (Civil Appeal E028 of 2023)
[2024] KEHC 7638 (KLR) (26 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7638 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E028 OF 2023**

**FR OLEL, J
JUNE 26, 2024**

BETWEEN

BRANTON MAKHASTSA APPELLANT

AND

RUTH SYOMBUA MUTUKU RESPONDENT

RULING

A. Introduction

1. The application before this court for determination is the Notice of Motion application dated 25th April 2024 brought pursuant to provisions of Section 1A, 1B, 3, 3A, and 95 of the *Civil Procedure Act*, Order 50, rule 6, and Order 51 rules 1 and 3 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers (a) and (b) of the said application are basically spent and the main prayer sought is prayer (c) & (d) that; the court be pleased to extend time to allow the Applicant comply with the ruling delivered on 18th December 2023 and that they be deemed to have so complied with the said terms of the said ruling.
2. The application is supported by the grounds on the face of the said application and the supporting affidavit of one Ouko Moswaeri Advocate, of the applicant, and the same is opposed by the respondent, who filed her replying affidavit dated 22nd May 2024.

B. The Application.

3. The applicant averred that they had appealed as against the judgement delivered in Machakos SMCC E510 of 2022 issued on 23rd January 2023 and vide a ruling dated 18th December, 2024 this court did issue conditions of stay, directing that half the decretal sum be paid to the Respondent and the other half of the decretal sum be secured by a bank guarantee to be issued within 30 days of the said ruling. They had partially complied with the terms of the said ruling by releasing half



the decretal sum to the respondent on 11th April 2024 and the delay had been caused by the Appellants insurer Ms Direct line Assurance company experiencing structural/ Management adjustments.

4. Due to this delay, the respondent had commenced execution proceedings by proclaiming the Applicants assets. It was therefore necessary to seek for extension of time to so comply with the court orders as directed.
5. This application is opposed by the Respondent, through replying affidavit dated 22.05.2024, where she reiterated that the Applicant had failed to comply with the orders issued on 18.12.2023, and she had rightly levied execution to enforce the decree issued by the trial court. Further as a condition of stay granted herein, the applicant was directed to pay the auctioneer within 21 days and had failed to do so. The court was therefore urged to find that the applicant had moved this court in bad faith and further to hold that the said application under consideration was frivolous and vexatious.
6. The respondent further urged the court to find that there was bad faith in filing this Application as the applicant was asking court for more time to comply without first complying with the initial order issued. The explanation offered was weak and that the Applicant were only prompted to filing this application after enforcement of the decree had been undertaken. The applicant had demonstrated indolence in compliance with the previous orders issued and the court should thus not entertain this Application.
7. The respondent therefore urged this court to dismiss the said Application.

C. Analysis & Determination

8. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and discern that the only issue which arise for determination is whether time should be extended to allow the Appellants comply with this court orders issued on 18th December 2023.
9. Order 50 rule 6 of the *Civil procedure Rules* further provides that;

“where a limited time has been fixed for doing any act or taking any proceedings under these rules or by summary notice or by order of the court, the court shall have powers to enlarge time upon such terms(if any) as the justice of the case may require, and such enlargement maybe ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”
10. There is no doubt that the discretion to extend time is not a right of the party, but is an equitable remedy that is only available to a deserving party after laying a basis to courts satisfaction that there exists reasonable explanation as to why there has been a delay. The court will also consider if any prejudice will be suffered by the respondent and if the application has been brought without unreasonable delay.
11. In the Supreme court citation of *Nicholas Kiptoo arap Korir Salat Vs IEBC& 7 Others* (2014) eKLR the following principles of extension of time was laid down;
 - a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on case by case basis;



- d. Whether there is a reasonable explanation for the delay. The delay should be explained to the satisfaction of the court.
 - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; and
 - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
12. The court too can fall back on provisions of Section 1A, 1B & 3A of the *civil procedure Act*, which grants the court inherent powers to grant such orders as it may deem necessary and further enjoined court to determine disputes in a just manner while considering the lower rather than higher risk of injustice. In the citation of *Shabbir Ali Jusab Vs Anaar Osman Gamrai & another* (2013) eKLR, it was held that; the court should focus on substantive justice and disregard procedural technicalities.
13. The Appellant counsel has given two contrasting reasons to explain the delay. On the grounds made in support of the said Applicant, the applicant avers that the delay is attributed to the bereavement of one of the signatories at the applicant's insurance company, while at paragraph 5 of the replying affidavit they attribute the delay to structural/management changes at the Appellants insurer, Directline Insurance Co ltd, hence the delay in complying with the consent terms. The two contrasting positions are not supported by factual evidence to prove bereavement and/or management changes. Secondly giving two different explanations denotes that the applicant insurer is dishonest and therefore is underserving of the orders sought.

Disposition

14. Taking all relevant factors into consideration I do find that the application dated 25th April 2024 is unmerited and proceed to dismiss the same with costs to the Respondent.
15. The costs of this Application is assessed at Kshs.20,000/=.
16. There will be stay of execution of 14 days to enable the Appellant settle the decree outstanding.
17. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 26TH DAY OF JUNE 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 26th day of June, 2024.

In the presence of;

No appearance for Applicant

Mr. Muema for Respondent

Sam Court Assistant

