



Batra Company Limited & another v Kibui (Suing as Personal Representative of the Estate of Kelvin Mwingirwa Kibue (Deceased)) (Civil Appeal E212 of 2023) [2024] KEHC 13187 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13187 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E212 OF 2023
EM MURIITHI, J
OCTOBER 31, 2024**

BETWEEN

BATRA COMPANY LIMITED 1ST APPELLANT

CENTRE STAR CONSTRUCTION LIMITED 2ND APPELLANT

AND

CYPRIANO KIBUI RESPONDENT

**SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KELVIN
MWINGIRWA KIBUE (DECEASED)**

RULING

1. By a Notice of Motion under certificate of urgency dated 26/9/2024 pursuant to Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Order 42 Rule 6 and 7, Order 9 Rule 9 of the Civil Procedure Rules and all the enabling provisions of the law, the Appellants seek that:
 1. Spent
 2. Spent
 3. Pending hearing and determination of this application, this Honorable Court be pleased to issue an order staying the execution of the judgment entered into on or about 14th November, 2024 against the Appellants, and all the consequential orders and directions including attachment and proclamation of decree issued on 17th September, 2024 and commanding Beta Besa Auctioneers to sell by auction after giving 15 days' notice and making due proclamation.
 4. Leave be granted to the firm of MBLAW Advocates LLP to come on record for the Appellants.



5. The Honorable Court make further orders and issue other directions as it may deem just and expedient.
 6. The costs of this application be provided for.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Milton Mwirigi, the 1st Appellant's director sworn on even date. He avers that the Appellants filed a memorandum of appeal on 27/11/2023 through the firm of Messrs. Macharia, Burugu & Co. Advocates against the trial court's judgment. The Appellants have since learnt that this court granted stay of execution on condition that the Appellants would deposit such security for the due performance of such decree. The said firm of Advocates deliberately or otherwise failed and/or neglected to appraise the Appellants of the grant of conditional order of stay. The material developments particularly the issuance of the conditional order of stay and the consequent non-appraisal of the Appellants by their former advocates was done in bad faith and extreme secrecy. This conduct by the said advocates depicts obvious malice and a clear intent to deny the Appellants an opportunity to enjoy their rights to fair hearing under Article 50 of *the Constitution*. The Appellants learnt of the conditional stay orders on 25/9/2024 with utter shock and dismay when they were served with warrants of attachment and an auctioneers' invoice. Evidently, the Respondent, who is now acting on the non-compliance with the conditional order of stay, that was callously not communicated to the Appellants by their then advocates, has set in motion the wheels of execution, and it is extremely urgent that the conditional stay orders are regurgitated with the full knowledge of the Appellants. The application has been made timeously as it has been shown that the Appellants had no knowledge of the issuance of the conditional stay by this court. The Appellants are willing to satisfy the attendant conditions of stay and exhibit full compliance without fail. The Appellants will suffer substantial loss and damages unless the orders sought are granted.
3. The Respondent opposed the application vide his replying affidavit sworn on 3/10/2024. He terms the application as frivolous, non-starter, vexatious and an abuse of the court process which ought to be dismissed with costs. He avers that the firm of Macharia, Burugu & Co. Advocates is on record for the Appellants as no consent and/or leave has been sought by the firm of Mblaw Advocates to come on record. The court lacks jurisdiction to entertain this matter as it was transferred to Isiolo High Court as Isiolo High Court Civil Appeal No. E021/2024, and thus currently before that court for directions. The application is res-judicata because the court already pronounced itself vide the ruling of 7/5/2024. The Appellants cannot purport to fault their counsel on record for failing to inform them of the conditional stay because they have been indolent litigants. The orders sought are aimed at forestalling justice and preventing him from enjoying the fruits of litigation.

Determination

4. The contention by the Respondent that the application is res judicata on account of the ruling of the trial court of 7/5/2024 is manifestly misguided and unfounded.
5. The provisions of Order 42 Rule 6 of the Civil Procedure Rules are succinctly clear that this court has unfettered jurisdiction to entertain an application for stay of execution even where such stay has been granted or refused by the trial court, as follows:
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such



stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside. (2) No order for stay of execution shall be made under subrule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant. (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application. (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given. (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling. (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

6. The lower court (M.A Odhiambo SRM) allowed an application for stay by the Appellants dated 31/1/2024 on condition that:
 - “ a) The applicants shall deposit decretal sum of Ksh One Million [Ksh 1,000,000] into an interest earning account in a reputable commercial Bank, to be held by both advocates for the parties to this suit, within 21 days of this ruling. b) In default of (a) above the respondent is at liberty to execute.”
7. The Appellants contend that they learnt with utter shock and disbelief of the conditional stay orders of 7/5/2024 on 25/9/2024 upon being served with warrants of attachment.
8. The Appellants’ outright non-compliance with the aforementioned conditional orders of stay is hinged on their erstwhile advocate’s mistake, which the court is beseeched not to visit upon them.
9. It is against that backdrop that the Appellants fundamentally seek regurgitation of the conditional orders of stay with their full knowledge.
10. It is trite that an advocate’s mistake should not be visited upon an innocent litigant, but it is not enough for the litigant to heap the blame entirely on his advocate. The litigant must demonstrate that he took tangible steps and exercised due diligence in following up on his case.



11. This court respectfully agrees with *Philip Keipto Chemwolo & Mumias Sugar Company Limited v Augustine Kubende (Civil Appeal 103 of 1984)* [1986] KECA 87 (KLR) (Civ) (30 October 1986) (Judgment) where the Court of Appeal (Apaloo JA) posited thus:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit.”

12. This court considers the reason for the inordinate delay herein as plausible, having been satisfactorily explained.
13. This court, in the exercise of its discretion under Order 50 Rule 6 of the Civil Procedure Rules will extend the time within the Appellants were required to comply with the conditional orders of stay.

Leave to come on record

14. The provisions of Order 9 Rule 9 of the Civil Procedure Rules make it mandatory that for any change of Advocates after judgment has been entered to be effected, there must be an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. In order not to impede the Appellants’ right to be represented by an Advocate of their choice, this court hereby grants the leave sought.

Orders

15. Accordingly for the reasons set out above, this court allows the application dated 26/9/2024 and makes the following orders:
1. The time within which the Appellants were required to comply with the conditions for stay of execution issued vide the ruling of 7/5/2024, is hereby extended.
 2. The Appellants shall deposit the decretal sum of Ksh.1,000,000 into an interest earning account in a reputable commercial Bank, to be held by both advocates for the parties to this suit, within 14 days from the date hereof.
 3. In the event of default, the stay hereby granted shall lapse and be of no effect.
 4. Leave is hereby granted to the firm of Mblaw Advocates LLP to come on record in lieu of the firm of Macharia, Burugu & Co. Advocates.
 5. The hearing of the Appeal shall progress as earlier on scheduled before the High Court in Isiolo.
 6. The applicants shall in terms of Order 50 rule 6 of the Civil Procedure Rules pay the costs of this application to the Respondent.

Order accordingly.

DATED AND DELIVERED THIS 31ST DAY OF OCTOBER, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Chumo for Mr. Busiega for Appellants.



Mr. Kaba for Mr. Maranya for the Respondent.

