



**Chako v Mmbukane (Miscellaneous Civil Application 2 of 2024)
[2024] KEHC 13314 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13314 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CIVIL APPLICATION 2 OF 2024
JN KAMAU, J
OCTOBER 31, 2024**

BETWEEN

JAVAN KISANYA CHAKO APPLICANT

AND

AINEA MMBUKANE RESPONDENT

RULING

Introduction

1. In his undated Notice of Motion filed on 23rd January 2024, the Applicant herein sought that he be granted leave to file his appeal out of time and that upon hearing this application this court be pleased to set aside the Ruling made by Hon M. Ochieng, Senior Principal Magistrate at Hamisi Law Courts on 13th May 2022 and 23rd November 2023 which ordered that he be sentenced to civil jail for thirty (30) days.
2. He swore an affidavit in support of the said application on 23rd January 2024. He averred that he was the judgment debtor and that the Respondent had caused him arrested and was held in custody for criminal Case No 945/67/20 from 15th August 2020 up to 1st September 2020 at Mudete Police Station. He stated that he was a Kenyan Teacher TSC No 37xxx teaching at Sabatia Primary School and of ID No 125xxxxx.
3. He further averred that on 23rd November 2023, the Respondent caused him arrested again and he was sentenced to thirty (30) days civil jail. He asserted that the said sentence made him lose on the promotion interview scheduled by Teachers Service Commission at Moi Girls Vokoli in Sabatia Sub-county on 6th December 2023.
4. He stated that he had paid the Respondent Kshs 37,500/= out of Kshs 60,000/= as down payment for an alleged sum of Kshs 20,000/=. He asserted that he had paid the same amount in duress so as to avoid the torture he was going through and while being in his condition of a person living with



disabilities. He asserted that he went through strenuous and demeaning circumstances that could have been avoided using alternative ways of solving/resolving conflicts.

5. He urged this court to quash the decision of the Trial Court and set aside the Ruling on the ground that the evidence adduced did not prove the charges against him as was purported in the Sale Agreement. He pointed out that in confirming an illegality, the Respondent's witness had made a false statement and that the Attorney General erred in making investigation without going to the ground.
6. It was his contention that he had brought his application in good faith and averred that the order he had sought for would not prejudice anyone's interest in any way.
7. On his part, the Respondent swore a Replying Affidavit on 7th March 2024 in opposition to the present application. The same was filed on even date.
8. He averred that the application herein was frivolous, scandalous and an abuse of the court's process and should be dismissed. He stated that the Applicant sought orders against the "plaintiff (PW 2) and Attorney General" who were not parties herein hence it was not clear which redress and against whom he was seeking the court's indulgence. He termed the application as incurably defective.
9. He averred that on 30th October 2018, he entered into a land Sale Agreement with the Applicant who was selling his Land Parcel Number Kakamega/Kedoli/978 and that upon execution of the same he deposited Kshs 20,000/= to the Applicant. He later discovered that the Applicant had duped him as he was evasive and could not cooperate with him to have the sale perfected.
10. He instructed his Advocates who drafted a Demand Letter dated 21st June 2021 and it served upon the Applicant requiring him to refund his said Kshs 20,000/=. The Applicant failed to comply with the said Demand Letter whereupon he filed Hamisi Civil Case No 29 of 2021 on 22nd July 2021. Judgment was then delivered in his favour.
11. He extracted the decree which was issued on 23rd May 2022. Costs were assessed at Kshs 33,460/=. He pointed out that after one (1) and a half (1/2) years after serving the decree upon the Applicant, he did not respond as a result of which his Advocate applied for execution through a Notice to show cause (NTSC) why the Applicant would not be committed to civil jail.
12. When the matter came up for (NTSC) on 7th September 2023, the Applicant failed to attend court whereupon warrants of arrest were issued in execution against him with the same being effected on 28th September 2023.
13. The Applicant was arrested and on 28th September 2023, he paid a sum of Kshs 2,000/=. He was given the last chance to pay the decretal sum in monthly instalments. The matter was slated for 19th October 2023 to confirm compliance. However, the Applicant failed to appear and had also not remitted any monies to him as was directed on 28th September 2023.
14. The warrants of arrest were then re-instated and on 23rd November 2023, the Applicant was committed to civil jail for thirty (30) days. He pointed out that he paid Kshs 1,800/= for his sustenance in jail.
15. He explained that the Applicant filed an application on 15th December 2023 seeking to be released from civil jail on condition that he pays Kshs 30,000/= and thereafter to pay the remaining balance within six (6) months by making monthly instalments of Kshs 5,000/=.
16. The Applicant remitted the said Kshs 30,000/= through his advocates and the court released him on condition that he paid the balance within six (6) months. However, since he was released from civil jail, the Applicant had never honoured his undertaking and stood in contempt of court.



17. He averred that he who came to equity had to come with clean hands and hence, the Applicant did not deserve the orders sought. He contended that the Applicant had not tendered any explanation or reason for the inordinate delay for not filing an alleged appeal on time as it was twenty-two (22) months since the subject judgment was delivered.
18. He noted that the Applicant had failed to annex to his application, a draft memorandum of appeal which he was opposed to. He asserted that the Applicant was merely trying to delay his obligation to remit the whole decretal sum to him. He was categorical that he stood to suffer irreparably if the orders sought were granted since he would have been denied the fruits of his judgment. He averred that it was in the interest of justice that the Applicant's application be dismissed.
19. The Applicant's Written Submissions were dated 6th May 2024 and filed on 2nd July 2024 while those of the Respondent were dated and filed on 13th May 2024. This Ruling was based on the said parties' Written Submissions which they relied on in their entirety.

Legal Analysis

20. Right from the onset, this court noted that the Applicant mainly submitted on the merits of the intended appeal and reiterated the averments in his Affidavit in support of the application herein.
21. On his part, the Respondent invoked Section 79G of the *Civil Procedure Act* and submitted that the Judgment was delivered on 13th May 2022 and the Applicant was accorded thirty (30) days from the said date to prefer an appeal but he never did. He argued that it was two (2) years since the said Judgment was delivered and the Applicant had failed to show sufficient cause for his failure to file the appeal within the prescribed timelines.
22. He further submitted that it was a general rule that a party intending to appeal must provide security for costs so that in case of unsuccessful appeal, then the decree holder would not need to go back to the tedious process of execution. He blamed the Applicant for having not provided the same. He added that a contemnor such as the Applicant herein ought to first purge the contemptuous acts before any court could grant him an opportunity to be heard.
23. He contended that should this court find it fit to accord the Applicant leave to appeal then it should be on condition that the Applicant remits the balance of the decretal sum to him. He asserted that the Applicant's prayer that the order committing him to civil jail be set aside was absurd since he had since been released. He further added that it was a general rule that costs follow events. He urged the court to direct the Applicant to shoulder the costs of this application to act as a deterrent to frivolous litigation.
24. Notably, the Trial Court's Judgment was delivered on 13th May 2022. The Applicant filed this application on 23rd January 2024. This was about one (1) year, eight (8) months and ten (10) days. In the mind of this court, this was inordinate delay.
25. Be that as it may, courts must exercise great caution not to deny litigants their right to fair trial. Indeed, every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of the *Constitution* of Kenya, 2010. Even where a party delays in doing an act, there is always a provision that would give it reprieve to seek justice.
26. Notably, Order 50 Rule 6 of *Civil Procedure Rules* empowers the court to enlarge the time to do a particular act. It stipulates as follows:-

“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 power to



enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

27. Against this backdrop, this court noted that the Applicant had not annexed a draft Memorandum of Appeal which would have disclosed whether or not he had an arguable case herein. Be that as it may be, this court noted that he was acting in person and had no legal representation. Thus, he may not have had the knowledge of how to draft applications such as the one herein. In the circumstances, this court chose not to penalise him on that ground as Article 159(2)(d) behoves courts to administer justice without undue regard to procedural technicalities.
28. In cases such as this, the court was required to consider if the opposing side would suffer any prejudice if the orders sought were granted. The court did not see any prejudice that the Respondent would suffer or was likely to suffer if the Applicant herein pursued his constitutional right to be heard. If there was any prejudice, then the same could be compensated by way of payment of costs.
29. Taking all the factors hereinabove into account, it was the considered view of this court that it was in the interests of justice (emphasis court) that the Applicant be given an opportunity to have his case heard on merit as it would suffer prejudice if it was denied an opportunity to fully present its case to be heard on merit.
30. Indeed, the power to grant orders in the interest of justice and/or for the ends of justice (emphasis court) is well captured in Section 3A of the *Civil Procedure Act* that states that: -

“Nothing in the Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice (emphasis court) or to prevent abuse of the process of the court.”
31. Turning to the issue of stay of execution pending appeal, this court noted that the Respondent submitted on the same, particularly, the conditions with regard to a money decree, whereas the Applicant only prayed to be granted leave to appeal. Be that as it may, it was prudent that to grant a status quo order to avoid rendering the Appeal an academic exercise.
32. As regards whether or not this court could set aside the order committing the Applicant to civil jail, without belabouring, it found it imprudent to deal with the same at this stage as that was in the purview of the appellate stage.

Disposition

33. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s undated Notice of Motion Application filed on 23rd January 2024 was partly merited only in respect of Prayer No (2) and the same be and is hereby allowed in the following terms: -
 1. That there shall be a status quo order, the status being that the Applicant was out of civil jail currently on condition the Applicant shall deposit the balance of the decretal amount in court within thirty (30) days from the date of this Ruling. This court did not indicate the amount of the balance of the decretal sum as it was not clear what this amount was from the pleadings that had been presented before it.



2. For the avoidance of doubt, in the event, the Applicant shall default on Paragraph 33(1) hereinabove, the conditional status quo shall automatically lapse.
3. The Applicant be and is hereby directed to file and serve his Memorandum of Appeal within fourteen (14) days and Record of Appeal within one hundred and twenty (120) days from the date of this Ruling.
4. This matter will be mentioned on 25th February 2025 to confirm compliance and/or for further orders and/or directions.

34. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 31ST DAY OF OCTOBER 2024

J. KAMAU

JUDGE

