Ndungu v Omanga (Civil Appeal 144 of 2023)
[2024] KEHC 13330 (KLR) (28 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13330 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL 144 OF 2023

TA ODERA, J

OCTOBER 28, 2024

BETWEEN

DAVID MBUCHA NDUNGU ..... APPLICANT

AND

THOMAS OMANGA ..... RESPONDENT

(Being an Appeal arising from the Judgment and Decree of the Honourable G. Barasah, Resident Magistrate, delivered in Ogembo PMCC No.172 of 2020 on 5th January 2023)

RULING

1 The applicant filed the application dated 15.1.24 seeking:

a ..... spent

b. ..... spent

c. That this Honourable court be pleased to review and/or extend the period for compliance by 14 days the order issued by Hon. Lady Justice P. Gichohi ordering the applicant to deposit the decretal amount in a joint interest earning account in the joint names of the advocates for parties.

d. That costs be provided for.

2 The application is based on the grounds that;

i. The applicant filed Notice of motion Kisii High Court Miscellaneous Application no. E48 of 2023 on 23.2.23 seeking stay of execution of the decree issued in Ogembo PMCC No. 172 of 2020 inter alia.

ii. The application was heard and determined on 6.11.23 wherein the applicant was directed to file a memorandum of appeal within 21 days and deposit the decretal sum in court within 21 days.

iii. The memorandum of appeal was filed within time but the deposit was not made due to inadvertence of counsel who failed to extract the court order for submission to the accounts department for processing of invoice.

iv. This was occasioned by resignation of the applicant's counsel's representative who resigned without handing over the notes on the file.

v. The counsel for applicant learnt of this upon proclamation of the properties of the applicant.

vi. Mistake of counsel ought not be visited upon his innocent client.

vii. The Intended appeal raises arguable issues and the applicant ought to be given a chance to be heard.

viii. The proclamation was done on 18.12.23 when the applicant's counsel had closed for Christmas holidays and the application was made on 15.1.24 when they resumed and so there was no inordinate delay.

ix. That the court had unfettered discretion to grant the orders sought.

x. It is in the interest of justice that the application be allowed.

3 The application was supported by the annexed affidavit of Muma Nyagaka Advocate who reiterated the ground of the application and attached the copy of order for deposit if the decretal sum and extension of time MN.1 and warrant of attachment and proclamation MN.2.

4 The respondent filed the replying affidavit dated 22.1.24. He deponed that the application is frivolous, vexatious and an abuse of the process of this court and he asked this court to dismiss it with costs. Also that the 21 days leave to deposit the decretal sum lapsed without any action being taken though the applicant was aware of the ruling and that the delay has not been explained. He deponed that execution commenced 30 days upon delivery of the ruling. Further that the instant application is Resjudicata as the court already pronounced it/s self on the issues in the instant application and cannot now set aside the conditions of the said ruling. Also that the applicant has not come to this court with clean hands and the application does not raise triable issues of law, is an afterthought, unmerited and meant to deny him of enjoying the fruits of his judgment. He said he will suffer substantial loss if the application is allowed and he thus urged this court to dismiss the application.

5 The application proceeded by way of written submissions. The applicant submitted that the court has the discretion to allow the application under order 50 Rule 2 of the Civil Procedure rules and extend time of compliance. counsel cited the case of Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No Nai 255 of 1997) (unreported), where the Court held that:

> "It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted".

6 On the issue of delay, the case of Andrew Kiplagat Chamaringo Vs Paul Kipkorir Kibet (2018) eKLR where it was held that there is no maximum or minimum period of delay and that a satisfactory reason for delay is enough for the court to exercise its discretion.

7 On whether mistake of counsel should be visited upon his client and the right to be heard counsel submitted that mistake of counsel ought not be visited on his client and cited the case of Athi River Development authority vs Jeremiah Kimigho mwakio & 3 others (2015) eKLR, Philip k. Chemwelo and Ano vs Augustine Uubende (1986) KLR and Mwai v Murai No4 (1982) KLR.

8 The Respondent submitted that court orders are not issued in vain and so the court should not extend the orders for deposit of the decretal sum. He cited the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR

9 where it was held "From the above case law, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

10 This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

1. 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;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time".

11 It was submitted that the orders sought to be extended were issued on the presence of one Murgor Advocate who was instructed by the applicant and that the non- compliance diminished the import of the said orders which lapsed after 14 days.

12 It was submitted that there is no excuse for the non -compliance as there is no need to serve an order the accounts department to generate an invoice as the right procedure is to move the registry to generate an invoice and then deposit the sum in court. Also that counsel Murgor who dealt with the matter is still in the said firm and it is not true that he resigned as alleged. The respondent also told this court that the court had jurisdiction to grant extension of time but only to a party deserving of it as per its discretion.

13 It was submitted that the respondent will be prejudiced by the granting of the said orders sought as he has been denied fruits of the judgment from 24.2.23.

14 Also that the instant application was filed 60 days after delivery of the ruling whose orders are sought to be reviewed. it was also submitted that the order 45 Rule 1 have not been satisfied to warrant review to wit; discovery of new and important matter, mistake or error, sufficient reason and application must have been made without unreasonable delay.

15 I have carefully considered the application the able submissions by both counsel and the law. Order 45 rule 1 of the Civil Procedure rules provides that: -

> " (1) Any person considering himself aggrieved—
>
> a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

16 The applicant was not aggrieved by the ruling but seeks a review of the orders dated 6.11.23 by way of extension of time for compliance. This application therefore falls within the purview of the last limb of Order 45 Rule 1 (b) of the Civil Procedure rules, i.e for any other sufficient reason. It is not denied that this court has the discretion to grant the orders sought. What this court has to determine is whether sufficient cause had been shown to warrant grant of the said orders and whether the application has been made without undue delay

17 The applicant has come to this court seeking equitable orders which are at the unfettered discretion of the court. The conditions for granting discretionary orders were laid down in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR (supra) to wit; -

1. 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;

    1. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.

    2. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

    3. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

    4. Whether there will be any prejudice suffered by the respondents if the extension is granted;

    5. Whether the application has been brought without undue delay; and

6. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

18 On whether the applicant has established sufficient reason for non-compliance, the application the ruling was delivered on 6.11.23 and the applicants counsel says they closed their office on 18.12.23 and found out about the proclamation on 15.1.24 for non-deposit of the decretal sum and they moved the court on the same day. Counsel said their representative who had the notes of the file left their service but counsel for the respondent said that advocate Murgor who is in conduct of the matter still works for the said firm. The particulars of the said representative and when he allegedly left service were not revealed and so I find that the said argument is vague and thus untenable. Court orders are not issued in vain but for compliance.

19 On the issue of delay, taking into account the Christmas Holidays as the applicant has submitted, the application was filed about 60 days after the ruling was delivered as rightly submitted by counsel for the respondent. In the ruling dated 6.11.23, the court was gracious enough to grant the applicant time to file his appeal out of time and deposit the decretal sum in court. The reason for the delay in compliance with the court orders was not matter is not sufficiently explained I find that the applicant is guilty of laches

20 On whether mistake of counsel should be visited upon the client, the advocates for the applicant argued that mistake of counsel ought not be visited upon their client. Counsel for the applicant had a higher duty to ensure compliance as they had benefitted from the discretion of the court. Though mistake of counsel should not be visited upon an innocent client as per the cited cases, in this case is an exception as in this case judgment was delivered on 24.2.23 and the orders to file the appeal and make deposit were made on 6.11.23 in the presence of counsel but this was not done and though counsel owns up to the mistake, there is no sufficient explanation to the same as I have already found.

21 On prejudice, the respondent said that he will be prejudiced if the orders are granted as he has been denied of the fruits of thee judgment. I have weighed the right of applicant to be heard and the right of the respondent to enjoy the fruits of his judgment in the circumstances and I find that the applicant was given a right to be heard but squandered it.

22 This is a court of equity and "he who comes to equity must come with clean hands". The appellant has not come to court with clean hands and he is thus not entitled to the orders sought. I do not find merit in the application and I proceed to dismiss it with costs to the respondent. The appeal is also dismissed for being filed without compliance with the orders of the court. Costs to the respondent.

T.A ODERA

JUDGE

28.10.24.

DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF -

Mr. Muma for the Appellant /Applicant

Miss Bosire for the Respondent

Court Assistant - Oigo