



**Muturi & another v Embu Gaturi Housing Co-operative Society Limited & another  
(Civil Appeal 22 of 2014) [2024] KEHC 15037 (KLR) (27 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15037 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL 22 OF 2014  
LM NJUGUNA, J  
NOVEMBER 27, 2024**

**BETWEEN**

**SIMON NJOGU MUTURI ..... APPELLANT**

**AND**

**WAMAE NJENGA ..... APPLICANT**

**AND**

**EMBU GATURI HOUSING CO-OPERATIVE SOCIETY LIMITED .... 1<sup>ST</sup>  
RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant filed a notice of motion dated 20<sup>th</sup> June 2024, being supported by the grounds set out on its face and the facts deposed in the supporting affidavit thereof. The orders sought are as follows:
  1. Spent;
  2. Spent;
  3. That the honourable court be pleased to extend time to the 1<sup>st</sup> respondent/applicant herein to file and serve the memorandum of appeal against the ruling and order of the honourable court (Hon. D. Endoo) delivered on 24<sup>th</sup> April 2024 with respect to the appellants' notice to show cause dated 13<sup>th</sup> October 2023;
  4. That this honourable court be pleased to grant leave to the 1<sup>st</sup> respondent/applicant herein to file and lodge at the registry the memorandum of appeal and the prescribed fee out of time;



5. That this honourable court be pleased to issue an order for stay of execution of ruling and order of the honourable court (Hon. D. Endoo) delivered on 24<sup>th</sup> April 2024 and all consequential orders pending hearing and determination of the appeal;
  6. That this honourable court be pleased to grant any other orders as it may deem fit to further the ends of justice; and
  7. That the costs of and incidental to this application be in the cause.
2. Through a ruling delivered on 24<sup>th</sup> April 2024, Embu High Court's Deputy Registrar, Hon. D. Endoo, in determining a notice to show cause, ordered that judgment debtor deposits the full decretal sum into a joint account, failing which, warrants of arrest would issue. The appellants filed a notice of appeal dated 07<sup>th</sup> May 2024 seeking to challenge this decision at the Court of Appeal. The applicant has argued that the time for filing the memorandum of appeal lapsed when its advocate was away on compassionate leave, having lost his parent. That the impugned ruling is based on the fact that there were no stay orders in place but the applicant is keen on pursuing his appeal. It is on this basis that the orders herein have been sought.
  3. Through a replying affidavit, the appellant/respondents stated that the judgment was delivered in this appeal on 22<sup>nd</sup> February 2017, and the applicant challenged the same at the Court of Appeal. The Court of Appeal struck out the memorandum of appeal and the applicant filed another application seeking leave to appeal out of time but the same was disallowed. There were no stay orders in place at that point, and they moved the High Court for execution of the decree through a notice to show cause against Sylvester Njeru. That the said Sylvester Njeru passed away and so the respondents filed another notice to show cause against Joseph Munyi, the vice chairperson of the applicant. In the pendency of determination of the notice to show cause, the parties were informed that the pending matter before the court of appeal filed by the applicant has since been dismissed.
  4. The Deputy Registrar proceeded to deliver the impugned ruling herein. The respondents urged that the applicant failed to comply with section 79B of the *Civil Procedure Act* and is seeking extension of time for a non-existent substantive appeal. That the applicant neglected to comply within the ample time it was accorded by the court and has only moved the court through this application when the 60 days allowed by the court through impugned orders are about to elapse. They urged that the applicant is not deserving of the orders sought since it has not offered any security if it is to be granted stay according to Order 42 Rule 6 of the Civil Procedure Rules. That the explanation given for the delay does not hold water and the same is not genuine. They termed the application as an abuse of the court process and a ploy by the applicant to deny them the fruits of their judgment.
  5. The application was canvassed by way of written submissions.
  6. The applicant submitted that the court has discretion to enlarge time under section 95 of the *Civil Procedure Act*. It relied on the cases of Imperial Bank Limited (In Receivership) & Another v. Alnasir Popat & 18 Others (2018) eKLR, Muringa Company Limited v. Archdiocese of Nairobi Registered Trustees (2020) eKLR and Noroge v. Kimani (2022) eKLR and argued that the reasons given for the delay are not inordinate and are excusable. That the delay was occasioned by the advocate, thus the applicant should not suffer the consequences as was held in the case of Vishva Stone Suppliers Company Limited v. RSR Stone (2006) Limited (2020) eKLR.
  7. It urged the court to do justice by allowing the application since no prejudice will be occasioned upon the respondents. It relied on Order 42 Rule 6(1)&(2) and stated that it is bound to suffer substantial loss if the orders are denied and that it will comply with whatever form of security the court will impose



- in its discretion. Reliance was placed on the case of Solomon Odongo Muyeka Alubala v. Ricardo Badoer (2021) eKLR and argued that the intended appeal is arguable and has high chances of success.
8. The appellants/respondents argued that the application does not meet the requirements for extension of time to appeal and they relied on the cases of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR and Evans Kiptoo · Vs. Reinhard Omwoyo Omwoyo (2021) eKLR. That the applicant intends to protract the proceedings for longer than necessary, thus denying them justice. That the delay is too long and no sufficient explanation was given. That the applicant has habitually failed to meet the requirements of the law, which explains why his appeal was struck out by the Court of Appeal.
  9. They relied on section 79B of the *Civil Procedure Act*, Order 42 Rule 6 of the Civil Procedure Rules and the case of *George Kaleve Musyoki v Nolturesh Loitoktok Water & Sanitation Company Limited (Cause 135 of 2015)* [2018] KEELRC 573 (KLR) and argued that the court should not exercise its judicial discretion in favour of the applicant since it does not act in good faith. That the applicant is still on a fishing expedition as its conduct has consistently shown and the court should not exercise its discretion in its favour.
  10. The issue for determination is whether the applicant deserves to be granted the orders sought.
  11. Through a ruling delivered on 24<sup>th</sup> April 2024, the court ordered the applicant, through its officials to pay the decretal sum into a joint account within 60 days, in default of which warrants of arrest would issue. The applicant is aggrieved by these orders and it filed a notice of appeal dated 07<sup>th</sup> May 2024 intending to challenge the ruling at the Court of Appeal. The impugned ruling arose from notice to show cause proceedings before the Deputy Registrar. In response to the application, the appellants/respondents stated that the applicant had challenged the substantive judgment at the Court of Appeal but the memorandum of appeal was struck out. After that, the applicant unsuccessfully moved the Court of Appeal for orders for extension of time to appeal.
  12. As at the time of filing the application herein, there was a 50-day delay since the impugned ruling was delivered. The applicant deposed that the delay was occasioned when its advocate was bereaved and was forced to take compassionate leave. That by the time the advocate was returning to work, time had already elapsed and it became necessary to file the application herein. The court has discretion to enlarge time as provided under Section 95 of the *Civil Procedure Act* which states:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”
  13. However, the pertinent question herein is, for what purpose should the court enlarge time? The substantive appeal lodged at the Court of Appeal was struck out because it was filed late. The respondents moved to execute for the decretal amount from the 1<sup>st</sup> respondent, in light of their successful appeal at the high court. The matter was placed before the Deputy Registrar as the administrative officer whose office exists under Order 47 Rule 2 of the Civil Procedure Rules. The impugned order was issued by the Deputy Registrar after hearing the notice to show cause.
  14. As it has been said many times, execution is a lawful process (see the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR). In this case, the ruling enables the respondents to execute for the decree arising from the judgment of the court which until now has not been challenged successfully on appeal. This means that the order of the Deputy Registrar is given under the umbrella of the



substantive judgment of the court. Therefore, this order cannot be challenged at the Court of Appeal when the substantive appeal was unsuccessfully challenged at the same court.

15. That being said, it is my view that the application herein is a waste of the court's time and it seems to be calculated to defeat justice by denying the respondents the fruits of their judgment. Litigation must come to an end at some point and this seems like a good time to let the matter rest.
16. I find that the application lacks merit and the same is dismissed in its entirety.
17. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**L. NJUGUNA**

**JUDGE**

