



**Nyarengesi & 2 others v Kariuki (Civil Appeal E912 of 2024)
[2024] KEHC 16091 (KLR) (Civ) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16091 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E912 OF 2024**

**TW OUYA, J
DECEMBER 19, 2024**

BETWEEN

JARED MOGIRE NYARENGESI & 2 OTHERS APPELLANT

AND

DOUGLAS MAINA KARIUKI RESPONDENT

(Being an appeal from the Judgement delivered by Honourable B.M Cheloti (Principal Magistrate on 7th November, 2023) Pursuant to leave granted by Hon J. Mulwa on 2nd July 2024)

RULING

Background

1. This is an application dated 3rd October 2024 by the respondent/Applicant herein seeking for orders that court be pleased to strike out this appeal for failure by the appellants to comply with the court's orders given on 11th April, 2024 together with costs thereto.
2. The Application is based on grounds that:
 - a. That Judgement was entered in favour of the applicant in Milimani Commercial Court Civil Case No E163 of 2020 on 7th November, 2023.
 - b. That the respondent/Appellants being dissatisfied with the said Judgement preferred an appeal to this court vide the Memorandum of Appeal dated 4th July, 20204.
 - c. That at the time of the judgment the respondents sought and were granted a 30 days stay to pursue proceedings for purposes of appeal.



- d. That the respondent also filed an application seeking stay of execution on 30th January 2024 and a ruling/ orders were issued ex parte on the same day.
 - e. That as per the court's orders, the respondent was to deposit half of the decretal sum in court within 30 days and return for hearing on 3rd April, 20224.
 - f. That the respondent had not complied with the orders within 30 days and they filed an application seeking extension of time to within which to comply and deposited Kshs 1,303,268.00/= on 12th March, 2024.
 - g. That the respondent also filed an application seeking immediate release of the vehicle and to have the Auctioneers, Direct "o" Auctioneers be cited for contempt of court orders dated 18th, March, 2024 and a ruling/ orders were issued ex parte 28th March, 2024 that parties return for interparties hearing on 3th April 2024 alongside the application dated 13th March 2024.
 - h. That on 11th April, 2023 orders were issued by consent of the parties and the respondent did not comply with neither of the orders, but filed a Memorandum of Appeal on 9th August, 2024 and served the same upon the Applicant on 5th September, 2024.
 - i. That the Applicant is keen to enjoy the fruits of his judgement and the same shouldn't be hindered by the respondent's indolence.
 - j. That further, to date no proof of request of proceedings or payment has never been served upon the Applicant's advocate.
 - k. That the respondents are not keen to prosecute its Appeal but rather delay the Applicant's win.
 - l. That in the circumstances it is only fair this Appeal is truck out for failure to comply with the timeline issued by the curt.
 - m. That court orders are not issued in vain.
 - n. That this application is made in good faith and it is in the interest of justice that it is allowed.
3. The Appellant/Respondent was granted conditional stay orders on 1st February, 2024. The condition was that the Appellant/Respondent was to deposit half of the decretal sum in court within 30 days in default of which the stay would lapse. The orders read:
- “In the interim I grant temporary stay on the applicant depositing 50% of the judgement sum in curt as security with 30 days in default, the stay order shall lapse.”
4. The Respondents did not comply within 30 days period but filed an application seeking extension of time within which to comply and deposited Ksh 1,303,268 on 12th March 2024. The parties were before court for inter parties hearing on 22nd July 2024 where orders were issued by consent of the parties That:
- i. The attached motor vehicle be released to the applicants as soon as the applicants pay storage charges and other charges as may be agreed upon.
 - ii. The applicants are granted leave to appeal out of time and Memorandum of Appeal to be filed within 7 days and ROA be filed within 60 days.
 - iii. The sum of Kshs 350,000 (general damages) and Ksh. 38,376 (special damages) being Kshs 388,375 to be released to the respondent through his advocates Ngotho Waweru Advocates in



the sum of Kshs 1,308,268 and the balance thereof to remain held as security pending hearing and determination of the Appeal.

- iv. The above orders are by consent of the parties compromised the three applications filed by the applicant.
5. The court had directed the parties to file written submissions for disposal of the instant application but as at the time of this determination, only the Respondent / Applicant ad complied. The Applicant submits that the Respondents did not comply with the orders but proceeded to file a memorandum of appeal on 9th August 2024 without applying to the court for extension of time which time lapsed on 11th June 2024. That the Appellant Respondent has not filed a record of appeal to date. The Applicant argues that this is in contravention of section 79G of the *Civil Procedure Act*.
6. The Applicant also argues that the Appellant did not serve the memorandum of appeal within 7 days as provided under Rule 12 of the Civil Procedure Rules as service was done on 5th September, 2024 which was 30 days after filing. He submits further that the Appeal ought to have been filed within the expanded 7 days period as per the orders of 22nd July 2024. That the Respondent filed the Memorandum of Appeal on 5th September and has not filed the Record of appeal yet 60 days period granted by the court have since lapsed.
7. The Appellant relies on section 79G of the *Civil Procedure Act* and relies on the authority of Fred Matiang'i vs Miguna Miguna and 4 others as quoted by Githinji, J in Ronald Wanje Jembe v Pheobiana Rehema Kalenga & Another (2022) eKLR where the court held that:

“Section 79G of the *Civil Procedure Act* requires that before the Court enlarges the time for appeal, the applicant must satisfy the court that he had good and sufficient case for not filling the appeal in time. In alibhai Musajee Vs Shariff Mohammed Al- Bet Civil Appeal No 283 of 1988, the court of Appeal held that whereas the *Civil Procedure Act* allows for extension of time for filing appeal, if good and sufficient cause shown, failure to act does not constitute a good or sufficient cause.”
8. It is the Applicant's view that the Memorandum was filed purely for delaying execution proceedings in the lower court. He argues that the delay in prosecuting this appeal is deliberate and unexplained and urges the court to exercise its discretion to dismiss the appeal with costs.

Determination

9. The court takes note that the respondent's advocates were duly served with the instant application with an affidavit of service sworn on 22nd October 2024 to that effect. The respondents did not file any response or submissions having also failed to appear in court on two mentions on 31st October 2024 and 14th November 2024. This court also takes notice of the initial orders that were granted by the court on 1st February 2024 granting the Respondent herein interim stay of execution orders and that they were conditional but were salvaged by the subsequent orders on 28th April 2024.
10. The subsequent orders granted by court on 22nd July 2024 required the respondent to file a Memorandum of Appeal within 7 days and Record of Appeal within 60 days which lapsed in September 2024. Upon being served with the instant application, the respondent has not appeared in court or expressed any grounds or reasons why the orders sought for should not be granted.
11. It is apparent that the respondent did not comply with orders granted on 22nd July 2024 requiring the filing of Memorandum of Appeal within 7 days. They filed it on 5th September without leave of the court. No record of appeal was ever filed to date while the 60 days window lapsed in September



2024. Considering that the orders issued by the court on 22nd July 2024 were an amalgamation of three applications by the Respondent and made pursuant to the consent by the parties all in favour of the Respondent, it is appalling that he was still not able to comply. This court can only deduce that the respondent had no intention of proceeding with the appeal or complying with court orders. tan

12. For the reasons above and in the absence of any response to this application by the respondent, this court deems that the application is not opposed. The applicant is within his right to move this court for the orders sought.

Disposition

13. For the reasons above, this court determines that:
1. This application is allowed
 2. The Memorandum of appeal dated 4th August 2024 and filed 5th August 2024 is hereby struck out.
 3. Costs to the Applicant

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF DECEMBER, 2024

ROA 14 days.

HON. T. W. Ouya

JUDGE

No appearance (Kimondo and Gachoka advocates) for the Appellant

Ms Kamau holding brief for Ngotho Waweru for the Respondents

Court Assistant: Martin

