



Kenya Power Lighting Company Limited v Onyango & another (Suing as the legal administrator and personal representative of the Estate of Cornel Onyango Oketch - Deceased) (Civil Appeal 48 of 2022) [2023] KEHC 21246 (KLR) (29 May 2023) (Ruling)

Neutral citation: [2023] KEHC 21246 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 48 OF 2022
JN KAMAU, J
MAY 29, 2023**

BETWEEN

KENYA POWER LIGHTING COMPANY LIMITED APPELLANT

AND

MICHAEL OKENCH ONYANGO 1ST RESPONDENT

ROSE AMAGORO THOMAS 2ND RESPONDENT

SUING AS THE LEGAL ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF CORNEL ONYANGO OKETCH - DECEASED

(Being an appeal from the Ruling of Hon. C. Oruo (SPM) delivered at Winam in Principal Magistrate’s Court Case No E60 of 2021 on 27th May 2022)

RULING

Introduction

1. In his Notice of Motion dated 18th October 2022 and filed on 19th October 2022, the Appellant sought for orders that the court be pleased to enlarge time for it to comply with the consent orders of this court dated 4th October 2022 and grant stay of execution of the Decree and/or orders of the Trial Court in respect to the Judgment delivered on 8th October 2021 in Winam PMCC No E60 of 2021 pending the hearing and determination of the suit in the Trial Court.
2. It also sought for orders that the Proclamation and attachment levied against it be lifted and the court to issue an order of restitution of any property already attached by the Respondents or their agents back to it.



3. Its advocate, Owiti Catherine Awuor, swore an affidavit in support of the said application. She also swore a Further Affidavit on 7th November 2022 reiterating her averments in the Supporting Affidavit. The same was filed on 14th November 2022.
4. It averred that the Trial Court entered ex parte judgment against it in favour of the Respondent herein on 8th October 2021 and that it entered appearance and filed an application dated 15th February 2022 seeking to have the aforesaid judgment set aside and it be allowed to defend the suit. It contended that the aforesaid application was dismissed vide Ruling delivered on 27th May 2022 and that being aggrieved by the said decision, it filed the appeal herein.
5. It pointed out that on 4th October 2022, it recorded a consent with the Respondents herein which compromised the appeal and the said consent was adopted as order of the court thus marking the appeal as settled.
6. It asserted that it complied with all the limbs of the consent order number (1) save for the payment of the throw away costs. Its advocate deposed that that being apprehensive of the delay in dispatch of the cheque of the throw away costs in favour of the Respondents due to the closure of its offices on Sunday and on 10th October 2022 which was a national holiday, he called the Respondent's advocates seeking indulgence for a further two (2) days.
7. It contended that it dispatched the cheque to its advocates via courier on 12th October 2022 which its the advocates received on 13th October 2022. It was its contention that its advocates informed the Respondents that the cheque had been dispatched and that they could pick the same from its Advocate's office.
8. It stated that the Respondents failed to collect the said cheque whereupon its advocates forwarded the same to the Respondents' Advocates chambers on 14th October 2022. It added that the Respondent's advocates acknowledged the cheque but then cancelled the acknowledgment and declined the cheque without advancing any reason for the same.
9. It was its case that the Respondents' declining of the cheque was clothed with malice and was a calculated move towards stealing a march against it so as to initiate execution proceedings as the Respondents were well aware the cheque was in its custody. It asserted that it wrote to the Respondents seeking to know their reasons for the declinature of the cheque so as to establish the next amicable action but no response was given.
10. It further stated that the Respondents proceeded to obtain warrants of attachment on 14th October 2022, on the same day that they declined the cheque and a day after they had been informed to collect the cheque. It was apprehensive that in the absence of the orders of stay of execution and/or restitution of property, the Respondents would proceed to execute and subject it to irreparable and/or substantial loss.
11. It was emphatic that delay in compliance with the orders directing it to pay Kshs 30,000/= within seven (7) days had been explained and was not inordinate and/or inexcusable and that compliance can be ensured immediately as the cheque was still in its custody.
12. It asserted that this court had the discretion to enlarge or extend time for compliance with the aforesaid orders and that having explained the reason for the delay, it ought to be given an opportunity to be heard. It added that it had brought this application without unreasonable delay and that the Respondents would not be prejudiced in the event that the application was allowed. It contended that it was in the interest of justice that the orders sought herein be granted.



13. In opposition to the present application, the 1st Respondent swore a Replying Affidavit on his own behalf and that of the 2nd Respondent on 24th October 2022. The same was filed on even date.
14. The Respondents admitted that the appeal herein was settled by a consent entered on 4th October 2022 and that by virtue of the same having been adopted as a judgment of court, this court was rendered court functus officio and hence, it could not entertain the present application which attempted to rewrite the terms of the said consent.
15. They contended that the said consent stipulated that the throw away costs would be paid within seven (7) days which meant that the same was to be paid on or before 11th October 2022 but that the Appellant brought them the cheque on 14th October 2022 which it averred was on a Friday at 4.40 pm after banking hours meaning that the same could only be banked on 15th October 2022 which was a Saturday and either clear or bounce the following week on Tuesday 18th October 2022.
16. It was their case that at the time the Appellant was forwarding the cheque on 14th October 2022, they had already instructed Pambo Investment Auctioneers on 13th October 2022 and further instructed the Executive Officer at Winam to re-issue warrants of attachment of movable property which were issued on the morning of 14th October 2022.
17. They contended that the consent further required that the Appellant do file a Defence within seven (7) days which meant that the same was to be filed on or before 11th October 2022 but the Appellant filed the same on 12th October 2022 after the lapse of the time stipulated on the consent. They asserted that the Appellant had expressly shown that it was not interested in obeying court orders.
18. They further stated that the application was an abuse of the court process, lacked merit and should be dismissed with costs. They asserted that the application did not meet the threshold for the grant of the orders the Appellant had sought and that no prejudice would be occasioned to it if the orders are not granted. It was their contention that they stood to suffer serious prejudice having reached the point of executing the judgment for the second time and spent money on service of the documents, their advocate and auctioneers.
19. The Appellant's Written Submissions were dated 7th November 2022 and filed on 14th November 2022 while those of the Respondents were dated and filed on 23rd November 2022. This Ruling is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

20. The Appellant invoked Section 3A of the *Civil Procedure Act*, 2010 and Order 22 Rule 22 of the Civil Procedure Rules and submitted that the court had the inherent and discretionary powers in the interest of justice to grant the orders it had sought. It pointed out that the Respondents' move to proclaim and attach its property for want of compliance with the consent orders was ill motivated. It asserted that it had extended professional courtesy upon the Respondents by reaching out to be indulged for two (2) days maximum and that their advocate was amenable to the proposal.
21. It contended that it was not true that it had withheld the cheque with the intentions of delaying it as the Respondents had alleged and that it highly regretted the delay. It reiterated that the delay was neither inordinate nor unreasonable. It explained that it was a corporate company with requisition procedures that would span around three (3)- five (5) days for the cheque to be cleared and dispatched once drawn. It added that it did not operate on Sundays and public Holidays and that its offices remained closed on the said dates. It pointed out that 10th October 2022 was a public holiday having been declared so by the interior Cabinet Secretary.



22. It further submitted that despite the delay it had endeavoured to comply with the conditional and substantive orders and that the reasonable delay had been timeously communicated to the Respondents for reasons that it was still desirous of prosecuting the Trial Court's matter hence duly filed the Statement of Defence before the effluxion of the allowed period.
23. In this regard, it placed reliance on the case of Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet [2018] eKLR as cited in Moses Mutuguti Muhia vs Francis Mwangi Kariuki & Another [2022] eKLR where it was held that the law does not set out any minimum or maximum period of delay but that any delay should be satisfactorily explained.
24. It further invoked Order 50 Rule 6 of the Civil Procedure Rules and contended that the courts have power to enlarge the time required for the performance of any acts stipulated in the Rules notwithstanding the fact that such time has lapsed. In this respect, it placed reliance on the case of Leo Sila Mutiso vs Rose Hellen Wangari Mwangi Civil Application No 255 of 1997(eKLR citation not given) where it was held that the decision of whether or not to extend time for appealing, was essentially discretionary. It further relied on the case of Thuita Mwangi vs Kenya Airways Limited [2003] eKLR where it was held that in exercising its discretion, the court's primary concern should be to do justice to the parties.
25. It implored upon the court to exercise its judicial discretion under Order 50 Rule 6 of the Civil Procedure Rules, Article 50 (sic) on a party's right to be heard and Article 159 (2)(a), (b) and (e) (sic) which provide that justice shall be rendered to all and for the protection and promotion of *the Constitution* principles. It asserted that in light of the demonstrated actions it had adduced regarding the material non-disclosure of facts by the Respondents leading to the ill-motivated proclamation and attachment of the Appellant's property on account of civil disobedience of the court orders, the orders prayed should be granted.
26. It further placed reliance on other cases among them the case of Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR where the court set out factors to be considered in the exercise of discretion in extending time. They included; extension of time is only available to a deserving party, the burden of laying a basis to the satisfaction of the court is with the party seeking such orders, consideration should be made on a case to case basis, reasonable reason for delay, any prejudice to be suffered by the respondent, application brought without undue delay and public interest.
27. It urged the court to condemn the Respondents into bearing the auctioneers fees for having proceeded with the execution even after agreeing to indulge it. It was emphatic that it had sufficiently demonstrated that it neither abused nor wilfully disobeyed the court orders and urged the court to allow its application as prayed.
28. On their part, the Respondents submitted that where the court has discretion to extend time under the provisions of Order 50 Rule 6 of the Civil Procedure Rules if good reason is shown, it must interrogate whether the said provision is applicable to court orders where the time for doing an act is set not by the court but by the parties themselves in a consent order.
29. They contended that a consent judgment or order has a contractual effect and can only be set aside on the grounds that would justify the setting aside of a contract or if certain conditions remain to be fulfilled which are not carried out. They argued that the time within which the Appellant was to pay the throw away costs was part of the consent order and being so the court could not interfere with it as the same would amount to the court rewriting the terms of the contract between the parties herein.



30. They were emphatic that any order made in the presence and with consent of counsel was binding on all parties to the proceedings or action and on those claiming under them and could not be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court, or if consent was given without sufficient material facts or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement. They added that no such ground had been alleged in this case and that the failure to abide by the consent was caused by the Appellant's delay and not any of the reasons envisaged by the law.
31. They contended that the Appellant's counsel was well aware that the Appellant was a corporate company with procedures as alleged at the time of recording the consent and should have taken that into account but that the Appellant was comfortable with the seven (7) day period of compliance and could not claim to have been made aware of the facts after recording the consent.
32. They placed reliance on several cases among them the cases of *Hirani vs Kassam* (1952) 19 EACA 131 at 134, *Brooke Bond Liebig vs Mallya* 1975 EA, *Flora Wasike vs Destimo Wamboko* (1982-1988) KAR 625, *Contractors Ltd vs Margaret Oparanya* [2004]eKLR where the common thread was that a consent order could not be varied or discharged unless the same was obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient material facts or in misapprehension or ignorance of material facts or in general for a reason which would enable the court set aside an agreement.
33. They pointed out that there was no agreement for extension of time by the parties and that the Appellant had not submitted any evidence before this court to support the allegation. They asserted that the call logs of routine calls made by the Appellant to them could not be said to amount to an agreement to vary a consent. They added that the cheque was rightfully rejected as it had been mistakenly received by the secretary but when the same was brought to their advocate's attention it was rejected for having been submitted out of time. They asserted that they stood to suffer serious prejudice having reached to a point of executing the judgment twice as a result of the laxity on the Appellant's part and that it was not even willing to refund the auctioneers fees yet the failure on their part led to the instructing of the auctioneers for the second time.
34. It was their case that the prayer of stay of execution did not make sense as the only way the parties would go back to hearing of the matter at the Trial Court was if the Judgment and Order was set aside and not through an order of stay of the Trial Court's Judgment. It urged the court to dismiss the Appellant's application with costs.
35. Notably, the consent order dated 4th October 2022 read as follows:
 1. That the Appellant's Notice of Motion Application dated 21/6/2022 and filed on 24/6/2022 be and is hereby compromised in the following terms:-
 - a. That the Appellant do pay the Respondent a throw away costs of Kshs 30,000/= within 7 days from today.
 - b. That the Appellant do file and serve a statement of Defence within 7 days from today.
 - c. That in default the Judgment that was delivered on 8th October, 2021 in Winam PMCC No E060 of 2021 Michael Oketch Onyango and Anor vs Kenya Power Lighting Company Ltd will stand as the Judgment of the Court.
 2. That there will be no order as to costs of the Notice of Motion Application dated 21/06/22.
 3. That the Appeal herein be and is hereby marked as settled.



4. That the Consent of the parties that has been recorded be and is hereby endorsed and adopted as an order of the Court. The file to be closed forthwith.
5. That orders accordingly.
36. In the cases of *Flora N. Wasike vs Destimo Wamboko (Supra)* and in *Board of Trustees National Social Security Fund vs Michael Mwalo [2015] eKLR*, the common thread was that a consent could not be set aside or varied unless it was proved that it was obtained by fraud or collusion or by an agreement that was contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general or for reason which would enable the court to set aside an agreement.
37. This court noted that the Consent Order dated 4th October 2022 by parties herein was adopted as order and judgment of the court on 4th October 2022. There was nothing to indicate that the Appellant applied for it to be set aside or that there were vitiating factors such as misrepresentation, mistake, coercion, undue influence and/or duress that would have enabled it avoid the Consent Order.
38. The Appellant had not applied to challenge the Consent Order herein on any of the grounds that could have vitiated the same. As the said Consent order had not been set aside, reviewed, varied and or vacated, its terms were still valid and remained in force as the Respondents correctly pointed out.
39. This court had due regard in the cases of *Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR* where the Court of Appeal held that *functus officio* was a principle of law that prevented a court that rendered a final decision in a matter to re-open and hear the matter.
40. The principle of *functus officio* was also addressed in the case of *John Gilbert Ouma v Kenya Ferry Services Limited [2021] eKLR* where it was held that a court that had heard a matter was prevented from re-hearing the same on a merit-based re-engagement once final judgment had been entered and a decree issued.
41. Having said so, in the same case of *John Gilbert Ouma v Kenya Ferry Services Limited (Supra)*, the court therein acknowledged that the doctrine of *functus officio* did not bar a court from entertaining a case it had already decided, a position that this court fully associated itself with.
42. Whilst it was correct that this court marked the Appeal herein as settled pursuant to order No 3 of the Consent order of 4th October 2022 and that the Appellant did not demonstrate any vitiating factors to persuade it to vary the terms of the said Consent order, it nonetheless had at the back of its mind the provisions of Section 3A of the *Civil Procedure Act* Cap 12 (Laws of Kenya) which provides as follows:-

“Nothing in this 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 or to prevent abuse of the process of the court.”
43. 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.



44. In this regard, this court had due consideration of Order 50 Rule 6 of Civil Procedure Rules, 2010 which 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 (emphasis 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”.

45. Further, Order 50 Rule 2 of the Civil Procedure Rules states that:-

“Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceedings, Sunday, Christmas Day and Good Friday, and any other day appointed as a public holiday shall not be reckoned in the computation of such limited time.””

46. In view of the public holiday on 10th October 2022, the time to pay the throw away costs and to file a Statement of Defence was to lapse on 11th October 2022.

47. The court perused the documents the parties furnished it and their assertions and noted that the cheque was dated 7th October 2022. This was drawn three (3) days after the Consent order was adopted as an order of the court. The same was despatched to the Appellant’s advocates on 12th October 2022. They received the same on 13th October 2022 and according to the screenshots of communication between the Appellant’s advocates and those of the Respondents at 1.25 pm, the Appellant’s Advocates asked those of the Respondent to collect the cheque.

48. The Respondents’ advocates did not appear to have responded whereupon the Appellant’s advocates delivered the cheque to the said advocates offices on 14th October 2022. However, the said advocates returned the cheque was to the Appellant’s advocates as was shown in the screenshots of the Whatsapp message between the two (2) advocates. The Respondents’ advocates did not deny that there was such communication with the Appellant’s advocates.

49. It was not clear why the Appellant’s advocates did not deliver the cheque to the Respondents’ advocates immediately they received the same instead opting to ask that the Respondents’ advocates send someone to their offices to collect the same. This may have appeared prudish and may have irked the Respondents’ advocate leading them to seek the re-issue of warrants against the Appellant herein.

50. Notably, whereas the Respondents’ Advocates applied for the re-issue of the Warrants of Attachment on 13th October 2022 and the said Warrants of Attachment were issued on 14th October 2022, the Appellant’s goods were not proclaimed until 17th October 2022 by which time the Appellant had already despatched its cheque to the Respondents’ advocates offices.

51. Although the Respondents may have been entitled to proclaim as the Appellant did not forward to them the cheque by 11th October 2022, taking the said circumstances into consideration, this court formed the opinion that the proclamation by Pambo Auctioneers on 17th October 2022 was not justified as the cheque had already been despatched to the Respondents’ advocates’ offices on 14th October 2022. It was immaterial that the said Warrants of Attachment were issued on the same day of 14th October 2022.



52. Indeed, it would be too unjust and draconian to deny the Appellant an opportunity to ventilate their case on merit on the ground that a cheque for throw away costs was late by three (3) days and the same was actually forwarded to the Respondents' advocates offices before the Appellant's goods were proclaimed.
53. Going further, contrary to the Respondents' assertions, this court noted that the Appellant filed its Statement of Defence on 11th October 2022. This was within the time that was stipulated in the Consent order. Considering that the lower court matter could have proceeded on the basis of the Statement of Defence that the Appellant filed and the Respondents could have recovered the throw away costs as a normal debt, this court came to the firm conclusion that it was in the interests of justice to re-open the file and enlarge time within which the Appellant can forward its cheque to the Respondents' advocates as it could not be said to be functus officio in that regard.

Disposition

54. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated October 2022 and filed on 19th October 2022 was merited and the same be and is hereby allowed in the following terms:-
- a. That the Appellant do pay the Respondents throw away costs of Kshs 30,000/= within fourteen (14) days from today.
 - b. That in default thereof, the Respondents be at liberty to institute proceedings for the recovery of the same in the normal manner.
 - c. That for the avoidance of doubt, the Appellant be and is hereby relieved from bearing the Auctioneers' costs for the proclamation that was done on 17th October 2022.
 - d. That costs of the application will be in the cause.
55. It is so ordered.

DATED and SIGNED at KISUMU this 25th day of May 2023

J. KAMAU

JUDGE

DATED, SIGNED AND DELIVERED AT KISUMU THIS 29TH DAY OF MAY 2023.

M.S SHARIFF

JUDGE

