



**Said v Manga (Environment and Land Appeal 15 of 2019)
[2023] KEELC 16933 (KLR) (26 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16933 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 15 OF 2019
SM KIBUNJA, J
APRIL 26, 2023**

BETWEEN

NOOR SAID APPELLANT

AND

MARY MWAWASI MANGA RESPONDENT

RULING

1. The respondent moved the court through the notice of motion dated the 22nd November 2022 seeking for *inter alia* that the time to deposit the sum of Ksh.400,000.00 granted on the 19th January 2022 be extended and the stay order that lapsed on or about 18th July 2022 be reinstated and extended. The application is premised on the four (4) grounds on its face among them that the respondent was on 19th January 2022 granted stay of execution on condition she deposits Ksh.400,000.00 in 30 days that has since lapsed; that the respondent is now able to comply with the order but the time has lapsed; that as execution is yet to commence, no prejudice will be occasioned to the appellant if the application is granted. The application is supported by the affidavit sworn by Mary Mwawasi Manga on the 22nd November 2022 restating the above grounds and deposing that she is old and sickly and was unable to raise the sum of Ksh.400,000.00 within the time given; that she managed to deposit the amount with her advocates by the second week of June 2022 and that the application has been filed without undue delay.
2. The application is opposed by the respondent through the replying affidavit sworn by Noor Said on the 18th January 2023, in which he deposes *inter alia* that on the 19th January 2022, the court granted the respondent conditional stay of execution on condition she deposits security of Ksh.400,000.00 in a joint interest earning account in 30 days, and in default the appellant be at liberty to execute the judgement; that his advocates forwarded bank forms to the respondent's advocates for opening of the escrow account but no response was ever received despite reminders; that the orders of 19th January 2022 were self-executing, and the application has been made in bad faith as the orders have lapsed; that



if the orders sought are granted the appellant would be prejudiced as he would be denied the fruits of his judgement; that the application has not been filed timeously and there has been undue delay as it was brought ten (10) months after the time given by the court had expired; the application has no merit and it is in the interest of justice for it to be dismissed with costs.

3. The learned counsel for the respondent and appellant filed their submissions both dated the 27th February 2023, which the court has considered.
4. The issues for determination by the court are as follows;
 - a. Whether the respondent has made a reasonable case for extension of time to comply with the order of 19th January 2022 to deposit Ksh. 400,000.00 in a joint interest earning account.
 - b. Who pays the costs of the application.
5. The court has carefully considered the grounds on the notice of motion, affidavit evidence by both parties, submissions by the learned counsel, the superior case cited and come to the following determinations;
 - a. The learned counsel for the respondent has in their submissions conceded that the application was filed “way out of time.” The counsel has gone ahead to beseech the “court to apply the rationale behind the provisions of sections 1A and 1B of the *Civil Procedure Act* [Rules], commonly referred to as the “Oxygen Rule” and allow prayer 2 and 3 of the application”, because the respondent failed to raise the amount ordered to be deposited in time due to being of old age and sickness.
 - b. The learned counsel for the appellant submitted that the stay of execution order of 19th January 2022 was conditional upon a security deposit of Ksh.400,000.00 being made in 30 days. That as the condition was not complied with, the stay order was automatically vacated on the 19th February 2022 as the order was self-executing, and the appellant’s right to execute became active. The counsel referred to the case of *Timon Otiemo Mboga v Kenya Forest Service* [2016] eKLR, where the court stated as follows;

“It is the opinion of this court that a conditional stay lapses automatically upon failure to comply with the condition upon which it was predicated. The party required to comply should therefore apply for extension or variation of the orders during the validity of the orders and not after expiry thereof. This is because once the order expires, it is no longer available and cannot be extended or varied. Such order becomes extinct and cannot be resurrected. The applicant cannot therefore apply for its extension or variation of a non-existent order, but can only apply for a fresh order.”

The counsel further submitted that there is no evidence adduced to show that the respondent failed to raise the amount required in time because of her age and sickness. That the respondent’s counsel never responded when the bank account opening forms were forwarded to them and that though the conditional stay order lapsed on the 19th February 2022, the instant application was not filed until November 2022.
 - c. That the record show that the court’s judgement was delivered on the 30th September 2021, in which the respondent’s case was dismissed with costs. The court went on to find and hold that;
 25. ... The holding that of the Tribunal that the respondent is tenant of the appellant must be respected. The Tribunal had issued orders for the eviction of the respondent. She



only continued with possession because of the order of injunction issued in her favour. Now that she has lost the case, she must vacate the premises forthwith. She must do so within 14 days of this judgement, and in default, she be forcibly evicted at her own expense. This is without prejudice to any right of the appellant to recover any mesne profits or rent that she may claim.

26. The respondent will pay the costs of this appeal to the appellant.”

That subsequent to the delivery of that judgement, the respondent filed the application dated the 5th October 2021 that was decided through the ruling delivered on the 19th January 2022, in which the court *inter alia* ordered that;

16. I think this sum of Kshs. 400,000/- would be fair to be deposited by the applicant as security. If she succeeds on appeal, this money will be returned to her. If she fails, then this sum to be released to the respondent without prejudice to any right of the respondent to further claims of mesne profits or costs.

17. I will order that this amount of Kshs. 400,000/- be proved to be available by the applicant through her counsel, within 30 days from today, and upon proof, be deposited in a joint interest earning account of both counsel for the applicant and the respondent. If there is no proof of availability of the money for deposit within 30 days then there will be no stay of the judgement herein and the same may be executed by the respondent.

18. in the event that the monies above are made available as directed, the costs of this application to abide the costs of the appeal. If the funds will not be made available, then the applicant will shoulder the costs of this application.”

It is crystal clear, and indeed admitted by the respondent that the Ksh.400,000.00 was not availed to her counsel until reportedly sometimes in June 2022, and even then no communication was made to the counsel of the appellant until through the instant application.

d. That it is not in dispute that the conditional stay of execution granted on 19th January 2022 lapsed automatically on or about the 19th February 2022 after the respondent failed to avail the Ksh.400,000.00 to be deposited in a joint interest earning account in 30 days. It follows therefore that after the lapse of the conditional stay order on or about the 19th February 2022, the appellant was at liberty to execute the judgement. It is a fact the Appellant had not done so by the time the instant application was filed on the 24th November 2022. I have however seen the appellant has since filed an application to execute the decree and warrants were issued on the 6th December 2022.

e. That as the conditional stay orders issued lapsed on or about the 19th February 2022, and there was no application made to extend time before it expired, it follows that by the time the instant application was filed on the 24th November 2022, there was no stay order in existence whose time could be extended. I am wholly in agreement with the decision in the case of *Timon Orieno Mboga v Kenya Forest Service* [supra] that a conditional order whose time has expired before an application to extend its lifespan, is a dead order and cannot subsequently be extended.



The alternative would be for the party to consider seeking for a fresh order, but whether the applicant would succeed or not depends on the facts to be presented to the court. In this suit, there was therefore no stay order in existence by the 24th November 2022 when the application dated the 22nd November 2022 was filed, capable of being reinstated and extended.

- f. That in any case, the application dated the 22nd November 2022 and filed on the 24th November 2022 was brought after more than ten (10) months from the date of the order of 19th January 2022, and more than nine (9) months after the conditional stay order had expired. The respondent has not attempted to explain the delay in filing of the application, other than saying that she was unable to raise the amount within time given due to her old age and sickness. However, for whatever it was worth, no documentary evidence to support the two claims were annexed to her supporting affidavit. The respondent's application is undoubtedly without merit and should be dismissed.
 - g. That as under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya costs follow the event, the respondent should pay the appellant's costs in the application.
6. Flowing from the above determinations, the court finds and orders that;
- a. The respondent's notice of motion dated the 22nd November 2022 and filed on the 24th November 2022 is without merit and is hereby dismissed.
 - b. The respondent will pay the appellant's costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 26th DAY OF APRIL 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Appellant: Absent

Respondent: Absent

Counsel : Mr Hassan for Appellant

Mr Obara for Respondent

Wilson – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

