



REPUBLIC OF KENYA



KENYA LAW

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**Nyambura v Mwaura (Suing as the legal representative of the Estate of
Debora Wangari Njau) (Miscellaneous Civil Application E315 of 2022)
[2023] KEHC 22817 (KLR) (Civ) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22817 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E315 OF 2022
CW MEOLI, J
SEPTEMBER 28, 2023

BETWEEN

MARY NYAMBURA APPLICANT

AND

**GEOFFREY NJAU MWAURA (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF DEBORA WANGARI NJAU) RESPONDENT**

RULING

1. The live prayers for consideration in the motion dated 23.02.2023 by Mary Nyambura (hereafter the Applicant) seek; -
 - “ 3. That this honorable court be pleased to stay the execution of the judgment of Honorable D.M Kivuti (Mr.) Principal Magistrate delivered on 06.04.2022 pending the determination of the appeal herein being High Court Civil Appeal Number E247 of 2022;
 4. That the honorable court be pleased to enlarge time to the Applicant in complying with the orders and the ruling of the court issued on 14.06.2022 by depositing Kshs. 1,856,745/- to the Respondent’s advocates account within 45 days which compliance was done by the Applicant 4 days after the deadline date of compliance;
 5. That the payment of Kshs. 1,856,745/- made by the Respondent Advocate on 02.08.2022 be deemed as proper compliance by this honorable court”. (sic)



2. The motion is expressed to be brought pursuant to Section 3A, 79G & 95 of the Civil Procedure Act, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1 & 3 of the Civil Procedure Rules, inter alia. On grounds on the face of the motion, as amplified in the supporting affidavit sworn by Kelvin Nguire, the deputy claims manager at Directline Assurance Company Limited, the insurers of motor vehicle registration number KAU 603P in respect of which the lower court suit was defended.
3. The gist of his affidavit is that the Applicant lodged an application dated 02.06.2022 seeking inter alia stay of execution of the lower court judgment pending determination of the intended appeal which motion was determined on certain conditions vide a ruling delivered on 14.06.2022. That the Applicant's insurer thereafter released payment of Kshs. 1,856,745/- to the advocate of the Respondent, Geoffrey Njau Mwaura (hereafter the Respondent) through two cheques dated 19.07.2022 and further furnished the court with a bank guarantee dated 25.07.2022 for the sum of Kshs. 1,856,745/- pursuant to the foregoing ruling of the court.
4. Despite this, the Respondent has maliciously proceeded to extract warrants of sale of moveable property dated 14.02.2023 for Kshs. 4,439,984.48/- in execution of the decree of the lower court. The deponent asserts that the Applicant is interested in pursuing this appeal. In summation, he deposes that the Applicant stands to suffer substantial and irreparable loss or damage if the Respondent proceeds with the attachment and sale of the Applicant's property. An eventuality that would render the Applicant's appeal nugatory because the Applicant may not recover the decretal sum from the Respondent whose means are unknown. The deponent pointing out that the decretal sum is a colossal amount.
5. The Respondent opposes the motion through the replying affidavit dated 30.03.2023. He views the motion as brought in bad faith as a desperate attempt by the Applicant to defeat the course of justice. He goes on to assert that despite the Applicant's motion dated 02.06.2022 having been allowed on condition, the Applicant has neither served him nor his advocate with the memorandum of appeal thereby breaching the conditions in the order of the court issued on 14.06.2022. He further deposes that the Applicant admittedly failed to pay half of the decretal sum being Kshs. 1,856,745/- or furnish a bank guarantee within the forty-five (45) day timeline as directed by the court in its ruling. That the court in the latter ruling expressly directed that failure of the Applicant to comply with the orders on security would result in the Respondent being at liberty to execute against the Applicant.
6. He urges the court to decline to grant the orders sought by the Applicant as they are an outright abuse of the court process and an afterthought; that it is trite that extension of time is not a right of a party but rather an equitable remedy that is only available to a deserving party at the discretion of the court that ought to be exercised judicially; and that the Applicant only sought for enlargement of time to comply with the orders of the court as an afterthought after commencement of execution proceedings. The Respondent goes on to depose that the Applicant has not demonstrated the circumstances or the hardship that led to the delay in complying with the orders of the court pointing out that the prayer seeking stay of execution pending hearing and determination of the appeal as sought herein is res judicata.
7. In conclusion, he asserts that no party ought not be allowed to disobey court orders as that would lead to a culture of impunity. That as penalty for the Applicant's default in complying with court orders, the court should dismiss the motion and further strike out the memorandum of appeal for failure of service within the prescribed time.
8. The motion was canvassed by way of written submissions. The Applicant's submissions revolved around the twin issue of stay of execution and enlargement of time within which to comply with the orders of the court issued on 14.06.2022. Counsel for the Applicant anchored his submissions on the



decision in *Edith Gichugu Kione v Stephen Njagi Thoithi* [2014] eKLR. He reiterated that half of the decretal sum was released to the Respondent's advocate on time but failure in securing a bank guarantee within time was due to internal processes; that the guarantee was duly secured and deposited albeit 4 days after the lapse of the time stipulated by the order of the court of 14.06.2022.

9. It was submitted that the Applicant has satisfactorily explained the failure to comply with the order of the court within the prescribed and the Respondent has not demonstrated he would suffer any prejudice if the motion is allowed, the Applicant having already complied with the orders of the court. The court was urged to allow the motion as prayed.
10. On the part of the Respondent, counsel began by restating and relying on the contents of his response to the motion as part of his submission before this court. On the merits of the motion, counsel submitted that the ruling of the court issued on 14.06.2022 was express, and failure by the Applicant to adhere to the timelines granted meant that the order to stay execution stood automatically denied. Hence the prayer seeking extension of time is moot and this court has no jurisdiction to review its own orders. Calling to aid the decision in *Mombasa County Government v Kenya Ferry Services & Anor* [2019] eKLR, counsel argued that extension of time is not a right of a party but rather an equitable remedy that is only available to a deserving party at the court's discretion.
11. Asserting that the instant motion is res judicata and/or sub judice counsel cited the decisions in *Africa Management Communications Limited v Airtel Networks Kenya Limited* [2021] eKLR and *Uburu Highway Development Limited v Central Bank of Kenya & 2 Others* [1996] eKLR to submit that the court by its ruling delivered on 14.06.2022 addressed itself to the reliefs presently being sought in the instant motion. It was further submitted that despite the Applicant claiming that she has filed her memorandum of appeal, the same is yet to be served. That by dint of Order 10 Rule 3 of the Civil Procedure Rules, the court may on its own motion or on application by a party strike out pleadings which were not served within the prescribed time. In conclusion, counsel relied on the decision in *Benard Maina Kamau v Sunripe (1976) Limited* [2014] eKLR to contend that the Applicant ought not be allowed to disobey the court order without consequence.
12. The court has considered the rival affidavit material. It is appropriate at the outset to set out the history of the matter. The Applicant herein had earlier moved this court vide a motion dated 02.06.2022 seeking inter alia that the court be pleased to extend and grant leave to the Applicant to lodge an appeal out of time against the lower court judgment delivered on 06.04.2022; that the court be pleased to stay execution of the said judgment pending the hearing and determination of the of the intended appeal; and that the court be pleased to issue an order on security payable by the Applicant's underwriter in the form of a bank guarantee by a reputable bank in favour of this court.
13. The motion was opposed and Seron, J. vide his ruling delivered on 14.06.2022 allowed the said motion, in part rendering himself as follows; -

“ 15) In the end, I allow the motion dated 2/6/2022. Consequently, I grant the following orders:

- i. The applicant is granted leave of 10 days to file an appeal out of time.
- ii. An order for stay of execution of the decree pending appeal is granted on condition that the applicant pays Kshs. 1,856,745/- being half the decretal sum to the respondent within 45 days and further provides a bank guarantee for the balance of Kshs.



1,856,745/- within 45 days. In default the order for stay shall be deemed to have been denied and the respondent may execute.

- iii. Costs of the application to abide the outcome of the intended appeal.” (sic)

14. It is on the premise of the foregoing ruling that the subsequent warrants of attachment and proclamation were taken out by the Respondent prompting the instant motion. Essentially, the motion seeks to invoke this court’s power to enlarge time under Order 50 rule 6 of the Civil Procedure Rules which has been specifically invoked. Order 50 Rule 6 of the Civil Procedure Rules provides that:-

“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, 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.”

15. What then are the applicable principles? In the case of *Nicholas Kiptoo Korir Salat v Independent Electoral and Boundaries Commission and 7 Others* [2014] eKLR, the Supreme Court stated that:

“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:

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;

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

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

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

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

Whether the application has been brought without undue delay; and

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

16. The case of *John Tomno Cheserem vs Sammy Kipketer Cheruiyot* [2018] eKLR in which a motion was brought under Rule 4 of the Court of Appeal Rules appears to have specific relevance to the matter at hand as Rule 4 of the Court of Appeal Rules is in pari materia with the provisions of Order 50 Rule 6 of the Civil Procedure Rules. The application in that case was for enlargement of time or leave to file a record of appeal out of time. The court (Mohammed J) observed that:-

- “7. The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court



in deciding such an application are discretionary and unfettered. It is therefore upon an applicant under this rule to, explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour. In exercising my discretion I ought to be guided by consideration of the factors started in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and any interested parties if the application is granted, and whether the matter raises issues of public importance. In the case of *Fakir Mohammed V Joseph Mugambi & 2 Others*, Civil Appln No. Nai 332/04 (unreported) this Court rendered itself thus:-

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors.”

- (8) The matters to be considered are not exhaustive and each case may very well raise matters that are not in other cases for consideration. In *Mwangi v Kenya Airways Ltd*, [2003] KLR 48, the Court having set out matters which a single Judge should take into account when exercising the discretion under Rule 4, went on to hold:-

“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.”

17. The orders of Serگون J were explicit. In attempted compliance, two cheques for the total sum of Kshs. 1,856,745/- dated 19.07.2022 were dispatched by the Applicant’s advocate to the Respondent’s counsel vide a letter dated 01.08.2022 (annexures “KN-2 & KN-3”), a bank guarantee dated 25.07.2022 for the sum of Kshs.1,856,745/- was filed in this court on 29.07.2022 (annexure KN-4”) while the memorandum of appeal was lodged on 15.06.2022 (annexure “KN-8”. The Respondent has vehemently attacked the Applicant’s manner of purported compliance. He is justified to some extent. A review of the Applicant’s affidavit material reveals that while the appeal was filed within the 10-day period as ordered by the court, the same does not appear to have been served upon the Respondent. The Applicant did not tender any proof of service.
18. Concerning provision of security, the court is convinced that there was an attempt at compliance on securing the bank guarantee in time as the same is dated 25.07.2022 and was later filed before this court on 29.07.2022. However, with respect to the sum that ought to have been remitted to the Respondent,



the court is at a loss cheques drawn on 19.07.2022 were not dispatched to the Respondent's counsel until 02.08.2022. No explanation has been proffered for the said delay.

19. That said, there was an attempted compliance with the gist of the court order issued on 14.06.2022, by way of filing the appeal and furnishing security on or before 29.07.2022, notwithstanding failure of prompt service on the part of the Applicant. Without such a service the Respondent could not readily ascertain compliance. Is failure to serve the memorandum of appeal fatal? The simple answer is no; there is no demonstration that the provisions of Order 42 Rule 12 of the Civil Procedure Rules have not yet taken effect in the actual appeal which is a separate matter from this miscellaneous cause.
20. Lastly the plea of res judicata may apply to prayer 3 of the motion as the prayer was determined in the earlier motion. However, the fact that this application was brought in the miscellaneous cause during the subsistence of the appeal filed pursuant to Serگون J's ruling does not in the circumstances of this case run afoul of the sub judice rule as contended by the Respondent.
21. In the end despite the Applicant's tardy compliance, such missteps, without more, cannot be allowed to defeat the Applicant's right of appeal. The Court of Appeal in *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* (2020) eKLR emphasized the right of appeal in the following terms:

“Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystalized in the case of *Richard Ncharpi Leiyagu vs. IEBC & 2 Others* (supra); *Mbaki & Others vs. Macharia & Another* [2005] 2EA 206; and the Tanzanian case of *Abbas Sherally & Another v Abdul Fazaiboy*, Civil Application No. 33 of 2003; for the holding inter alia that:

- (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
- (ii) the right to be heard is a valued right; and
- (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice;...”

22. In these circumstances, the court is persuaded to grant prayer (4) and (5) of the motion dated 23.02.2023, the effect thereof being to regularize the late compliance by the Applicant and reinstating the stay of execution granted under limb (ii) of the orders made in the ruling of Serگون J of 14.06.2022. It follows that prayer (3) of the instant motion is superfluous. The costs of the instant motion are awarded to the Respondent in any event.

DELIVERED AND SIGNED AT NAIROBI ON THIS 28TH DAY OF SEPTEMBER 2023.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Khamala

For the Respondent: Mr. Muriithi

C/A: Carol

