



REPUBLIC OF KENYA



**Silayo & another v Wanjiku (Civil Appeal E447 of 2021)
[2022] KEHC 11127 (KLR) (Civ) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11127 (KLR)

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

CIVIL

CIVIL APPEAL E447 OF 2021

SJ CHITEMBWE & JK SERGON, JJ

MAY 31, 2022

BETWEEN

PHMIDAMAS SILAYO 1ST APPLICANT

HAMISI O. NDEMWA 2ND APPLICANT

AND

CAROLINE WAMBUI WANJIKU RESPONDENT

RULING

- 1 By an application dated 25th August, 2021, the applicant sought for the following orders:
 1. Spent.
 2. That this court be pleased to reinstate orders granted on 23rd July, 2021 and thereafter enlarge or extend time within which to comply with the said court orders pending the hearing and determination of the appeal.
 3. That the court extends and or grant interim orders of stay of execution of the judgement issued and delivered on 23rd July, 2021.
 4. That the court, upon reinstating, do vary the orders issued to allow the Applicants to provide a bank guarantee instead of opening a joint interest earning account.
 5. Spent.
 6. That the court be pleased to issue other orders that it may deem fit in the interests of justice.
 7. Costs of the application.
- 2 The application was opposed through a Replying affidavit dated 28th September, 2021.



- 3 Parties chose to canvass their respective arguments through written submissions. However, the Respondent chose to rely on her replying affidavit.
- 4 In their submissions, the applicants contend that their efforts to comply with the conditions for opening a joint interest earning account were frustrated as the respondent's counsel failed to supply them with filled account opening forms on time.
- 5 They submit further that the order for security had been issued on 23rd July, 2021 which was during the 2nd and 3rd wave of the Covid-19 pandemic. As a result, their businesses were affected by the travelling directives issued by the ministry of health and as such they are not able to deposit security as ordered.
- 6 The Respondents in opposition, aver that the delay in opening the account was in fact caused by the applicants as they had furnished them with the filled forms on 11th August, 2021. Concerning variation of orders, they contend that the applicant has not provided valid reasons to warrant the variation of the orders.

Analysis and determination

- 7 The main issues for determination can be summed up as to whether the court can reinstate and thereafter vary the orders granted on 23rd July, 2021. The rest of the prayers are dependent on the determination of the main issue.
- 8 According to the ruling delivered on 23rd July, 2021, the applicant had 30 days to create a joint interest earning account and deposit security therein. This means that the deadline was 23rd August, 2021.
- 9 The applicants sent the account opening forms to the respondent on 11th August, 2021. The account opening documents were returned on 11th August, 2021, according to the respondent. On 18th August, 2021, the applicant sent a letter to the respondent asking them to confirm receipt of the account opening forms. The respondents sent a letter dated 25th September, 2021 which was received by the applicants informing them that they had begun execution against them. The applicant filed the application on 25th August, 2021. Finally, there is a letter on record dated 27th August, 2021 from the respondent to the applicants informing them that they were returning the account opening forms.
- 10 In determining reinstatement of a suit and/or orders, the court in *James Mwangi Gathara & another v Officer Commanding Station Loitokot & 2 others* [2018] eKLR stated that:

Section 3A of the *Civil Procedure Act* provides thus:

“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.”

The constitution of Kenya has deposited judicial power with judicial officers for the purpose of being used to adjudicate disputes and administer justice substantively and fairly without due regard to technicalities. (See Article 159 of *the Constitution*).

I now turn to the question whether the action is excusable. On this, courts have come up with applicable principles and standards to consider in exercising judicial discretion.



I find the following cases relevant. The decision whether to reinstate a suit and the legal test to be met has been discussed in the case of: *Wanjiku Kamau Versus Tabitha Kamau & 3 others* 2014 EKR;

The court has the discretion to set aside judgement or order and there are no limitations and restrictions on the discretion of the judge except of the judgement or order is raised. It must be done on terms that are just”

Further, in the case of *Lochab Bros Ltd Versus Peter Karuma t/a as Lumumba, Lumumba Advocates* 203 eKLR the court observed that:

the main concern of the court is to do justice to the parties and the court will not impose conditions on itself to filter the wide discretion given to it by rules”.

- 11 From the analysis of the order of events above, it is apparent that the delay was caused by the respondent as she returned the forms after the application was filed in court. The applicants began the account opening process way before the deadline while the respondent began execution before according them a chance to deposit the security. It is evident that the applicants will suffer prejudice owing to the fact that there was no mistake on their part. It is therefore in the interest of justice that the orders be reinstated.
- 12 The applicants pray that the orders after reinstatement be varied to allow them provide a bank guarantee instead of depositing security in the interest earning account. The conditions for varying orders were laid out in the case of *Okiya Omtatab Okoiti v Commissioner General, Kenya Revenue Authority and 2 Others* NRB HC Petition No. 532 of 2017 [2017] eKLR where the court stated thus:

“The High Court has inherent jurisdiction to vacate or vary its own orders in cases where there would otherwise be an irremediable injustice, but this power will only be exercised in exceptional circumstances, where justice requires the Court to act, or where a mistake has occurred which, if unrepaired, would cause a serious injustice. Examples though not exhaustive include: -

- (a) Varying an order to give effect to the meaning the court intended the order to have or to resolve an ambiguity.
- (b) Reviewing an order made *ex parte*, the basis of which has been said to be natural justice. Under this category can also be included denial of procedural fairness through no fault of a party. The court may set aside an order at any time if the order was made in the absence of a party if service was not proper or for sufficient reason.
- (c) The occurrence of circumstances after the order which warrant varying the order.
- (d) Entertaining an application for extension of time for appealing against the order after the time for compliance with that order has expired.

For an application of this nature to succeed, the court is required to first consider and satisfy itself that the applicant has a strong case likely to succeed on the merits. Secondly, the court must be satisfied that the applicant will be irreparably injured, if stay is refused. Thirdly, the court must consider whether the issuance of a stay order will substantially injure the other



parties interested in proceedings. Lastly, the court is bound to consider where the public interest lies.”

- 13 It is trite law that he who alleges must prove. While it is true that a lot of businesses were affected as a result of the pandemic, it is important for the applicants to tender evidence in support of their allegations by providing financial statements. A court of law cannot make a determination based on assumptions, it does so from the application of legal principles to facts and evidence. Nevertheless, concerning their prayer, it all goes down to the purpose of a security which was fittingly explained in *Arun C Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, where the court stated that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

- 14 The respondents contend that a bank guarantee will not bear interest as opposed to a joint interest earning account should the appeal fail to see the light of day. This raises the question of sufficiency of the security in guaranteeing performance in the event that the appeal fails. Will the respondents be at a disadvantage? I think not.

- 15 The court in *Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others* [2015] eKLR, held thus:

... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the *Civil Procedure Rules* includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

- 16 The order issued on 23rd July, 2021 ordered the applicants to deposit the decretal amount of Kshs 280,356 in a joint interest earning account. This is what the respondent is entitled to as fruit of her judgement. Interest, in my view, is a plus. Had the court ordered that the security be deposited in court, no interest would have accrued from the deposit since the ultimate purpose of security is guaranteeing performance of a decree. Should the appeal fail, the respondents will collect what is due to them. I find that a bank guarantee from a reputable bank is just as adequate as a deposit in a joint interest earning account. Furthermore, the respondents as I found out, were slothful in returning the signed documents to the applicants. Their apathy towards opening the joint account is the root cause of this application. It is only just and fair that the applicants provide a bank guarantee instead of depositing security in a joint interest earning account.

- 17 In the end, I find that the application to reinstate and vary orders to be meritorious. The application dated 25th August is hereby allowed. The applicant shall provide a bank guarantee from a reputable bank within 45 days hereof. Costs shall follow the outcome of the appeal.



It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF MAY 2022

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S. CHITEMBWE

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY 2022

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J.K. SERGON

JUDGE

