



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**HCCC NO. 2562 OF 1994**

EUNICE KYALO MUTHEMBWA.....PLAINTIFF

-VERSUS-

COSMAS K. MUTHEMBWA.....DEFENDANT

**RULING**

1. This ruling is in respect to the application dated 7<sup>th</sup> November 2019 in which the defendant/applicant herein seeks the following orders: -

**a. Spent.**

**b. Spent.**

**c. That this honourable court be pleased to extend time, for such period as it may deem fit and proper, for the defendant to lodge and serve a Memorandum of Appeal against the ruling and order of the Deputy Registrar (Elizabeth Tanui) delivered on 19<sup>th</sup> May 2016.**

**d. That pending the hearing and determination of the Intended Appeal, this honourable court be pleased to grant a stay of the Ruling and Order of the Deputy Registrar (Elizabeth Tanui) delivered on 19<sup>th</sup> May 2016.**

**e. That the costs of the application be provided for.**

**f. That this honourable court be pleased to grant any other and further orders it deems fit to grant.**

2. The application is brought pursuant to Order 20, 49, 50 Rule (5) and 51 Rule 1 of the Civil Procedure Rules. It is supported by the applicant's affidavit and is premised on the following grounds: -

**a. That sometime in 1994, the plaintiff moved this Honourable court vide Originating Summons seeking the determination of her share of matrimonial properties.**

**b. That this honourable court delivered its final judgment on 2<sup>nd</sup> July 1999.**

**c. That being dissatisfied with the said judgment, the defendant lodged an Appeal to the Court of Appeal (Nairobi Civil Appeal No. 74 of 2001: Cosmas K. Muthembwa –vs- Eunice Kyalo Muthembwa), and after the hearing of the Appeal, the Appellate Court pronounced itself in a judgment delivered on 19<sup>th</sup> April 2002.**

**d. That in the judgment aforesaid, the Appellate Court held as follows: -**

**i. The Appeal had been allowed only to the extent that motor vehicle registration numbers KAC 762S and KAA 422 E were taken into account by this honourable court when they should not have.**

**ii. The order directing the division and distribution of properties owned by Limited Liability Companies was set aside as they were not parties to this suit.**

iii. The date of reference for valuation and distribution purposes should, and subject to settlement of existing loans under the charges and mortgages, be the date when cohabitation ceased viz December, 1992.

e. That none of the parties contested the decision of the Appellate Court.

f. That following the judgment of the Appellate Court, this honourable court was tasked with the implementation of the varied Decree.

g. That the responsibility of determining the value of the matrimonial properties and the parties' share of the same was bestowed on the Deputy Registrar who exercised her jurisdiction under Order 49 of the Civil Procedure Rules, 2010, and delivered her ruling on the 14<sup>th</sup> day of November 2016.

h. That in her ruling of 14<sup>th</sup> November 2016, the Deputy Registrar varied the decision of the Court of Appeal (in Nairobi Civil Appeal No. 74 of 2001: Cosmas K. Muthembwa -vs- Eunice Kyalo Muthembwa) and proceeded to hold as follows: -

i. That the Loans from Standard Chartered Bank, Kenya Tourism Development Corporations and KCB Savings and Loans were for the benefit of Park Place Hotel Limited and Park Place Restaurant Limited and were, therefore, liabilities of the limited liabilities companies and not the matrimonial estate.

ii. That the value of the loans mentioned in (h) (i) above cannot be netted from the value of the estate.

iii. That the plaintiff's share of the matrimonial properties would attract interest at the court's rate from 31<sup>st</sup> December 1992.

iv. That the Deputy Registrar's Ruling clearly deviates from the Court of Appeal's holding that the date of reference for valuation and reference purposes should, and subject to settlement of existing loans under the charges and mortgages, be the date when cohabitation ceased viz December, 1992.

j. That being dissatisfied with the Ruling of the Deputy Registrar delivered on 14<sup>th</sup> November 2016, the defendant instructed his former advocates on record to appeal against the entire decision, and they erroneously lodged an Appeal in the Court of Appeal.

k. That an Appeal against the decision of a Deputy Registrar exercising jurisdiction under Order 49 rule 1 of the Civil Procedure Rules, 2010 should be heard and determined by a judge of this honourable court.

l. That on 7<sup>th</sup> October 2019, the defendant was advised by his former advocates that the Appeal lodged in the Court of Appeal wrongly founded and therefore could not stand.

m. That the Appeal lodged in the Court of Appeal was consequently withdrawn, and the defendant was constrained to retain the services of this current advocates on record to pursue an appeal against the decision of the Deputy Registrar in the appropriate way.

n. That the defendant faults the decision of the Deputy Registrar on the following grounds:

i. That the Learned Deputy Registrar erred in both law and fact in failing to hold that the subject matrimonial properties were encumbered by loans from Standard Chartered Bank Limited, Kenya Tourism Development Corporation, Kenya Commercial Bank Savings and Loan as at December 1992 when cohabitation between the plaintiff and the defendant ceased.

ii. That the Learned Deputy Registrar erred in both law and fact in failing to factor the loans from Standard Chartered Bank Limited, Kenya Tourism Development Corporation, Kenya Commercial Bank Savings and Loan as at December 1992 when ascertaining and arriving the plaintiff's share of the matrimonial properties.

iii. That the Learned Deputy Registrar erred in both law in holding that the loans acquired from Standard Chartered Bank Limited, Kenya Tourism Development Corporation, Kenya Commercial Bank Savings and Loan were for the benefit of Park Place Hotel Limited and Park Place Restaurant Limited, and, therefore, should not be factored in when ascertaining the plaintiff's share of matrimonial properties.

iv. That the Learned Deputy Registrar erred in law in disregarding the decision of the Court of Appeal Nairobi Civil Appeal No. 74 of 2001: (Cosmas K. Muthembwa -vs- Eunice Kyalo Muthembwa) which is binding on this honourable court.

v. That the Learned judge erred in both law and fact in holding that the plaintiff's share of the matrimonial properties would attract interest at court's rate, 14% per annum, from 31<sup>st</sup> December 1992 until payment in full.

o. That disappointingly, the defendant's instructions to appeal against the decision of the Deputy Registrar were erroneously carried out by his former advocates, thus the delay in lodging and serving a Memorandum of Appeal as required under

Order 49 Rules (2) and (3).

p. That the defendant had no personal knowledge of the forum for lodging and appeal against the decision of Deputy Registrar and the timelines within which a Memorandum of Appeal should be filed and served and he, therefore, discovered his former advocates mistake when he received their email dated 7<sup>th</sup> October 2019 by which date the stipulated period had already lapsed.

q. That upon discovery of his former advocate's mistake, the defendant called for the client's file and promptly appointed the firm of Saluny Advocates LLP to take over the conduct of the matter.

r. That the impending distribution of the matrimonial properties in line with the decision of the Deputy Registrar will render the application herein and the Intended Appeal nugatory.

s. That the defendant craves this honourable court's urgent intervention, by way of an order staying all the execution of the Ruling of the Deputy Registrar delivered on 14<sup>th</sup> November 2016, together with the consequential orders, to ensure that the application herein and the intended Appeal are not rendered nugatory.

t. That the mistake(s) of the defendant's former advocates should not be visited on him.

u. That in the circumstances, it is only fair and just that the orders sought herein be granted.

v. That the plaintiff will suffer prejudice if the orders sought herein are not granted.

w. That the Intended Appeal has reasonable chances of success, and if the orders sought herein are not granted, it will be rendered nugatory.

3. The plaintiff/respondent opposed the application through the Grounds of Opposition dated 14<sup>th</sup> November 2019 wherein she lists the following grounds: -

1. The application is incompetent as the advocate who has purported to draw the application is not properly on record having failed to obtain leave of court to come on record after judgment.

2. Save for taxation of costs nothing is pending in this matter to warrant stay of execution.

3. Notice of Appeal was filed on 28<sup>th</sup> November 2016 in this matter and served on the same date. Civil Appeal No. 329 of 2017 was thereafter filed on 18<sup>th</sup> September 2017.

4. The appeal came up for hearing on 25<sup>th</sup> September 2019 and was withdrawn unconditionally by the applicant/defendant herein with costs to the plaintiff/respondent.

5. That in any event this application is pre-mature as taxation of costs which precedes execution is yet to be done both in this matter and in the appeal.

6. That the issue of distribution of the matrimonial properties as purported by the applicant does not arise as the decree herein was a money decree.

7. That if this honourable court is inclined to grant stay of execution, then it should be conditional on the applicant/defendant depositing the decretal amount in an interest earning account in the names of the advocates as security for the due performance of the decree in compliance with Order 42 rule 6(2) (b).

4. Parties canvassed the application by way of written submissions which I have considered.

5. The main issues for determination is whether the defendant has made out a case for the granting of the orders of stay of execution and the extension of the period within which to lodge a Memorandum of Appeal against the ruling of the Deputy Registrar delivered on 19<sup>th</sup> May 2016. There was also the issue of whether the applicant's current advocates are properly on record. Before delving into the substance of this ruling, I wish to point out that even though the applicant states, the body of the application, that the ruling of the Deputy Registrar (DR) that is the subject of the applications was rendered on 19<sup>th</sup> May 2016, a perusal of the court record indicates that the said ruling was delivered on 14<sup>th</sup> November 2016.

**Are the applicant's advocates properly on record?**

6. Order 9 Rule 9 of the Civil Procedure Rules stipulates as follows: -

**“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—**

**(a) upon an application with notice to all the parties; or**

**(b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.”**

7. Order 9, rule 10 provides that;

**“An application under rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first.”**

8. In the present case, I note that the applicant’s counsel did not seek the leave of the court or the consent of the applicant’s former advocates before coming on record for the applicant even though they were instructed after the entry of the judgment in the matter. I therefore find that they are not properly on record. My finding on the issue of representation would have been sufficient to determine the application but I am still minded to consider the rest of the issues for determination.

#### **Stay of execution**

9. The applicant seeks to stay the execution of the impugned ruling pending the hearing and determination of an intended appeal. Order 42 Rule 1 of the Civil Procedure Rules empowers this court to stay execution pending appeal. Order 42 Rule 6(2) of the Civil Procedure Rules on the other hand stipulates as follows on the conditions to be met before stay is granted:

**“(2) No order for stay of execution shall be made under subrule (1) unless—**

**(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”**

10. In the case of *Butt v Rent Restriction Tribunal* [1982] eKLR the Court of Appeal captured the applicable principles in deciding whether or not to grant stay of execution pending appeal as follows: -

**“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 459:**

**“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”**

#### **Delay**

11. As I have already stated in this ruling the impugned ruling was delivered on 14<sup>th</sup> November 2016 and the instant application filed 3 years later on 7<sup>th</sup> November 2019. It is my finding that there was an unreasonable and an inordinate delay in filing the application. It is also clear to me that the impugned ruling has not been executed for the 3 years that it has been in existence and I note that no material was placed before this court to show that the execution was imminent or that the defendant’s property was in danger of being attached in execution of the said ruling.

12. The applicant attributed the delay in filing the application to the mistake by his lawyers who filed the intended appeal before the Court of Appeal before the Court of Appeal instead of the High Court. It is however curious to note that the applicant does not indicate when the intended appeal was erroneously filed before the Court of Appeal or when the same was withdrawn.

13. My finding is that the delay in filing the instant application was not only inordinate, but has also not been explained. I find that it was not enough for the applicant to claim that his lawyers made a mistake by filing the appeal before the wrong court as the applicant has not explained what steps he took, for the entire 3 years that the appeal was lying before the Court of Appeal, to see to it that it was prosecuted.

14. In *Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others* [2015] eKLR, the Court of Appeal held that in determining whether to exercise the discretion in a party’s favour, the court pays regard to the damage sought to be forestalled *vis-a-viz* the prejudice to be visited on the opposing party. The Court observed as follows: -

**“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel’s duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side.”**

15. Guided by the above decision I am not satisfied that the adage that “**Mistakes by a lawyer should not be visited on his client**” is applicable to this case. Courts have taken the view that legal business should be conducted efficiently and they can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age.

#### **Substantial loss**

16. In the present case, the defendant has not indicated that the plaintiff is a (wo)man of straw such that she will not be able to pay back the decretal sum should the same be paid out to her so as to warrant the granting of orders of stay of execution. In any event, I have already noted that the applicant has not established that there is any impending execution.

#### **Security of costs.**

17. The defendant did not offer any security for costs but claimed that he was not expected to furnish security for the due performance of the decree. It was the applicant’s case that the conditions for stay of execution in Order 46 Rule 6 are not applicable herein as the intended appeal is not an appeal against final judgment but that the appeal is anchored on Order 49 of the Civil Procedure Rule.

18. My finding is that Order 49 of the Civil Procedure Rule speaks to the Special Powers of the Registrars and has got no provisions relating to stay of execution pending appeal. I further find that orders for stay of execution fall squarely under the provisions of Order 46 Rule 6 whose conditions the applicant needed to satisfy. In this case I find that none of the conditions outlined under Order 46 Rule 6(2) have been met.

#### **Extension of time.**

19. The applicant also sought orders for the enlargement of time within which to file the intended appeal. The power granted to this court to extend time is a discretionary power which must be exercised judiciously.

20. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and Others* [2014] eKLR the Supreme Court outlined the principles governing the court’s powers to extend time as follows: -

- a. 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.**
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.**
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.**
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.**
- e. Whether there will be any prejudice suffered by the respondents if the extension is granted.**
- f. Whether the application has been brought without undue delay; and**
- g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.**

21. In the instant case, I have already noted in this ruling that the reasons advanced by the applicant for the delay in filing the intended appeal are not satisfactory and I therefore do not need to repeat myself over the issue.

22. Be that as it may and considering the fact that the applicant’s right to appeal the decision of the court orders on the fundamental right to access justice, this court will reluctantly grant the applicant’s prayer for extension of the time to appeal but subject to conditions that will ensure that the said appeal is not used as a means of delaying the final conclusion of dispute herein.

23. Consequently, I will allow the application herein, albeit, in part in the following terms: -

- a. The applicant is granted an extension of time to file and serve a Memorandum of Appeal against the Ruling and Order of the Deputy Registrar (Honorable E. Tanui) delivered on 4<sup>th</sup> November 2016 on the following conditions: -
  - i. That within 45 days from the date of this ruling, the full decretal sum of Kshs 27,242,505 shall be deposited in an interest earning account in a banking institution of repute to be held in the joint names of counsel for the applicant/defendant and the plaintiff.**
  - ii. That the intended appeal be filed and served within 14 days from the date of this ruling.**
  - iii. That in the event of failure to comply with conditions in a(i) and (ii) herein above, the orders for enlargement of the period within which to file the intended appeal shall automatically lapse/be vacated.**
- b. The costs of the application are awarded to the plaintiff/respondent.**

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 27<sup>TH</sup> DAY OF MAY 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17<sup>TH</sup> APRIL 2020.

W. A. OKWANY

JUDGE

**In the presence of:**

Mr. Kiura for the Plaintiff/Respondent

Mr. Saluni for the Applicant/Defendant.

Court Assistant: Sylvia.