



**Mischeck v Nthiga (Environment and Land Appeal 33 of 2019)
[2022] KEELC 13459 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13459 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL 33 OF 2019
A KANIARU, J
SEPTEMBER 22, 2022**

BETWEEN

NORMAN NJUE MISCHECK APPLICANT

AND

PHILISIA NGITHI NTHIGA RESPONDENT

RULING

1. What is before this court for consideration is a notice of motion dated January 20, 2022 and brought under certificate of urgency.. it is expressed to be brought under order 50 rule 4 and 6 and order 51 rule 1 of the *Civil Procedure Rules 2010*, sections 1A, 1B, 3A, 63(e) of the *Civil Procedure Act* and all other enabling provisions of the law. The applicant – Norman Njue Mischeck – is the appellant in the suit while the respondent in the application – Philisia Ngithi Nthiga– is also the respondent in the appeal.

Application

The motion came with four (4) prayers but prayer 1 is spent. The prayers for consideration are therefore three (3) _ prayers 2, 3 and 4 _ and they are as follows:

1. That this honourable court be pleased to extend the time for the applicant to comply with the orders issued vide the ruling delivered on the October 25, 2021
2. That this honourable court be pleased to grant prayer 2 above pending determination of the appeal
3. That the costs of the application be provided for.
2. The application is premised on the grounds, *inter alia*, that; a ruling was delivered on October 25, 2021 which ordered the applicant to deposit the title deed for Land parcel No Evurore/ Nguthi/ 1935 with the court as security for due performance of the decree within 60 days. That the lower court case CMCC No 12 of 2015 between the respondent and the applicant was still active as there was a pending application by the respondent for the execution of the trial court’s judgment. It was deposed that the



said lower court's case was coming up for mention to confirm filing of submissions on November 30, 2021 during which the applicant was ready to comply with the said orders but that the matter did not proceed and another date for January 18, 2022 was given despite the applicant insistence that there were orders due to lapse.

3. The applicant contended that the time limited for complying with the orders of the court lapsed for reasons that can not be blamed on him and the delay to comply was not inordinate. He deposed that basically, he was ready to comply with the orders of this court and the objects of the appeal will be defeated if the time to deposit the security is not extended. He further stated that the proprietor of the land parcel had already made a sworn undertaking and made available his title deed. It is his case that unless the court grants the orders sought, he would suffer irreparable loss. The application is accompanied by a supporting affidavit sworn by the applicant in which he reiterated he grounds in the application.
4. The application is opposed by the respondent by way of a replying affidavit sworn on February 14, 2022. She terms the application as incompetent and an abuse of the court process for reason that despite the applicant having been granted orders of stay of execution on conditions, he has never complied with the conditions set by the court. It was contended that the time limited for stay has lapsed and hence the stay orders have also lapsed.
5. It was also stated that the lower court proceedings could not in any way impede the applicant's compliance with the orders of this court and thus reasons proffered by the applicant for failure to comply with the orders were mere lies and fabrication. Further that the applicant is a vexatious litigant who had on several occasions been granted stay orders by the lower court but failed to comply with the same and, as such, he is not deserving of the orders sought.
6. According to the respondent, the applicant was taking advantage of her old age and ill-health to frustrate her by using delaying tactics and taking the court round in circles. Finally, it was argued that the application fails to set out any grounds for extension of stay orders and as such it ought to be dismissed.
7. The application was canvassed by way of written submissions. The applicant filed his submissions on June 7, 2022. He gave a brief background of the case and framed three issues for determination. The first was whether the orders given on October 25, 2021 lapsed on January 18, 2022. On this, he submitted that the said orders gave the applicant 60 days to comply from the date of the ruling. That the date when the matter was mentioned in the lower court was January 18, 2022 and which was a lapse of two days only as per order 50 rule 4 of the [Civil Procedure Rules](#) and he called upon the court to bear in mind that Sundays were excluded.
8. On who was to blame for the delay, he submitted that the applicant had been ready to comply with the orders of this court and that when the lower court matter was scheduled for hearing, the lower court was not sitting and the matter was given another date, being January 18, 2022, and this date was given despite him having indicated to the trial court that there were orders which were to lapse on January 16, 2022. He thus blamed the trial court for not having complied with the orders of this court despite him having been ready. He stated that he had attached a sworn undertaking dated November 10, 2021 and a valuation report done on November 17, 2021 as evidence that he was all along ready to obey the court orders.
9. On whether the orders of October 25, 2021 can be extended, the applicant relied on the provisions of order 50 rule 6 of the [CPR](#) which gives this court discretion to enlarge time for doing an act where such time is limited. He also invoked sections 1A, 1B and 3 and 95 of the [Civil Procedure Act](#) and article 159 of the [Constitution of Kenya 2010](#) and urged this court to allow the application herein considering that



he had an arguable case and further that the respondent would not be prejudiced. In support of the case, he relied on the case of *Edith Gichugu Koine v Stephen Njagi Thoitthi* (2014) eKLR.

10. The respondent on the other hand field her submissions on June 10, 2022. She submitted that the applicant herein has not met the threshold for extension of time to comply with the court's orders. She argued that this court ought to be guided by the principles of extension of time as were laid down in the case of *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral & Boundaries Commission and 7 others* (supra) which was enunciated in *Thuita Mwangi v Kenya Airways Limited* (2003) eKLR.
11. The respondent submitted that the applicant had not given a plausible reason for the delay in depositing the required security as the reasons given, that is to say that the delay was due to the failure to be granted an earlier date at the lower court was baseless. She said the said date could not hinder the applicant from complying with the orders of this court. Further that the application is an abuse of the court process as the applicant had earlier been granted orders of stay of execution but failed to comply with conditions of stay and that the instant application was a delaying tactic aimed at delaying the appeal. Further also that the application was against the overriding objectives.

Analysis and determination

12. I have considered the application, the response made, and the rival submissions by the parties herein. I find that two issues commend themselves for my determination, which issues are;
 - i. Whether the applicant ought to be granted extension of time within which to comply with the orders made on October 25, 2021
 - ii. Who ought to bear the costs of the application.
13. As to whether the applicant ought to be granted extension of time within which to comply with the orders made on October 25, 2021, the legal provisions with regard to the extension of time is order 50 rule 6 of the *Civil Procedure Rules 2010* and section 95 of the *Civil Procedure Act*. Section 95 of the *Civil Procedure Act* provides as thus;-

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”
14. Order 50 rule 6 of the *Civil Procedure Rules* provides thus:-

“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. In essence the legal impact of the above provisions is that this court is granted unfettered discretion to enlarge time where limited time has been fixed for doing any act or taking proceedings under the rules or by summary notice or by order of the court. Further that such enlargement may be granted even though the time fixed or granted may have expired.



16. In the case of *Shanzu Beach Restort Limited v Crown Marble & Quartz Ltd* [2020] eKLR, the court held that;-

“..... On the foregoing, it is my considered view that extension of time is an equitable remedy granted to deserving party at the discretion of the court. Whether the court should exercise that discretion is to be considered on case to case basis. However, the party seeking the extension of time bears the onus to prove to the satisfaction of the court the existence of extenuating circumstances which delayed compliance of the court orders. The applicant must show sufficient reason for the exercise of court’s discretion in its favour.....”

17. In the instant case, the applicant submitted that the reasons as to why he failed to comply with the orders on deposit of security was because the lower court’s case was still alive and had a date but on which date the matter did not proceed. That the next date which the lower court file was coming up for hearing was two days after the lapse of the orders of this court. The respondent, in rebuttal, deposed that the lower court proceedings cannot in any way impede the applicant’s compliance with the orders of this court and thus the reasons given by the applicant for failure to comply with the orders are mere lies and fabrications.

18. From the perusal of the records herein, it is clear that the applicant initially sought orders of stay of execution in the trial court, which orders were granted on condition that he deposits kshs 300,000/- as security for due performance of the decree. The applicant then moved the same court seeking review of the said orders and that he be allowed to deposit title deed of some land. However the trial court in the ruling delivered on February 9, 2021 declined the said application on the grounds that the said land did not belong to the applicant and further that there was no consent by the owner of the said land that he/she had allowed the land to be used as security.

19. What followed was the application filed before this court in which the court accepted the title to the land parcel herein together with the accompanying documents and further ordered that the owner of the land do give a sworn undertaking that a portion of the land can be sold if need be to realize the costs of the appeal.

20. In my view, what the applicant was expected to do was not to pursue the file and seek for a date before the court so as to comply with the said orders. What he needed to do was just to file the security documents together with the undertaking as ordered by this court and then extract the orders made by this court and serve the respondent herein. This would stop any further proceedings in the lower court file. In my view, the reasons given by the applicant are therefore not sufficient. It is not clear why he was indeed following up on the lower court file. I am of the view that it would have been very easy to have the security documents filed at the time the file had a date. The deposit of the title is not an act which is done in open court but in the court registry. I say this having noted that the applicant stated that he was ready to comply with the orders but the court was not sitting on November 30, 2021. I seem not to understand why he did not take any steps to have the title deposited in court until on January 13, 2022 when he did a letter to the Deputy Registrar requesting for a date in the instant cause. There is no evidence as to the steps he took to have the lower court’s file retrieved for the deposit of the title document and other relevant documents. In my view, there are no special circumstances which the applicant has put forward explaining the delay in compliance of this court’s orders of October 25, 2021.

21. The respondent deposed that the applicant is a vexatious litigant and highlighted the various applications by the applicant before the trial court and further deposed that the applicant was taking advantage of her old age and deteriorating health. As I have already pointed out, the applicant was initially granted stay orders by the trial court and when he sought review of the same, the trial court



declined the application. He then came to this court seeking the review of the said orders and this court allowed his application. However, he did not comply with the said orders. It is trite that justice delayed is justice denied. Further every litigant has a right to enjoy his or her judgment.

22. However as I have already pointed out, extension of time within which to comply with court orders is a matter of discretion. Further article 159 of the Constitution provides for the principles of administration of justice and amongst them is that justice should be administered without undue regards to procedural technicalities. The orders subject of the instant application were made on October 25, 2021 and were to lapse within 60 days. Under order 51 rule 4, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, ought to be omitted from any computation of time for the amending, delivering or filing of any pleading or the doing of any other act. It therefore means that the orders herein lapsed on January 17, 2022. As such the application herein was filed only one day late.
23. I note that the issue herein relates to land which is an emotive issue. The applicant herein has already filed his appeal, which is pending hearing. If the applicant is not given an opportunity to comply with the orders of this court, then the appeal will be rendered nugatory and will only be there for academic purposes. This is because the respondent will proceed with the execution of the judgment and decree of the trial court.
24. As it stands, the orders of this court are already lapsed and no stay is in force. However, the respondent has not proceeded with execution of the same. It therefore means that extending the time within which the applicant is to deposit the security will not be prejudicial to the respondent. I say so having noted that the applicant has indicated that he is willing to comply with the orders of this court. In my view, this is a deserving case where the applicant ought to be given another chance to comply with the orders of October 25, 2021. However the said orders ought to be complied with within 30 days from the date hereof failing which the said orders shall lapse and execution to issue.
25. The applicant, having been the one who has necessitated the instant application, is the one to bear the costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 22ND DAY OF SEPTEMBER, 2022.

In the presence of M/s Chepkorir for applicant and in the absence of Kahiga for respondent.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

22.09.2022

