



Catholic Archdiocese of Nyeri v Mwangi & another (Environment and Land Appeal E055 of 2021) [2023] KEELC 21229 (KLR) (2 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21229 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E055 OF 2021
JO OLOLA, J
NOVEMBER 2, 2023**

BETWEEN

CATHOLIC ARCHDIOCESE OF NYERI APPELLANT

AND

PETER KAMAU MWANGI 1ST RESPONDENT

ANGELUS MAINA MWANGI 2ND RESPONDENT

RULING

1. By the notice of motion dated and filed herein on March 15, 2023, the Catholic Archdiocese of Nyeri (the appellant) prays for orders:
 3. That this Honourable court be pleased to extend the period within which to comply with the ruling of the court delivered on February 16, 2023, by a further period of 30 days;
 4. That the extension of time do operate as a stay of execution pending compliance and further orders of this Honourable court; and
 5. That the costs of this application be provided for.
2. The application which is supported by an affidavit sworn by the applicant's Financial Administrator Father Boniface Mwangi is premised on the grounds:
 - (i) That this court delivered a ruling on February 16, 2023 requiring the appellant to deposit the decretal sum of Kes 540,000/- within 30 days;
 - (ii) That the 30 days lapsed on March 16, 2023 but the Appellant was not able to raise the entire amount as required and was unable to comply with the orders of the Court and hence the need for extension of time;



- (iii) That at the time of making the application dated June 16, 2022, the appellant was in possession of the funds and was able and willing to deposit the decretal sum;
 - (iv) That owing to hard economic conditions coupled with the fact that the appellant is a religious organization that generates income within its organization, and not funded, it has not been easy to raise the entire amount all at once;
 - (v) That the appellant has managed to raise half of the required amount and seeks another 30 days to enable it mobilise its resources and be able to deposit the decretal amount;
 - (vi) That the application has been brought well on time and before the lapse of the orders and there is no prejudice visited upon the Respondent who will be heard on appeal.
3. Peter Kamau Mwangi (the 1st respondent) is opposed to the application. By what he terms as a notice of preliminary objection dated March 15, 2023, the 1st respondent objects to the application on the basis that:
- 1. The appellant's application is contrary to the conditions set out in order 42 rule 6(2) and 7(1) of the [Civil Procedure Rules, 2010](#);
 - 2. That the application is incompetent, fatally defective and an abuse of the court process;
 - 3. That the appellant's application should therefore not be entertained by this Honourable Court; and
 - 4. That the application be struck out with costs to the Respondent.
4. Angelus Maina Mwangi (the 2nd respondent) is similarly opposed to the application. In a replying affidavit sworn on his behalf by his Advocate on record Karweru Muchemi Charles, the 2nd respondent avers that the appellant is to the best of his knowledge a vastly pecunious religious organization that owns huge tracts of land and has properties at Milimani, Nairobi which it rents out to Government and other persons.
5. The 2nd respondent further avers that on April 12, 2022, the appellant obtained orders of stay before the Lower Court but failed to abide by its condition. The appellant then filed another Motion before this court on June 16, 2022 seeking extension of time and the same was allowed on set conditions.
6. The 2nd respondent asserts that the current application is an abuse of the court process and urges the court not to countenance on a litigant who is employing the filing of motions to deny the respondent the fruits of their Judgment.
7. I have carefully perused and considered the application and the responses thereto. I have similarly perused and considered the submissions and authorities placed before me by the learned advocates representing some of the Parties herein.
8. By this application, the appellant urges the court to extend the period within which to comply with the ruling of this court delivered on February 16, 2023, by a further period of 30 days. In addition, the appellant urges that upon being granted, that extension of time does operate as a stay of execution of the orders issued herein pending compliance with the same.



9. The appellant's application is premised under order 50 rule 6 of the Civil Procedure Rules, 2010. The said rule provides thus:-

“(6) Where a limited time has been fixed for doing any act or taking any proceedings under those 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 or any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

10. As was stated by the Supreme Court of Kenya in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others (2014) eKLR:

- “i. 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;
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- vi. Whether the application has been brought without undue delay;
- viii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

11. The application before me arises from a ruling of this Court delivered on February 16, 2023. The said ruling arose from an application dated June 16, 2022 filed by the same appellant wherein it did urge the court to stay execution of a Judgment delivered in the lower court against itself on November 23, 2021. Consequent upon the delivery of the said Judgment, the appellant had filed an application in the trial court for stay of execution pending an appeal to this Court.

12. Having considered the said application and by a ruling delivered by the trial court on April 12, 2022, the appellant was granted a stay of execution of the decree on condition it did deposit the sum of Kes 540,000/- in an interest gaining joint account in the names of the Parties Advocates within 30 days.

13. As it turned out, the appellant was unable to comply with the order to deposit the said amount within the timelines stipulated by the trial court. Accordingly and by the said application dated June 16, 2022, the appellant moved to this court seeking an order of stay of execution as well as leave to be granted to itself to deposit the required security within another 30 days.



14. By the ruling delivered herein on February 16, 2023 aforesaid, this Court acceded to the appellant's request and granted it a further 30 days within which to deposit the security of Kes 540,000/-. It turns out that the appellant did not once again comply with the said orders and by this present application, the appellant prays for another extension of time for a period of 30 days to comply with the court's orders.
15. It is the appellant's case that as at the time it made that application dated June 16, 2022, it was in possession of the funds and was able and willing to deposit the same. The appellant asserts that owing to hard economic times coupled with the fact that it is a religious organization that is not funded and generates income from within itself, it has since spent the money on other activities and it was not able to raise the sum required within 30 days of the court's ruling delivered on February 16, 2023.
16. That explanation offered in paragraph 4 to 6 of the supporting affidavit of Father Boniface Mwangi is rather surprising given the reasons given for the previous application for extension of time by the appellant. In the application dated June 16, 2022 aforesaid, the same Father Boniface Mwangi deposed in the supporting affidavit that the appellant was unable to procure the required sum within 30 days due to certain bureaucratic procedures within the appellant organization.
17. In the ruling delivered herein on February 16, 2023, this court took into consideration the fact that the appellant is a large religious organisation and that it was possible that the bureaucratic processes within itself could have impeded it from accessing the funds in its accounts within the given 30 days. By the present application, the appellant is now telling the court that it is an impecunious organization and that it used the monies it had procured earlier for other purposes and was unable to raise the required security within the given timelines.
18. In the circumstances herein, it was apparent that the Appellant was being very economical with the truth and that it was not taking the Orders of the Courts cited above with the seriousness that they deserve. The law governing the issue of security for costs is set out under order 26 of the [Civil Procedure Rules](#) which provides as follows:
 - “ 1. In any suit the Court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other Party.
 2. ...
 3. ...
 4. ...
 5.
 - (1) If security for costs is not given within the time ordered and if the Plaintiff is not permitted to withdraw the suit; the Court shall, upon application dismiss the suit.”
19. In the case of an appeal such as this one, order 42 rule 14 (1) and (3) of the [Civil Procedure Rules](#) stipulates as follows:
 - “(1). At any time after the memorandum of appeal has been served, the court in its discretion, may order the appellant to give security for the whole or any part of the costs of such appeal.



(3) If security for costs is not given within the time ordered, the Court may dismiss the appeal.”

20. As was stated by Muriithi J. in Kisii High Court Election Petition No 6 of 2013 – *Fatuma Zainabu Mobamed v Ghati Dennitah & 10 others* (unreported) [cited with approval in *Evans Nyambeso Sedekiah & another v Independent Electoral and Boundaries Commission & 2 others*] (2013) eKLR:

“... security for costs, whether it is required by statutory provision or order of the court, must be taken as going to the root of the jurisdiction of the court to entertain the dispute. If no security for costs is deposited, then the petition or other proceedings though validly lodged before the court in accordance with the applicable procedure rules cannot proceed to hearing and determination as further proceedings are prohibited. As such, the provision for security for costs, is in my view, a substantive requirement underpinning the jurisdiction of the court to deal with the dispute in the proceeding in which the security for costs is required, and is based on the sound principle for the protection of the defendant from unrecoverable costs.”

21. In the matter herein, it was apparent that more than 2 years after Judgment was entered against itself and it was required to deposit security for costs, the appellant had evaded the same by giving all manner of excuses to justify its failure to comply with the orders of the court. In the premises, this court holds that the failure to deposit security for costs within 30 days from February 16, 2023 renders the appeal filed herein fatally defective.

22. The requirement for the deposit of the security for costs is a substantive legal requirement and not a procedural technicality that this court can excuse or extend time to enable compliance to be made.

23. Accordingly I dismiss the application and strike out the appeal filed herein with costs to the respondents.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 2ND DAY OF NOVEMBER, 2023.**

In the presence of:

Mr. Okoth for the Appellant

Mr. Peter Kamau the 1st Respondent in person

Ms Miriti for the 2nd Respondent

Court assistant – Kendi

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J. O. OLOLA

JUDGE

