



REPUBLIC OF KENYA



KENYA LAW
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**Mitau t/a Mombasa Fresh Water Supply Company v Kenya Ports Authority
(Civil Suit 75 of 2018) [2025] KEHC 232 (KLR) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 232 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 75 OF 2018
JK NG'ARNG'AR, J
JANUARY 23, 2025**

BETWEEN

**PETERSON MITAU T/A MOMBASA FRESH WATER SUPPLY
COMPANY PLAINTIFF**

AND

KENYA PORTS AUTHORITY DEFENDANT

RULING

1. The Defendant filed a Notice of Motion application dated 30th July 2024 under Certificate of Urgency pursuant to Section 1A, 1B, and 3A of the *Civil Procedure Act*, Order 50 Rule 6 of the Civil Procedure Rules and the inherent powers of the court.
2. The Defendant/Applicant seeks that this court be pleased to extend the time for furnishing the bank guarantee as ordered on 16th November 2023 by a further 7 days such that the bank guarantee issued by Citibank N.A in favour of the Plaintiff on 19th December 2023 and availed to the Plaintiff through his advocates on 20th December 2020 be deemed as having been provided with conditional timeline granted for the stay of execution pending appeal and the order made on 16th November 2023 and issued on 30th November 2023 be deemed as continuing to remain in force. That costs of this application be provided for.
3. The application is premised on grounds on its face and the affidavit of Robert Muge, the Assistant Legal Officer, Legal and Disputes Department, sworn on 30th July 2024 that by its order dated 16th November 2023 and issued on 30th November 2023, this court granted to the Defendant, Kenya Ports Authority (KPA), a stay of execution pending appeal on condition that KPA Furnishes a bank guarantee in the sum of Kshs. 28,000,000 within 30 days of the date as security of due performance of any decree that may ultimately bind it. That immediately thereafter, KPA's advocates wrote to the Plaintiff's advocates who responded to the said advocates on 20th November 2023. That on 15th December 2023, KPA's



- advocates forwarded to the Plaintiff's advocates the advance note from Citibank N.A, KPA's bankers, confirming issuance of a guarantee which was thereafter forwarded to them on 20th December 2023. That the short delay in furnishing the guarantee was not inordinate and is excusable especially so that the wording of the guarantee was only agreed by the Plaintiff and notified to KPA'S advocates on 21st November 2023. That if the 5 days are excluded, the 30-day period would have been complied with in any event.
4. That further, 16th December 2023 fell on a Saturday and under the provisions of Order 50 Rule 3, the 30-day period for provision of guarantee would run out on 18th December 2023, one day prior to the issuance and availing of the guarantee to the Plaintiff. That no prejudice would be caused to the Plaintiff if the time is extended especially given that the application was allowed on the premises that this court found that the interest of justice would be best served by a stay order pending hearing and determination of the appeal. That the Plaintiff is averse to a mutual extension of time and has now commenced enforcement proceedings through judicial review in Mombasa High Court Judicial Review No. E005 of 2024, Republic v the Managing Director Kenya Ports Authority & 2 Others Ex-parte Mombasa Fresh Water Supply Company. That it would be highly prejudicial if the said enforcement proceedings proceed when a guarantee has been issued in the matter for due performance of the decree.
 5. The Plaintiff/Respondent in the Replying Affidavit sworn on 13th August 2024 averred that the Plaintiff/Applicant has deliberately avoided to inform court that parties herein were in court on 18th July 2024 in High Court Judicial Review No. E005 of 2024 seeking for mandamus whereby the Defendant/Applicant were directed to file their Replying Affidavit to the main motion within 14 days and upon which parties were to file submissions within 14 days each. That instead of filing the Replying Affidavit as directed, the Applicant herein are filing a fresh application to get themselves out. That the conditional stay which had been issued on 16th November 2023 automatically lapsed on 16th December 2023 by failure of the Applicant to furnish a bank guarantee within the 30 days granted by the court.
 6. The Plaintiff/Respondent further stated that the Defendant/Applicant has never appealed against the ruling delivered on 16th November 2023 or applied for review or extension of the period. That they cannot now come to this court to apply for extension when the period has already lapsed and that the Defendant/Applicant had a lot of time to apply for extension of time before the Judicial Review Application No. E005 of 2024 was filed but chose not to. That court orders are issued to be obeyed and not to be flouted by parties at their whims and then come for extension of the same orders they chose to disobey. That the Defendant/Applicant is also wrongly computing the period given by court since the same ran from 16th November 2023 to 16th December 2023 and therefore the orders automatically lapsed on 16th December 2023. That there is nothing to extend and that they should have sought for fresh stay which has not been done.
 7. The application was canvassed by way of written submissions. The Defendant/Applicant filed submissions dated 4th November 2024 by relying on the decision of the Supreme Court in Nicholas Kiptoo Arap Korir Sata v Independent Electoral and Boundaries Commission & 7 Others (2014) KLR which set out relevant factors to be considered in determining applications for extension of time. That the Defendant/Applicant availed the bank guarantee on 19th December 2023 and forwarded it to the Plaintiff's advocates on 20th December 2023, one day after lapse of the 30-day period. That pursuant to provisions of Order 50 Rule 3 of the Civil Procedure Rules, the time limit for the bank guarantee to be availed was on 18th December 2023 and that the 2-day delay to avail the bank guarantee is excusable. The Defendant/Applicant submitted that they wrote to the Plaintiff/Respondent's advocates immediately after the grant of the order for stay on 16th November 2023 with the draft guarantee wording which



the Plaintiff/Respondent's advocates responded to on 20th November 2023 and received on 21st November 2023. That on 15th December 2023, the Defendant/Applicant's advocate wrote to the Plaintiff/Respondent's advocates attaching their banker's advance note confirming issuance of the bank guarantee, and that the hard copy guarantee would be sent once signed. That if the 5-day period that the Plaintiff/Respondent took in approving the wording is excluded, the 30 day period would be complied with. That had the Plaintiff/Respondent's advocates reverted earlier, the same would not result in the 1 day delay in issuance of the guarantee.

8. The Defendant/Applicant submitted that issuance of the guarantee as security not only ensures the rights of the Plaintiff are protected but also ensures the appeal is not rendered nugatory. That no prejudice will ensue to the Plaintiff should the relief for extension be granted as sought. That the Defendant on the other hand stands to suffer greater prejudice if the extension is not granted. That given that the Plaintiff/Respondent took no steps to enforce the decree until after 3 months, the Defendant genuinely believed that the Plaintiff/Respondent had accepted the bank guarantee as security for due performance of any decree that may be passed in the appeal. The Defendant/Applicant relied on the holding in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (2014) eKLR, *Spedag Interfreight Kenya Limited & Another v Jyoti Structures Limited & Another*, Kenya Electricity Transmission Company Limited (KETRACO) (Objector) (2022) eKLR, and *Boleyn Magic Wall Panel Limited v NESCO Services Limited* (2022) KEHC 10020, and prayed that the application be allowed.
9. The Plaintiff/Respondent in their submissions dated 11th November 2024 argued that the court cannot extend that which has already lapsed since the same does not exist. That the court cannot breath life into a dead order and that the Defendant/Applicant should have filed a fresh application for stay of execution for this court to consider whether they merit for reissuance of another stay. That the Defendant/Applicant does not explain the delay in compliance with the court order and that the application does not meet the parameters for issuance of stay or extension of time. The Plaintiff/Respondent relied on the holding in the case of *Isinya Roses Limited v Kyalo (Miscellaneous Case E050 of 2022)* (2022) KEELRC 13220 (KLR) (17 November 2022) (Ruling) where the court being aware that a bank guarantee had been provided late found that the applicant did not provide security as required by law. The Plaintiff/Respondent prayed for dismissal of the application.
10. I have considered the Notice of Motion application dated 30th July 2024, the Replying Affidavit sworn on 13th August 2024 and submissions by the parties. The issue for determination is whether the application is merited for grant of the orders sought.
11. The Defendant/Applicant explained that they wrote to the Plaintiff/Respondent's advocates immediately after the grant of the order for stay on 16th November 2023 with the draft guarantee wording which the Plaintiff/Respondent's advocates responded to on 20th November 2023 and received on 21st November 2023. That on 15th December 2023, the Defendant/Applicant's advocate wrote to the Plaintiff/Respondent's advocates attaching their banker's advance note confirming issuance of the bank guarantee, and that the hard copy guarantee would be sent once signed. That the Defendant/Applicant availed the bank guarantee on 19th December 2023 and forwarded it to the Plaintiff's advocates on 20th December 2023, one day after lapse of the 30-day period.
12. Order 50 rule 6 of the Civil Procedure Rules provides: -

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.

13. In *Nyaga & 2 others v Mathaara & 2 others* (Suing as the Administrators of the Estate of Brian Mumo alias Brian Mumo Munyao - Deceased) (Civil Appeal E39 of 2020) [2022] KEHC 10092 (KLR) (14 July 2022) (Ruling), the court held as follows: -

“Accordingly, this court has the discretion to grant the orders sought herein. However, the decision whether or not to do so is in the court’s discretion. This being an exercise of judicial discretion, like any other judicial discretion must on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court’s discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. One of those judicial principles expressly provided for in the above provision is that the applicant must satisfy the Court that he has a good cause for doing so, since as was held in *Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others* [1964] EA 633, there is no difference between the words “sufficient cause” and “good cause”. It was therefore held in *Daphne Parry vs. Murray Alexander Carson* [1963] EA 546 that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles.”

14. According to this court, the Defendant/Applicant’s explanation is sufficient. Engaging the Plaintiff/Respondent’s advocates immediately after grant of the order of stay on 16th November 2023 was a sign of good faith on their part and willingness to comply. The bank guarantee is available and had been furnished to the Plaintiff/Respondent.
15. This court finds that it is in the interest of justice that the Defendant/Applicant is granted an extension of time to deposit the bank guarantee.
16. In the upshot, the Defendant/Applicant’s Notice of Motion application dated July 30, 2024 is merited and allowed. Costs of the application shall be to the Plaintiff/Respondent.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF JANUARY, 2025.

J.K. NG’ARNG’AR, HSC

JUDGE

In the presence of: -

Mr. Mutugi Advocate for the Plaintiff/Respondent

Mr. Essaye Advocate for the Defendant/Applicant

Court Assistant – Shitemi

