



REPUBLIC OF KENYA



Muoki v Nyamai (Civil Appeal E233 of 2024) [2025] KEHC 7974 (KLR) (5 June 2025) (Ruling)

Neutral citation: [2025] KEHC 7974 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E233 OF 2024**

RC RUTTO, J

JUNE 5, 2025

BETWEEN

JOSEPH MAKEWA MUOKI APPELLANT

AND

NICODEMUS MBINDYO NYAMAI RESPONDENT

RULING

1. Before me are two applications for determination. In the first one, the Appellant/Applicant moved this Court by way of a notice of motion dated 12th February 2025 seeking the following orders;
 - a. Spent.
 - b. That time within which to comply with Order/Ruling issued/delivered on 13th November, 2024 be enlarged and/or that the Applicant be granted further 45 days or such other time as the court may specify to comply with the 2nd Order/term of the ruling.
 - c. That this honourable court do vary/review and allow the appellant/applicant to deposit Kenya shillings two million in a joint interest earning account in the name of both advocates on record for the parties as opposed to depositing a specific bank guarantee to court.
 - d. That this application be heard together with our application dated 3rd of February, 2025 coming up for directions on 13th February, 2025.
 - e. That the costs of this application be provided for.
2. The application is premised on the grounds on the face of it and supported by an affidavit sworn on 12th February, 2025 by Ouko Moswaeri, an Advocate in conduct of this matter for the Applicant. The grounds are that: due to financial constraints, vandalism of their offices, and change of structural management, the banks refused to issue any bank guarantee hence complying with the orders is an exercise in futility; the delay in complying with the orders was occasioned by various factors not within



- their control; the application has been made without undue delay; no prejudice will be occasioned to the Respondent; and the appeal will be rendered nugatory if the stay orders are vacated.
3. The Applicant had earlier filed an application dated 3rd February 2025, which he urged that it be heard together with the foregoing one. In this application dated 3rd February, 2025, he prayed for the following orders;
 - a. Spent.
 - b. That the Court be pleased to issue interim orders for stay of execution of the warrants issued by the honourable court in Machakos CMCC E387 of 2022 issued on 7th August 2024, pending the hearing and determination of this application.
 - c. That the Court grants an extension of time for 45 days for the applicant to comply with the ruling delivered on 13th November 2024.
 - d. Cost of the application to abide by the outcome of the appeal.
 4. This application was supported by the affidavit by Shem Ouko Moswaeri an advocate in conduct of this matter. He deponed that there has been delay in complying with the stay conditions, that the delay was occasioned by the structural management at Direct Line Assurance followed by the court issuing orders dated 5th June 2024 freezing accounts of the insurance; that the company has made alternative ways in order to comply with the stay conditions within the next 45 days; the Respondent has commenced execution, and that the delay is not inordinate and is excusable.
 5. Both applications were opposed by the Respondent via replying affidavits sworn on 10th February 2025 and 19th February 2025 respectively. In the replying affidavits the respondent deponed that; that the applications are fatally defective and based on misrepresentation of facts and should be struck out. That the applications are moot since there are no existing orders to be extended as sought; those 60 days granted by the court to comply with the stay conditions had lapsed and the default clause issued had since taken effect; that the applications are not made in good faith as it was filed to stop and delay the execution which had been undertaken by the decree holder. It was urged that if the court was to grant fresh stay of execution orders, the entire decretal sum of kshs.6,384,389 be deposited in a joint interest earning account. They prayed that the applications be dismissed with costs.
 6. In urging his applications, the Applicant filed submissions dated 1st March, 2025. He submitted that they had partially complied with the order of 13th November 2024 by already paying the Respondent, through their Advocate, a sum of ksh.1,000,000/-. That what remains is for the court to determine whether to vary the stay condition from a bank guarantee, to a deposit being made in a joint interest earning account in the name of both Advocates on record for the parties.
 7. They submitted that there was sufficient cause to grant extension of time. They also urged the Court to rely upon section 95 of the *Civil Procedure Act*, Order 50 Rule 6 of the Civil Procedure Rules, as well as the Nicholas Kiptoo Arap Salat versus Independent Electoral & Boundaries Commission (IEBC) & others (2014) eKLR to extend/enlarge time for them to deposit the decretal sum as this would in the interest of justice.
 8. It was the Applicant's submission that no prejudice will be occasioned to the Respondent if the applications are allowed, but that the Applicant will be prejudiced considering the colossal sum of money involved. To support this argument, reference was made to the case of Kelvin Kinyua Macharia versus Aisha Motors Dealers Limited & 3 others (2020) eKLR. Ultimately, they urged the Court to allow the notice of motions applications.



9. The Respondent's submissions are dated 19th March 2025 and set out the following issues for determination: whether the applications were brought with due delay; whether the Court can extend, review or vary the stay of execution orders of 13th November 2024; whether the Appellant's action will prejudice the Respondent; and whether the Appellant met the threshold for stay under Order 42 Rule 6.
10. On the first issue, it was submitted that there was undue delay in filing of the application since the application was filed one month after the lapse of the orders of the court, and after execution had issued. They sought to rely on the case of *Re Estate of Erasto Kiwinda Tole (Deceased) (2022) eKLR*.
11. As to whether the Court can extend/review, vary the orders of 13th November 2024, the Respondent opposed the extension of time for compliance and submitted that the orders vacated on effluxion of time as ordered by the court and due to non-compliance. That the order was to the effect that the entire application be marked as dismissed with costs to the Respondent and thus they are no orders to be varied. Reference was made to the case of *Giant Holdings Limited v Kenya Airports Authority (2004) eKLR*.
12. It was urged that failure to issue the bank guarantee as a result of structural management changes at Directline Assurance is a lame excuse since the management issues existed. That the Applicant's only option is to file a fresh application to be considered independent of the ruling of 13th November 2024.
13. On whether the Respondent will be prejudiced, it was submitted that it continues to suffer injustice as the decretal sum remains unpaid. That the one million paid to the Respondent was paid on 12th February 2025, way after the court orders had lapsed. They urged that if the Court was inclined to grant a fresh stay of execution, the remaining decretal amount should all be deposited in a joint interest earning account. The Court was urged to dismiss the applications with costs.
14. Upon analysing the parties' submissions, two issues arise for determination namely; whether the Court can extend time for the compliance with the orders of 13th November 2024; and whether this Court can vary the terms of the orders of 13th November, 2024.
15. On 13th November 2024 this Court granted the Appellant a conditional order of stay of execution in the following terms; that;
 - a. The appellant will pay the respondent a sum of Ksh.1,000,000/- and provide a bank guarantee of ksh.2,000,000/- which guarantee will be specific to this appeal and shall be valid for the entire period of the Appeal.
 - b. These conditions are to be met within 60 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
 - c. The parties are to agree on the auctioneer's proclamation costs or the same to be taxed and be paid by the Applicant.
16. In the case of *Teachers Service Commission v Kenya National Union of Teachers & 2 others [2013] eKLR* the court held that:

“A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door.



If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”

17. In this instance, it is undisputed that the Appellant did not comply with the terms of the order of the court. A perusal of this order indicates that the stay was subject to specific conditions that were to be fulfilled within 60 days from the date of issuance. The order also outlined the consequence of non-compliance, stipulating that failure to adhere to the set terms would result in the dismissal of the application with costs awarded to the Respondent, who would then be free to proceed with execution.
18. Consequently, in accordance with the terms of the order, and as rightfully stated by the Respondent, on 13th January, 2024, that is 60 days after the ruling was made, and the Applicant having not provided a bank guarantee, three critical things emerged, namely: (i) The order of stay lapsed, meaning there was no more stay to the decision sought to be appealed against; (ii) the application forming the foundation of the stay order stood dismissed with costs, that is there was no basis upon which a stay could be said to obtain; and (iii) the Respondent was now free to commence execution.
19. It therefore follows that, for the Applicant to seek to extend time for the performance of the orders dated 13th November, 2024; or to vary the said order, this court finds that that is an act in futility. There is neither a valid order in place to warrant the Court’s exercise of its discretionary powers to extend time for its performance, nor is there a valid order before the Court for it consider whether to vary it. The said orders automatically lapsed upon breach by the Applicant himself. He should have understood the order for what it was: a conditional order of stay. Thus, this Court has no powers to extend, vary, or review that which is non-existence.
20. I hasten to add that the Applicant is clearly second-guessing what prayer or order that the Court may issue. In the first instance, he seeks extension of time by 45 days to enable them comply with the orders of the courts. Then in the second breath, it seeks that the Court vary the order by now ordering for a deposit of money in a joint account and not the filing of a bank guarantee. I again find this improper. Why would a litigant seek extension of time to perform that which he has no intention of performing, having clearly demonstrated that he wants to seek that the terms be varied? For this reason, I find the two applications to have been brought not in good faith. The Applicant is inclined to attempt all possible ways to circumvent clear orders of the Court. Unfortunately for him, and luckily for the course of justice, those orders are none existence, having lapsed.
21. Accordingly, as per the terms of the Ruling, the orders automatically lapsed due to the Applicant’s non-compliance. There is therefore no valid order in place for the Court to exercise its discretion to vary, review the terms or even extend time for performing any act.
22. The upshot of the above is that the applications dated 3rd February 2025 and 12th February 2025 are dismissed with costs.
23. Orders accordingly

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 5TH DAY OF JUNE 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....Appellant

.....Respondent



.....Sam Court Assistant

