



**GKM v MNK (Originating Summons 1 of 2018)
[2024] KEHC 54 (KLR) (10 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 54 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
ORIGINATING SUMMONS 1 OF 2018**

EM MURIITHI, J

JANUARY 10, 2024

**IN THE MATTER OF SHARING MATRIMONIAL PROPERTY
AND
IN THE MATTER OF MARRIED WOMEN PROPERTIES ACT**

BETWEEN

GKM APPLICANT

AND

DR MNK RESPONDENT

Meaning of the phrase "sufficient reason" as used in Order 45 rule 1 of the Civil Procedure Rules.

The applicant sought a review of an order staying the execution of a decree for the distribution of matrimonial property, arguing that the respondent had failed to file an appeal within the prescribed timelines. The respondent had lodged a Notice of Appeal but did not file the substantive appeal within 60 days, as required by the Court of Appeal Rules. The Applicant contended that this delay was a deliberate tactic to frustrate the execution of the judgment. The High Court found that the delay rendered the previous stay order unjustified and inoperative. It determined that "sufficient reason" existed under Order 45, Rule 1 of the Civil Procedure Rules to vacate the stay. The court explained that sufficient reason included any valid justification warranting a review to prevent injustice, such as procedural delays that undermined the fair administration of justice. The absence of a pending appeal and the lack of any application for an extension of time justified lifting the stay. Consequently, the court allowed the Deputy Registrar to execute the necessary transfer documents to enforce the decree. The application for review was granted, and the respondent was ordered to bear the costs of the proceedings.

Reported by John Ribia

Statutes – interpretation of statutes – interpretation of Order 45 rule 1 of the Civil Procedure Rules - meaning of the phrase sufficient reason as used in Order 45 rule 1 of the Civil Procedure Rules - what constituted 'sufficient reason' for granting a review under the Civil Procedure Rules.



Civil Practice and Procedure – review – where there was an order staying execution – application to review stay order - whether a court could review or vacate an order staying execution when there was an unreasonable delay or failure to file an appeal within the prescribed timelines - Environment and Land Court Act, (cap 8D), section 13(1) and (7); Civil Procedure Act (cap 21) section 80; Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 49, rules 1, and 5; Court of Appeal Rules, 2022 (cap 9 Sub Leg) rule 82.

Civil Practice and Procedure – appeals - failure to lodge an appeal after filing a Notice of Appeal – application to review or lift stay of execution - whether the failure to lodge an appeal after filing a Notice of Appeal constituted sufficient reason for lifting a stay of execution - whether an order staying execution became inoperative when there was no pending appeal or application for an extension of time to file an appeal - whether the Deputy Registrar could be authorized to execute transfer documents in enforcing a decree for the distribution of property - whether a party's procedural delays could amount to abuse of court process, justifying the court's intervention to prevent injustice - Environment and Land Court Act (cap 8D) section 13(1) and (7); Civil Procedure Act (cap 21) section 80; Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 49, rules 1, and 5; Court of Appeal Rules, 2022 (cap 9 Sub Leg) rule 82.

Brief facts

The applicant sought a review of a Court Order issued on December 16, 2022, which had stayed execution of a decree issued on June 13, 2019. The decree awarded the distribution of matrimonial property between the applicant and the respondent, Dr. MNK, on a 40:60 basis. The respondent had previously filed a Notice of Appeal on June 25, 2019 but did not file the actual appeal within the required 60 days.

The applicant argued that no appeal existed and that the respondent's delay was a tactic to frustrate execution. The respondent opposed the application, asserting that the grounds for review had not been met.

Issues

- i. Whether a court could review or vacate an order staying execution when there was an unreasonable delay or failure to file an appeal within the prescribed timelines.
- ii. Whether the failure to lodge an appeal after filing a Notice of Appeal constituted sufficient reason for lifting a stay of execution.
- iii. Whether an order staying execution became inoperative when there was no pending appeal or application for an extension of time to file an appeal.
- iv. Whether the Deputy Registrar could be authorized to execute transfer documents in enforcing a decree for the distribution of property.
- v. What constituted 'sufficient reason' for granting a review under the Civil Procedure Rules?
- vi. Whether a party's procedural delays could amount to abuse of court process, justifying the court's intervention to prevent injustice.

Held

1. The phrase "sufficient reason" in Order 45 rule 1 of the Civil Procedure Rules must be one that was analogous or *ejusdem generis* to the other reasons stipulated in order 45 rule 1. A sufficient reason was a reason which in consideration of the interest of justice would justify the review, varying or setting aside of the order. It may include situations where the order in issue has become inoperative, useless or redundant, or it caused an injustice or otherwise caused more hardship than it avoids.
2. The appeal for the determination of which the court ordered that the application be held in abeyance was never filed. There was nothing to wait for as there was no pending appeal, and the court was not aware of any application for extension of time to file the appeal. The failure to institute an appeal in accordance with rule 82 of the Court of Appeal Rules attracted the consequences under rule 83 of the Rules, that the appeal was deemed to have been withdrawn, and there was, consequently, no appeal pending hearing and determination to justify the continuation of the orders under review.



3. There being no appeal pending determination to justify the orders, the same must be reviewed to lift the order holding in abeyance the determination of the application for Deputy Registrar to execute transfer documents.
4. The Deputy Registrar possessed ministerial powers under Order 49, Rules 1 and 5 of the Civil Procedure Rules. The provisions authorized the Deputy Registrar to perform specific procedural tasks traditionally assigned to the court. Under rule 1, the Registrar or an executive officer, empowered by the Chief Justice, could execute any ministerial acts required by the court. Additionally, rule 5 allowed the Registrar to issue formal orders related to the attachment and sale of property, as well as notices concerning arrest and imprisonment in the execution of High Court decrees. However, if any party raised an objection to the proceedings, the matter must be referred to a judge for further determination.

Application allowed.

Orders

- i. *The Court Order of December 16, 2022 was reviewed and set aside.*
- ii. *The applicant's application dated September 10, 2021 for execution of the judgment of the High Court delivered on June 13, 2019 was granted.*
- iii. *The appellant was to pay to the respondent/applicant the costs of the applications dated September 10, 2021 and April 17, 2023 made in execution of the Judgment of June 13, 2019.*
- iv. *File closed.*

Citations

Cases

Kenya

1. *Kimani, Stephen Gathua v Nancy Wanjira Waruingi t/a Providence Auctioneers Civil Appeal 142 of 2012; [2016] KEHC 6883 (KLR) - (Explained)*
2. *Mambili, Tokeshi Imbuka & 2 others v Joseph Onzeke Sambwa & another Civil Suit 44 of 2003; [2004] KEHC 392 (KLR) - (Explained)*

Statutes

Kenya

1. Civil Procedure Act (cap 21) section 80- (Interpreted)
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 49 rules 1, 5- (Interpreted)
3. Court of Appeal Rules, 2022 (cap 9 Sub Leg) rule 82 - (Interpreted)
4. Environment and Land Court Act (cap 8D) section 13(1)(7) - (Interpreted)

Advocates

M/S David John Mbaya & Co. Advocates for the appellant.

M/S Leonard K. Ondari & Co. Advocates for the respondent/applicant.

RULING

1. By notice of motion dated 17/4 2023, the applicant decree holder respondent in the intended appeal herein moved the court for orders:
 - a) That this application be certified as urgent and order that the same be heard expeditiously.
 - b) That this honourable court be pleased to order review of the orders recorded on December 16, 2022 and have them discharged varied, and or vacated.
 - c) That this honourable court be pleased to issue further orders as it deems fit for the interest of Justice.



- d) That costs of this application be provided for.
2. It was based on grounds set out in the application as follows:
- “a. Since delivery of judgement on June 13, 2019, to date no single step has been taken, and or no appeal has been filed so far.
 - b. That by any standards any appeal would have been filed by now, as its already 5 solid years ago.
 - c. That the application and orders issued by the court on December 6, 2022 were meant to frustrate the execution of the judgement and subvert justice.
 - d. That there's a sufficient reason to order review.”
3. The appellant did not file any replying affidavit but did file submissions dated October 17, 2023 in opposition to the application.
4. By its ruling of December 16, 2022, the court had, on an application dated September 10, 2021 seeking to enforce by the signature of the Deputy Registrar of the Court, the judgment of this court pursuant to order 49 rule 5 of the Civil Procedure Rules and section 13(1)(7) of the Environment and Land Court Act No 19 of 2011, made an order holding the determination of the said application in abeyance and reasoning as follows:
- “7. on one hand, the applicant wants the Deputy Registrar of this court to be authorized to execute the transfer documents, and the production of the original title documents to be dispensed with, while on the other hand, the respondent seeks the court's indulgence in order to pursue his right of appeal. The respondent has exhibited a Notice of Appeal lodged in this court on June 25, 2019 whereas the judgment sought to be appealed against was delivered on June 13, 2019. The respondent filed the Notice of Appeal without unreasonable delay and he cannot thus be said to have lost interest in appealing. The need to carefully balance the respondent's undisputed right to appeal with the corresponding right of the applicant to enjoy the fruits of her decree cannot be overstressed. If this court were to allow the application at this stage, the respondent's appeal would be rendered nugatory, and he would substantially suffer if his intended appeal were to be successful.”
5. In her submissions dated September 20, 2023 the applicant primarily urged that there did not exist any appeal and therein lay sufficient reasons to review the order of the court as follows:
- “on behalf of the applicants/plaintiff we wish to submit that we have not been served with any appeal and indeed no appeal exists. What happens when a party fails to lodge an appeal after 60 days was answered by the Court of Appeal in CoA at Nyeri Civil Appeal No 25/2020 between *Kamau and 47 others-vs-Salaries and Remuneration Commission (SRC)*, Judges Koome, Warsame & Kiage stated and I quote:-
- “We have said on numerous occasions that the rules of court exists for the purpose of orderly administration of justice before this court. The timelines appointed for the doing of certain things and taking of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals that come before



us. The rules are expressed in clear and unambiguous terms and they command obedience".

Failure to comply with timelines set invites sure consequences. In the case of failure to lodge an appeal within 60 days after filing of the notice of appeal, rule 83, which is invoked by the Applicant herein provides thus:-

Rule 83

'If a party who has lodged a notice of appeal fails, to institute an appeal within appointed time; he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or application by any party make such order. The party in default shall be liable to costs arising therefrom of any person on whom the notice of appeal was served.'

We wish to rely on this entirely in respect of whether there is an appeal against the decree and or Judgement of the court.

No 2 What are the conditions for review?

Applications for review are anchored on order 45, and section 80 of the [Civil Procedure Rules](#) and [Civil Procedure Act](#), respectively:

In summary the conditions are:-

- a) Discovery of new and important matter or evidence which after exercise of due diligence was not within the knowledge or could not be produced at the time.
- b) on account of mistake or error apparent on the face of record.
- c) An) other sufficient reason.

The applicant's application is based on (2) two ie

- a) Discovery of a new matter or evidence.
- b) Any other sufficient reason.

The court delivered that the respondent was seriously going to pursue his appeal, only to realise that the whole intention was a sham. The respondent played on the applicant and the court. We couldn't tell with any certainty that, the respondent won't appeal at all. The applicant further will rely on any sufficient reason on this application for review, that the appeal was never filed after all."

6. By submissions dated October 17, 2023, the respondent relied on [Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers](#) [2016] eKLR and decision of [Tokesi Mambili and others v Simon Litsanga](#) cited therein and urged that the applicant had not established grounds for review in terms of section 80 of the [Civil Procedure Act](#) and order 45 rule 1 of the [Civil Procedure Rules](#), as follows:

" Your Lordship the applicant has not presented any evidence before court that show new and important evidence had been found to review the orders of the ruling delivered on December 16, 2022. Neither has there been any error nor would mistake that was made that subject the orders for review. Further the respondent during hearing of the application dated September 10, 2021, had annexed a notice of appeal and a receipt to his replying affidavit. The same was served upon the applicant and thus cannot to be seen to say that he was not



aware that an appeal had been lodged. As such the applicant has not met the threshold of reviewing of the orders as no discovery of new evidence has been availed that was not within his knowledge when the ruling was made before this honourable court. The applicant has also not proven that there was a mistake or apparent error on the face of the record.

Conclusion

For the foregoing reasons, the respondent/JD prays that Your Lordship be guided by the above highlighted authorities and submission and be pleased to disallow the Application as prayed.”

7. However, in relying on *Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers* [2016] eKLR (Mativo J as he then was) the respondent must be taken to accept the ground of sufficient reason considered in that case but found to be absent, as follows:

“ I also find useful guidance in the decision of Kwach, Lakha and o’kubasu JJA in the case of *Tokesi Mambili and others v Simion Litsanga*[17] delivered on March 28, 2003 where they held as follows:-

- i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason. (Emphasis added)
- ii. Where the application is based on sufficient reason it is for the court to exercise its discretion.

The reason offered by the applicant is that there were orders issued in the various cases he referred to. This is not new evidence. The applicant has not satisfied that the orders in question were not within his knowledge. In fact he says he was an interested party in one of the cases. Alternatively, he has not demonstrated when he came to know about the said court decisions or that he could not obtain them despite due diligence. There is no allegation that there is an error apparent on the face of the record. It has not been shown that there is a sufficient reason to warrant the review.

In other words, I am not persuaded that the reasons offered amounts to ‘sufficient reason’ within the meaning of the rules cited above nor is it analogous or ejusdem generis to the other reasons stipulated in order 45 Rule 1.”

8. With respect, while I agree with the finding in the particular case, I do not agree that the phrase sufficient reason in order 45 rule 1 of the *Civil Procedure Rules* must be one that is “analogous or ejusdem generis to the other reasons stipulated in order 45 rule 1.” In my view, a sufficient reason is a reason which in consideration of the interest of justice would justify the review, varying or setting aside of the order. It may include situations where the order in issue has become inoperative, useless or redundant, or it causes an injustice or otherwise causes more hardship than it avoids.
9. However, on the facts in this case, it is a new and an important matter that the appeal for the determination of which the court ordered that the application be held in abeyance was never filed. There is nothing to wait for as there is no pending appeal, and the court is not aware of any application for extension of time to file the appeal. The failure to institute an appeal in accordance with rule 82 of the *Court of Appeal Rules* attracts the consequences under rule 83 of the Rules, that the appeal



is deemed to have been withdrawn, and there is, consequently, no appeal pending hearing and determination to justify the continuation of the orders under review.

10. There being no appeal pending determination to justify the orders of December 6, 2022, the same must, for this discovery and for this sufficient reason, be reviewed to lift the order holding in abeyance the determination of the application for Deputy Registrar to execute transfer documents herein.
11. The court is satisfied that there is a judgment of the court herein (Mabeya J) delivered on June 13, 2019 which decreed at paragraph 26 thereof as follows:

“26. The upshot is that the plaintiffs originating summons dated 4th November 2013 is meritorious and the same is allowed as follows:-

- a) A declaration issues that Plot LR No 32/34/4, Plot No. 305/76, Ngong Township, LR No Block 1/92, Meru Town and Plot No. 209 Gikomba Market are matrimonial properties.
- b) Plot LR No 32/34/4, Plot No 305/76, Ngong Township, LR No Block 1/92, Meru Town and Plot No. 209 Gikomba Market be distributed to the plaintiff and the defendant on 40:60 basis.
- c) The costs of the suit is awarded to the plaintiff.

It is so decreed.”

12. The court is further satisfied that the deputy registrar of the court has ministerial powers under order 49 rules 1 and 5 of the *Civil Procedure Rules* as follows:

" [order 49, rule 1.] Registrar to ministerial officer.

1. Wherever in these rules it is provided that any ministerial act be or thing may be done by the court, that act or thing may be done by the registrar or by an executive officer generally or specially thereunto empowered by the Chief Justice by writing under his hand.

[order 49, rule 5] Execution may be Registrar.

5. Formal orders for attachment and sale of property and for the issue of notices to show cause on applications for arrest and ordered by imprisonment in execution of a decree of the High Court may be made by the registrar or, in a subordinate court, by an executive officer generally or specially thereunto empowered by the Chief Justice by writing under his hand, but in the event of any objection being taken to the proceedings thereunder, all further proceedings shall be before a judge.”

13. The court finds merit in the application dated April 17, 2023, and it shall be allowed.

Orders

14. Accordingly, for the reasons set out above, the Court makes the following orders:

1. The Court order of December 16, 2022 is reviewed and set aside.
2. The applicant’s application dated September 10, 2021 for execution of the judgment of the court herein delivered on June 13, 2019 is granted as prayed.



3. The appellant shall pay to the respondent/applicant the costs of the applications dated September 10, 2021 and April 17, 2023 made hereunder in execution of the Judgment of June 13, 2019.

15. File closed.

order accordingly.

DATED AND DELIVERED ON THIS 10TH DAY OF JANUARY, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S David John Mbaya & Co. Advocates for the Appellant.

M/S Leonard K. Ondari & Co. Advocates for the Respondent/Applicant.

