



Muendo v Kilonzi (Legal representative of the Estate of Joab Mbithi) (Civil Appeal 128 of 2022) [2024] KEHC 119 (KLR) (17 January 2024) (Ruling)

Neutral citation: [2024] KEHC 119 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 128 OF 2022
FR OLEL, J
JANUARY 17, 2024**

BETWEEN

SAMUEL KALOKI MUENDO APPELLANT

AND

MBITHI KILONZI (LEGAL REPRESENTATIVE OF THE ESTATE OF JOAB MBITHI) RESPONDENT

RULING

A. Introduction

1. The application before this court is the Notice of Motion application dated 18th September 2023 brought pursuant to provisions of Section 1A, 1(B) and 3A, 75(G) and 95 of the *Civil Procedure Act*, and Order 51 rule 1 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers 1, 2 & 5 of the said application are basically spent and the main prayer sought are prayers (3) and (4) that;
 - a. That the court be pleased to review its orders and vary them to give effect the just expeditious proportionate, resolution of the Appeal
 - b. That time within which to comply with order/ruling issued/delivered be enlarged and the applicants be granted a further 45 days to furnish security by way of a bank guarantee or deposit the entire amount in a joint interest earning account.
 - c. That the costs of this Application to abide the outcome of the Appeal.
2. This application is supported by the ground on the face of the said application and the supporting affidavit of one Njoroge Caroline dated 18th September 2022, where she states that the applicant's insurer is facing financial challenges and has not been able to meet the terms of stay as directed under the ruling dated 27th June 2023. The applicant thus prayed for a review of the same to enable them furnish court with a Bank guarantee for the entire amount of the decretal sum and time be extended



by 30 days to enable them do so. The orders were sought in Good faith and would not prejudice the Respondent if so granted.

3. This application is opposed by the respondent who filed a replying affidavit dated 9th October 2023, wherein he stated that the said application is made in bad faith, was incompetent, an afterthought and was a delaying tactic to deny him the fruits of his Judgement. There was no basis made upon which an order of review could be granted nor was there any plausible reason given for the court to exercise its discretion to enlarge time. The Respondent thus prayed for this court to dismiss the said Application.

Analysis & Determination

4. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and Submissions filed. I do find that the issues for determination are whether the court order of 27th June 2023 should be reviewed and further whether time should be extended to allow the Applicant to comply with the orders dated 27th June 2023 albeitly reviewed to have them furnish court with a bank guarantee for the entire decretal sum.

5. Section 80 of the *Civil Procedure Act* grants the court the power to make orders for review, Order 45 sets out the jurisdiction and scope of review by hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason. The applicant has miserably failed to bring out any of the above grounds, the basis upon which this court can consider an application to review its orders dated 27th June 2023. Obviously, they are dissatisfied with the said order and should thus have appealed instead of waste precious judicial time with an application which is incompetent as far as the orders of review are sought.

6. Order 50 rule 6 of the *Civil procedure rules* do provides that;

“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 powers to enlarge time upon such terms (if any) as the justice of the case may require, and such enlargement maybe ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”

7. There is no doubt that the discretion to extend time is not a right of the party, but is an equitable remedy that is only available to a deserving party after laying a basis to courts satisfaction that there exists reasonable explanation as to why there has been a delay. The court will also consider if any prejudice will be suffered by the respondent and if the application has been brought without unreasonable delay. See *Nicholas Kiptoo Arap korir Salat v IEBC and 7 others* eKLR.

8. In *Imperial Bank ltd (in receivership) & Ano. v Alnasir Popat and 18 others* the court observed that;

“some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercised its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a parties opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; public interest issues implicated in the appeal or intended appeal and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration it must be born in mind that it is not really the role of a single judge to



detriment definitely the merits of the appeal. That is for the full court if and when it is ultimately presented with the appeal.”

9. Further in the *Salat case*(*supra*)the supreme court did observe that;

“Extension of time being a creature of equity, only enjoy, one can only enjoy if he acts equitably: he who seek s equity must do equity .Hence, one has to lay a basis that he was not at fault so at to let time lapse. Extension of time is not a right of a litigant against court, but a discretionary power of the courts, which litigants have to lay a basis where they seek courts to gran the same.”

10. The applicants counsel was in court when the ruling was delivered and they were aware of the terms of stay as given under the order dated 27th June 2023. The reason proffered for failing to observe the said terms of stay was that the Applicants insurer was experiencing financial challenges. This is an averment made without any supporting documentation and basically is a lame excuse, which cannot attract the courts positive discretion. The long and short is that this application is made in bad faith as the Applicant has moved court seeking an equitable order with dirty and soiled hands in equity.

B. Disposition

11. Taking all relevant factors into consideration;

- a. I do find that the Notice of Motion Application dated 18th September 2023 is wholly unmerited and the same is dismissed with costs to the Respondent.
- b. The costs of this Application are awarded to the Respondent and is taxed at Ksh. 30,000/= all-inclusive which shall be paid with 30 days in default execution to issue for the same.

12. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 17TH DAY OF JANUARY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 17TH DAY OF JANUARY, 2024.

In the presence of:-

No Appearance for Applicant

Mr Kamolo for Respondent

Court Assistant – Susan/Sam

