



REPUBLIC OF KENYA



**Maina & another v Nyang'aya (suing as the legal as representative and administrator of the Estate of the Late Elijah Mwaniki Kinuthia) (Miscellaneous Civil Application 2 of 2023) [2024] KEHC 2964 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2964 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
MISCELLANEOUS CIVIL APPLICATION 2 OF 2023  
JK SERGON, J  
MARCH 14, 2024**

**BETWEEN**

**JOSEPH MUNENE MAINA ..... 1<sup>ST</sup> APPLICANT**

**ANTHONY MWANGI MAINA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**DEVINAH KWAMBOKA NYANG'AYA (SUING AS THE LEGAL AS REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF THE LATE ELIJAH MWANIKI KINUTHIA) ..... RESPONDENT**

**RULING**

1. The application coming up for determination is a notice of motion dated 17th January, 2024 seeking the following orders;
  - (i) Spent
  - (ii) That the honourable court be pleased to review its orders of 20th September, 2023 and set them aside
  - (iii) That the honourable court be pleased to order that Kericho CMCC No. 39 of 2019 do proceed with execution henceforth.
  - (iv) That costs of the Application be borne by the applicants/respondents.
2. The application is supported by grounds on the face of it and the supporting affidavit of Devinah Kwamboka Nyangaya the applicant herein.



3. The applicant avers that judgment was entered in her favour in Kericho CMCC No. 39 of 2019, however, the applicants/respondents obtained orders for stay of execution pending appeal in this Court through the instant cause on 20th September, 2023.
4. The applicant avers that the applicants/respondents are in violation of the orders issued by this Court on 20th September, 2023 and that half the decretal amount in Kericho CMCC No. 39 of 2019 is yet to be deposited in a joint account in the names of both advocates and furthermore the applicants/respondents were yet to file their appeal.
5. The applicant avers that the advocate on record wrote severally to the advocates representing the applicants/respondents about compliance with the orders issued by this Court. The applicant avers that the applicants/respondents had deliberately neglected and/or reneged to comply with the conditions upon which the order for stay was premised in the ruling dated 20th September, 2023 and therefore the orders in the aforestated ruling ought to be lifted.
6. There was no response to the application on the part of the applicants/respondents. The matter came up for inter partes hearing on 15th February, 2024 and Mr. Oigara the Learned Counsel for the applicants/respondents stated that he had filed the notice of motion dated 8th February, 2024 as a response to the instant application.
7. The applicants/respondents notice of motion dated 8th February, 2024 seeking for the following orders;
  - (i) Spent
  - (ii) That the honourable court be pleased to review its orders made on 6th February, 2024 and allow the Respondents to file their replying affidavit to the application dated 17th January, 2024
  - (iii) That costs be provided for.
8. The application is supported by grounds on the face of it and the supporting affidavit of Joseph Munene Maina the 2nd applicant/respondent herein.
9. The 2nd applicant/respondent avers that they were served with the certificate of urgency and notice of motion dated 17th January, 2024 slated for inter partes hearing on 6th February, 2024 on 2nd February, 2024, they contended that the notice constituted one (1) working day.
10. The 2nd applicant/respondent avers that they filed their memorandum of appeal on 2nd October, 2023 and annexed a copy of the stamped memorandum of appeal and receipt for payment of filing fees dated 2nd October, 2023.
11. The 2nd applicant/respondent conceded that they received a letter dated 13th December, 2023 requesting their advocates to go to ABC Bank based in Eldoret to open the joint account, the following day, however, this was impossible as their advocates on record reside and have set up their legal practice in Nairobi.
12. The 2nd applicant/respondent stated that their advocates on record vide a letter dated 5th October, 2023 sent an email to the applicant's advocate stating that they were at the inception stage of setting up a joint bank account at Absa Nairobi Branch for purposes of complying the with court order, they were therefore requesting him to sign the form at Absa Eldoret Branch.
13. I have considered the pleadings filed by the parties and the sole issue for this court's determination is whether to review and/or set aside orders issued by this Court on 20th September, 2023. The answer



is in the negative. This Court will only vary the terms of the order for stay of execution if the Applicant satisfies any of the grounds for application for review. The grounds upon which an application for review may be premised, are found under Order 45 of the Civil Procedure Rules, 2010 and they are as follows: -

“(i) Where there is a discovery of new and important matter or evidence, which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order was made; (ii) On account of some mistake or error apparent on the face of the record; or (iii) For any other sufficient reason. I find that this application does not disclose any of the aforementioned grounds for review and therefore does not meet the threshold for review.

14. I however have taken note that there has been partial compliance with the orders dated 20th September, 2023, the applicants/respondents complied with said orders and filed their memorandum of appeal on 2nd October, 2023 and they have annexed a copy of the stamped memorandum of appeal and receipt for payment of filing fees dated 2nd October, 2023 in their response to the instant application. Therefore what is pending is the account opening process.

15. In Moyale Liner Bus Services v Gachu Ibrahim [2021] eKLR in an application made under similar circumstances, the Court deemed it fit to extend the time within which the Applicant may comply with the orders of the Court and observed as follows; “In view of the fact that the Court had already pronounced itself on the application for stay of execution in the final order on the appeal, this Court will not vary the terms of the order including its terms with respect to the nature of the security. The Court is *functus officio* on the issue of stay of execution and its terms.”

16. In the present circumstances, this court rendered itself on the application for stay of execution and is therefore *functus officio*. The only relief that can be afforded to the parties is an extension and/or enlargement of time to comply with the orders of this Court made on 20th September, 2023. The provisions of law on extension of time are found in Order 50 Rule 6 of the Civil Procedure Rules, 2010. The same provides as follows:

“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.”

17. Section 95 of the Civil Procedure Act, Cap 21 Laws of Kenya provides as follows: -

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

18. Consequently, the notice of motion dated 17th January, 2024, fails, however in the interests of justice, the time within which the parties are allowed to comply with the Court’s orders of 20th September, 2023 is hereby extended for a further twenty one (21) days from the date of this order. It is hereby ordered that



- (i) The Applicants/Respondents shall within twenty one (21) days from the date this order deposit half the decretal sum in a joint interest earning account opened in the names of the parties' Advocates.
- (ii) In default of the deposit in Order No. (i) above, the orders for stay of execution shall automatically lapse.
- (iii) There shall be no order as to costs as both parties are to blame for the delay in the account opening process.

**DELIVERED, SIGNED AND DATED AT KERICHO THIS 14TH DAY MARCH 2024.**

**J.K. SERGON**

**JUDGE**

In the Presence of:

C/Assistant – Rutoh

Miss Amaya holding brief for Kagunza for the Applicant

No appearance for the Respondent

