



**Mutinda v Mutinda alias James Mutinda (Civil Appeal  
E256 of 2023) [2024] KEHC 2731 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2731 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E256 OF 2023  
FROO OLEL, J  
MARCH 13, 2024**

**BETWEEN**

**DAVID MUTINDA ..... APPELLANT**

**AND**

**JAMES K MUTINDA ALIAS JAMES MUTINDA ..... RESPONDENT**

**RULING**

**A. Introduction**

1. The Application before this court is the Notice of Motion application dated on 22.02.2024 brought pursuant to the provisions of law set out therein. The Applicant seeks the following prayers, that;
  - a. Spent
  - b. Spent
  - c. The court grants an extension of time for compliance with the consent order of 25<sup>th</sup> October 2023.
  - d. That the Appellant/Applicant herein be deemed to have duly complied with terms of the consent having deposited the entire decretal sum in a joint interest earning account within timelines contemplated in the consent orders of 25<sup>th</sup> October 2023.
  - e. Costs of this Application abide the outcome of the Appeal.
2. The Application is supported by the grounds on the face of the said application and the supporting affidavit of one Julie Ochoki Advocate dated 22.02.2023, Wherein she deposed that the parties did appear before this court on 25<sup>th</sup> October 2023, and a consent was recorded allowing the the Application dated 6<sup>th</sup> October 2023 on terms that they deposit the entire decretal sum of Kshs.1,200,000/= in a joint interest earning account at a reputable bank within the next forty days from the date thereof.



3. The parties did open the joint account for depositing the decretal sum and eventually the Appellant did manage to deposit funds therein on 21<sup>st</sup> January 2021 albeitly late. The delay in depositing the funds was occasioned by the appellant's insurer who was undergoing management changes, thereby causing a delay in implementing the order as sought. The applicant had sent auctioneers who had proclaimed on the appellants goods and unless stay of execution was granted, there was risk that the appellants good would be attached, yet the decretal sum had been deposited in the joint account as directed by court. This application was brought in good faith and it would be just and prudent to allow the prayers sought.
4. The application was opposed by the respondent, who did file a replying affidavit dated 04.03.2024, sworn by his advocate Kilonzi A Muli. The respondent deposed that the reasons advanced by the applicant for the delay in depositing the money was contradictory. On the grounds on the face of the said application, the applicants had stated that the delay was caused by bereavement of one of the mandatory signatories, while in the supporting affidavit, the applicant stated that the delay was caused by changes in the management structure of its insurer. This showed that the applicant was deliberately misleading court and were before court with unclean hands in equity.
5. The consent terms were clear that the decretal sum was to be deposited within 40 days from 25.10.2023. The deadline to do so was 05.12.2023. The appellants had thus failed to comply with the terms of the Consent order, which had a default clause allowed them to execute since there was no stay of execution as from 06.03.2024. Further the applicant did not have the courtesy of informing the respondents counsel that they had deposited the decretal sum in the joint account, thus on 15.02.2024, they did proceed and instructed Milan Auctioneers to proceed and execute for the entire decretal sum and the additional costs incurred.
6. The applicants were indolent, and it was a cardinal principle of law the court orders had to be obeyed without variation. The applicants had only attached a copy of a cheque deposit slip in the supporting affidavit and the court could not know if indeed the said cheques was honoured by the bank The application as filed was therefore unmerited and the same was fit for dismissal.

## **B. Analysis & Determination**

7. I have carefully considered the Application and corresponding affidavits thereto on record. Order 50 rule 6 of the civil procedure Rules does 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.”

8. The basis for applying for extension of time was discussed in the Court of Appeal case of Susan Ogotu Oloo & 2 Others v Doris Odindo Omolo [2019] eKLR where it was held:-

“In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the Supreme Court in Nicholas Kiptoo Arap Korir Salat v IEBC [2014] eKLR Sup Ct Application No 16 of 2014.

The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of



paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted”.

9. 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 party's opportunity to fully ventilate 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 borne in mind that it is not really the role of a single judge to determine definitely the merits of the appeal. That is for the full court if and when it is ultimately presented with the appeal.”

10. From the record, the parties did appear before the court on 25.10. 2023 and recorded a consent allowing for issuance of an order of stay of execution of the decree issued in primary suit on terms that the entire decretal sum be deposited in a joint interest earning account within 40 days. The applicants have complied with this order, though outside the stipulated time. They indeed deposited the decretal sum in the joint account on 22.01.2024. They therefore seek to validate the late deposit of this decretal sum.

11. The reasons advanced by the applicant for seeking extension of time is contradictory and weak. No proof has been provided to show which director of the applicant's insurer was bereaved and/or which structural management changes were being effected to stop the Appellants insurer from depositing the decretal sum on time. Be that as it may this is a fresh appeal and undoubtedly the appellants have a right to have their appeal heard on merit especially on the issue of quantum awarded. This right has to be balanced with the respondent's right to quick dispensation of justice and to enjoy the fruits of his judgement.

12. The court therefore has to balance the two contrasting rights and is guided by the provisions of Article 159(2)(d) of *the Constitution* and Section 1A and 1B of the *Civil Procedure Act* in administering justice. The focus being on substantive justice, rather than procedural technicalities, and the just, efficient and expeditious disposal of cases. At this point the court appreciates the sentiments expressed by the High Court in *John Gachanja Mundia v Francis Muriira Alias Francis Muthika & Another* [2016] eKLR that:

“..... However, I will be guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice in *the Constitution* as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief.”

## Disposition

13. Taking all relevant factors into consideration, I do grant issue the following orders;



- a. The time to deposit the decretal sum is deemed extended until 22.01.2023 and the Appellant/Applicant having deposited the decretal sum is deemed to have complied with the consent order dated 25.10.2023.
- b. The appellant will settle half (1/2) the Auctioneers costs for proclamation levied, on the basis of delay in depositing the decretal funds and for failure to advise the Respondents counsel once deposited. The said auctioneer's costs to be agreed upon or taxed.
- c. The costs of this application will abide by the appeal.

14. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 13TH DAY OF MARCH, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**Delivered on the virtual platform, Teams this 13th day of March, 2024.**

**In the presence of;**

**Ms Wataka for Appellant**

**Mr. Kilonzo for Respondent**

**Sam Court Assistant**

