



Total Energies Marketing Kenya PLC v Mwaura T/A Melion & Agro Hydrolinks (Commercial Appeal E037 of 2023) [2024] KEHC 3054 (KLR) (Commercial and Tax) (15 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3054 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E037 OF 2023
FG MUGAMBI, J
MARCH 15, 2024**

BETWEEN

TOTAL ENERGIES MARKETING KENYA PLC APPELLANT

AND

ERNEST M MWAURA T/A MELION & AGRO HYDROLINKS .. RESPONDENT

RULING

1. Before the court is the application dated 21st December 2023 brought under sections 1A, 3A and 3B of the *Civil Procedure Act* as well as Order 51 Rule 1 of the Civil Procedure Rules 2010. The application seeks to extend time for the Appellant to comply with stay conditions issued by this court on 10th November by a further 21 days and for a stay of execution of the ruling and decree issued by Hon. S.A. Opande in Nairobi CMCC E356 of 2022 pending the ruling of this Court.
2. The application is supported by the annexed affidavit of Boniface Abala, the Legal Manager of the applicant sworn on 21st December 2023. In response to the application the respondent filed a Notice of Preliminary Objection dated 11th January 2024 on the grounds that the application is sub judice.
3. The respondent also filed a replying affidavit sworn on 24th January 2024. The applicant filed written submissions dated 26th January 2024 in respect of both the application and the Preliminary Objection. The respondent filed a Digest of Authorities with respect to the Preliminary Objection, dated 26th January 2024.



Analysis

4. The first point of call for this Court is section 7 of the *Civil Procedure Act*, and an answer to the question as to whether this matter is indeed sub judice. If it is, then this Court must down its tools for being functus officio. The said section 7 provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

5. The applicant’s case is that the matter is not sub judice since the court has never been called upon by the parties herein to extend time for any party to comply with the directions on stay of execution issued on 10th November 2023. Further, the applicant argues that there is also no ruling on this matter finally and conclusively settling this issue on record.
6. The ruling of this Court delivered on 10th November principally sought to stay the execution of the ruling and decree of the subordinate court (Hon. S.A. Opande) in Nairobi CMCC No. E356 of 2022 pending the hearing and determination of the appeal filed before this Court. It is this Court’s finding that of the prayers sought in the application of 21st December 2023, prayer 2 does not lend itself for consideration of this Court having been determined substantially.
7. It is my view that prayer 3 of the said application is not sub judice. I say so in so far as the same is limited to seeking an extension of time and does not invite this Court to re-open the issue of stay of execution of the decision on security that the Court has already pronounced itself on. These issues were heard and finally determined in the November ruling.
8. Section 95 of the *Civil Procedure Act* is instructive of the discretion of this Court in enlarging time for the performance of any act. This discretion is further buttressed under Order 50 rule 6 of the Civil Procedure Rules which 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.”

9. Having so found, the question now moves to whether the applicant is deserving of the orders sought. In determining this application which seeks an extension of time, I am cognisant of the parameters for consideration set by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat V The Independent Electoral and Boundaries Commission & 7 Others*, [2014] eKLR.
10. The following guiding principles were established by the Court:
 - i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;



- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. Whether the application has been brought without undue delay;
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time; and
 - viii. The degree of prejudice to the respondent if the application is granted.
11. The first ground that the appellant relies on is that the time required for compliance with the directions of court lapsed prior to the appellant obtaining internal approval for the deposit of the decretal sum in a joint account.
 12. In light of the submission by the applicant that there are laid down protocol and structures within the applicant company, for seeking such approvals, nothing would have been easier than to demonstrate the efforts that had been put in place and the processes that had culminated to the present application. Unfortunately, none has been furnished to this Court.
 13. The second ground raised by the applicant is that there were ongoing negotiations between the parties herein which negotiations were geared towards a full and final settlement of the matter. The applicant has produced an email dated 9th December 2023 purportedly sent to the respondent.
 14. The email refers to negotiations that had allegedly taken place via text. Proof of such other communication has not been provided as evidence that the applicant was engaged in such negotiations and it is therefore difficult for this Court to come to a finding that there were indeed such negotiations between the parties.
 15. Further, no evidence has been tabled before this Court to demonstrate that the applicant reached out to the respondent either in an effort to open the said bank account or to explain their predicament before the lapse of the time that this Court had given for compliance.
 16. Finally, the order for stay of execution having been granted on 10th November 2023, lapsed on 1st December 2023. The present application was filed on 21st December 2023, about three (3) weeks later. The applicants were well aware that the orders of this Court were time bound. No justification has been given for the 21 days delay in filing this application which under the circumstances is inordinate delay.
 17. Finally, the applicant argues that it has put its advocates on record with the funds as directed by the court and is ready and willing to comply with the orders of the court. The evidence of such funds has not been demonstrated and in light of the totality of the circumstances, this Court finds that the same is unsubstantiated.

Determination

18. The long and short of this is that the application dated 21st December 2023 is dismissed with costs to the respondent.



DATED, SIGNED AND DELIVERED IN NAIROBI THIS 15TH DAY OF MARCH 2024.

F. MUGAMBI

JUDGE

