



REPUBLIC OF KENYA



**Kibe & 5 others v Attorney General & 2 others (Civil Miscellaneous Application
860 of 2001) [2024] KEHC 5479 (KLR) (Civ) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5479 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL**

CIVIL MISCELLANEOUS APPLICATION 860 OF 2001

AN ONGERI, J

MAY 2, 2024

BETWEEN

**GILBERT MACHARIA KIBE 1ST APPLICANT
SAMUEL KAMAU MACHARIA 2ND APPLICANT
SCENERIES LIMITED 3RD APPLICANT
GEORGE KANG'ETHE WARUHIU 4TH APPLICANT
GRACE GITHU 5TH APPLICANT
SOLOMON KARANJA 6TH APPLICANT**

AND

**ATTORNEY GENERAL 1ST RESPONDENT
NGENGI MUIGAI 2ND RESPONDENT
DAVID IRUNGU MDEGWA T/A CITY MERCHANT AUCTIONEERS 3RD
RESPONDENT**

RULING

1. The application coming for consideration in this ruling is the one dated 5/10/2023 brought under Article 159 of *the constitution*, Section 1A, 1B, 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law seeking the following orders;
 - i. That the orders of stay of execution issued on 29th June, 2023 be and are hereby discharged.
 - ii. That the principal amount of ksh.3,000,000/= deposited in joint account number 0152589039600 Kamau Kuria & Company Advocates and Gathenji & Company Advocates



at Standard Chartered Bank Kenyatta Avenue Branch together with all interest accrued by the said principal be released to the Gathenji & Company advocates, the advocates of Ngenji Muigai.

- iii. That the 2nd respondent be at liberty to execute against the applicants for the remainder of the decretal sum as per the decree dated 4th August, 2022.
 - iv. Costs of the application.
2. The application is based on the following grounds;
- i. That on 29th June, 2023 the court issued an order for stay of execution of the ruling delivered on 4th August, 2022 in this cause, pending hearing and determination of the appeal.
 - ii. That the Court further ordered the Applicants to deposit Kes.3,000,000/= into a joint interest earning account.
 - iii. That on 4th August, 2022 the Applicants were granted leave to file an appeal against the ruling delivered on 4th August, 2022.
 - iv. That it has been more than 14 months since the leave to appeal was granted and no appeal has ever been filed.
 - v. That it has been more than 3 months since the order of stay pending appeal was issued and no Appeal has been filed.
 - vi. That there is no pending Appeal.
 - vii. That the Applicants are using the Court process and in particular the orders of 29th June 2023 to frustrate the 2nd Respondent's efforts to realize the fruits of his judgment.
 - viii. That the 2nd Respondent has been kept out of rightful entitlement since 4th August, 2022 to date.
 - ix. That the Orders of stay were obtained through a misrepresentation of facts that the Applicants intended to file an appeal while in reality they were never keen on filing an Appeal.
 - x. That the continuance of the orders of stay amounts to abuse of the hallowed Court process.
 - xi. That the above ground constitutes sufficient reason to review and discharge the orders of 29th June, 2023 ordering a stay of proceedings pending Appeal.
 - xii. That if the orders of stay are allowed to remain in place, there will be great injustice to a party who has a judgement of this court.
 - xiii. That it is fair; legal and in the interest of Justice that this Application is allowed forthwith.
3. The application is supported by the affidavit of NGENGI MUIGAI sworn on 5/10/2023 in which he deposed that vide an originating Summons dated 31st July 2001, the Applicants sued him and the other two Respondents and sought a total of 53 orders against them.
4. That he successfully defended the suit and on 19th February, 2006 the learned Justice Isaac Lenaola (as he then was) dismissed the Originating Summons dated 31st July 2001 and ordered the Applicants to pay costs of the suit.
5. That on 21st October, 2006, he filed a party and party bill of costs against the Applicants pursuant to the aforesaid judgment and orders of the Courts.



6. That on 8th May, 2020 the Taxing Officer delivered a ruling on the Party and Party Bill of Costs.
7. That on 9th June, 2020 the Applicants filed a Reference against the decision of the Taxing officer but did not take a hearing date for the Reference for a period of 9 months.
8. That he filed an Application dated 29th March, 2021 seeking to enter judgment in terms of the certificate of Taxation.
9. That his advocates attended Court and took a hearing date for my Application dated 29th March, 2021.
10. That on the date of the hearing of my Application the Applicants also sought to have their Reference heard despite not having taken the trouble to fix it for hearing.
11. That the court ordered that the Reference be heard together with my Application dated 29th March, 2021.
12. That on 4th August, 2022 the court dismissed the Applicant's Reference with costs and allowed my Application dated 29th March, 2021 with costs.
13. That on the same date, 4th August, 2022 the Applicants advocate sought leave to Appeal to the Court of Appeal. And the Court granted the Applicants leave to appeal to the Court of Appeal.
14. That it has been over 1 year and 2 months since the Applicants were granted leave to Appeal to the Court of Appeal. To date no appeal has been filed.
15. That the Applicants are using the Court process and in particular the orders of 29th June 2023 to frustrate his efforts to realize the fruits of my judgment.
16. That the continuance of the orders of stay amounts to abuse of the hallowed Court process.
17. The respondent opposed the application vide replying affidavit sworn on 15/1/2024 by Gilbert Macharia Kibe in which he deposed that the Applicants, being aggrieved by the ruling dated 4th August 2022 filed a notice of Appeal on 15th August 2022 and applied for proceedings. The Applicant then filed an application seeking stay of execution pending appeal, which prayers were granted, and which decision, the Respondent had not appealed against. The order was however issued to the Applicant's Advocates on 25th July 2023, from which date, the 45 days granted by Court started running.
18. He further deposed that by 17th August 2023, the Respondent's advocates were yet to supply the bank with the required documents to open the joint account, and the account was eventually opened on 29th August 2023. Consequently, the Applicants deposited Kshs. 1.5 million into the joint account on 31/8/2023 and another Kshs. 1.5 million on 5/9/2023. The transaction of 29/8/2023 did it reflect, and a deposit of Kshs. 1.5 million was remade on 6/9/2023. He asserted that this was 43 days after the order was issued which was well within the 45 days ordered by Court on 29/6/2023.
19. He also deposed that the Applicants have never been served with the Bill of Costs dated 21/10/2006.
20. Further, he contended that during the Covid 19 period, dates were taken virtually by requesting the registry to fix a hearing date, and the failure of the registry to fix a date could not be blamed on the Applicants. The reference has however already been heard and is no longer an issue.
21. He further deposed that the Applicant's advocates had never been informed on whether the proceedings were ready, without which they cannot file an Appeal.



22. He contended that no new evidence had been tabled to warrant setting aside of the orders issued on 29/6/2023, this court is functus officio and the issues raised by the application are Res judicata as they have already been determined by the Court.
23. The parties filed written submissions as follows;
24. The 2nd Respondent, who is the Applicant in this application submitted that the current application does not seek a review of the orders of Court issued on 29/6/2023, but rather seeks to invoke the Court's inherent Jurisdiction as provided by Section 3A of the Civil procedure act to stop the Applicant's from abusing the court process, to enjoy a stay while they neglect to file an Appeal. He contended that the Applicants are likely to enjoy the stay orders indefinitely as the Respondents are stopped from enjoying the fruits of judgement in their favour.
25. On the issue of untyped proceedings, he submitted that the proceedings referred to are those dismissing the reference and those of the taxing Master during taxation, which are very brief. The Response had not demonstrated any effort in obtaining the typed proceedings for more than a year and a half, and urged the court to reject this explanation.
26. He further submitted that the Applicants have not given a valid reason why they have not lodged a memorandum and record of Appeal. It is the Respondent's contention that the Appeal has not been lodged so as to continue enjoying the stay orders perpetually and avoid paying the Respondent costs as ordered by Court.
27. On the assertion that this court is functus officio as the issues raised in the application are Res Judicata, the 2nd Respondent clarified that he is not aggrieved by the Stay orders, but rather by the abuse of the stay orders by the Applicant's refusal to lodge an Appeal. The question of abuse of stay orders is novel in the proceedings and the court is yet to deal with it.
28. He called upon this Honourable Court to exercise its inherent jurisdiction and protect the sanctity of the Court process by preventing the abuse and misuse of its orders. He asserted that this Court had jurisdiction to prevent abuse of its orders and grant the prayers sought.
29. In Response, the Applicants submitted that the Applicant's had complied with the Court orders and deposited the decretal sum into the joint account. They also contended that the Respondent had not appealed the decision granting a stay of execution, thus the current application was only filed to vex the Applicants.
30. They explained that the Court registry had never informed them that the typed proceedings were ready for collection, which is a common problem. They relied on Rule 84 of the Court of Appeal Rules which provides that where an application for typed proceedings has been made in this court within 30 days, the time taken to prepare the proceedings shall be excluded from the computation of time.
31. The Applicants contended that the issues in this Application are Res judicata and could have only been handled by an Appeal which was not lodged by the Respondents. The current application is also barred by The Doctrine of finality of litigation that requires that litigations comes to an end regardless of what parties think of the decision which ha been handed down. They contended that the current application is an Appeal disguised as a review as it purports to challenge the exercise of discretion by the Court, and thus an abuse of Court process. They urged the court to dismiss the Respondent's application with costs.
32. The sole issue for determination in this application is whether the stay orders should be vacated and the amount deposited released.



33. There is no record of appeal to date and I find that the delay of more than 140 months to prosecute this appeal is inordinate.
34. I allow the application dated 5/10/2023 in the following terms;
- i. That the orders of stay of execution issued on 29th June, 2023 be and are hereby discharged.
 - ii. That the principal amount of ksh.3,000,000/= deposited in joint account number 0152589039600 Kamau Kuria & Company Advocates and Gathenji & Company Advocates at Standard Chartered Bank Kenyatta Avenue Branch together with all interest accrued by the said principal be released to the Gathenji & Company advocates, the advocates of Ngengi Muigai.
 - iii. That the 2nd respondent be at liberty to execute against the applicants for the remainder of the decretal sum as per the decree dated 4th August, 2022.
 - iv. The respondents to pay the costs of the application.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
2ND DAY OF MAY, 2024.**

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent

