



REPUBLIC OF KENYA



**Tima & another v Housing Finance Company Ltd & another (Civil Case 660 of 2002)  
[2024] KEHC 5459 (KLR) (Commercial and Tax) (17 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5459 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 660 OF 2002  
FG MUGAMBI, J  
MAY 17, 2024**

**BETWEEN**

**SAMUEL O. TIMA ..... 1<sup>ST</sup> PLAINTIFF**

**LYDIA NYAMBONYI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**HOUSING FINANCE COMPANY LTD ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH KARIUKI WANYUGI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling determines two applications. Both applications emanate from a decision of this court issued on 10<sup>th</sup> July 2023 (the judgment). By the said decision the plaintiff was awarded Kshs. 18,545,000/= being the estimated value of the suit property at the time of sale, less Kshs. 9,000,000/= being the actual amount received for the suit property together with general damages of Kshs. 2,000,000/=, the rent amounts collected from the suit property and held in a joint interest account together with interest and costs of the suit.
2. The court rejected the 2<sup>nd</sup> defendant's counter-claim for mesne profits and interest but allowed the prayer by the 2<sup>nd</sup> defendant to evict the plaintiffs.

**The application dated 26<sup>th</sup> October 2023**

3. This application is filed by the 2<sup>nd</sup> defendant. It seeks to set aside the orders of stay of execution subsequently issued by this court on 23<sup>rd</sup> August 2023, which had the effect of staying the eviction of the plaintiffs from the suit premises by the 2<sup>nd</sup> defendant.



4. It also seeks leave to execute the decree before the taxation of the bill of costs and that the 2<sup>nd</sup> defendant be allowed to evict the plaintiffs from the suit property known as LR No. 36/111/948 before taxation as authorized by this court in the judgment.
5. The application is supported by the affidavit sworn on 26<sup>th</sup> October 2024 by John Patrick Machira, Counsel for the 2<sup>nd</sup> defendant in this matter. The applicant avers that there was an agreement and consensus regarding the 1<sup>st</sup> defendant's intended appeal which was that the said appeal and application for stay of execution was not intended to affect the 2<sup>nd</sup> defendant's right to evict the plaintiffs. This consensus was neither considered and nor reflected in the said stay order by this Honourable Court.

### **Analysis**

6. This court has taken note of the email communication between counsel for the 1<sup>st</sup> and the 2<sup>nd</sup> defendants in which counsel for the 1<sup>st</sup> defendant confirms that the intended appeal by the 1<sup>st</sup> defendant was only with respect to the amount awarded to the plaintiffs. The 1<sup>st</sup> defendants further confirm their willingness to sign a consent to confirm that their application for stay of execution did not affect the 2<sup>nd</sup> defendant and that the intended appeal was not going to touch on the eviction of the plaintiffs by the 2<sup>nd</sup> defendant.
7. The application is opposed by the plaintiffs vide a replying affidavit sworn on 13<sup>th</sup> November 2023. The plaintiffs express an intention to appeal against the said judgment. The gist of their case is that the application does not meet the threshold for review under Order 45 rule of the Civil Procedure Rules. The plaintiffs further argue that the decree herein cannot be split into two. The plaintiffs further take issue with the applicant for failing to respond to the application for stay of execution filed by the 1<sup>st</sup> defendant in which they would have been in a position to argue these facts.
8. This court notes that the 1<sup>st</sup> defendants have not opposed this application even though it is not clear why the defendants did not execute a consent to cement their intentions and vary the terms that were already adopted, with respect to the stay of execution application that had been filed by the 1<sup>st</sup> defendant. The plaintiffs have argued that the consent order dated 23<sup>rd</sup> August 2023 was still in force and could only be set aside on proof of fraud. I align myself with this submission.
9. The Court further notes that the consent order recorded on 23<sup>rd</sup> August was recorded pursuant to an application dated 2<sup>nd</sup> August 2023 filed by the 1<sup>st</sup> defendant. The application was served on the plaintiffs as well as the 2<sup>nd</sup> defendant pursuant to the directions of this court of 7<sup>th</sup> August 2024. The 2<sup>nd</sup> defendant for whatever reason chose not to respond to the application. Only the plaintiffs responded. The 2<sup>nd</sup> defendant was therefore deemed not to have any objection to the application. The 2<sup>nd</sup> defendant has not offered any explanation for the failure to oppose the application.
10. Instead of opposing the application, the 2<sup>nd</sup> respondent wrote to the plaintiffs seeking an explanation as to why the plaintiffs sought a blanket stay of execution against the entire judgment. In fact, the email of 8<sup>th</sup> August confirms that the 2<sup>nd</sup> defendant was served with the application and was aware of it at all material times.
11. Having failed to formerly respond to the application for stay execution or record a varying consent, the 2<sup>nd</sup> defendant has only himself to blame for indolence. This court finds that there is no basis on which to allow this application.



### **The application dated 23<sup>rd</sup> November 2023**

12. The second application is dated 23<sup>rd</sup> November 2023 and is filed by the plaintiffs seeking enlargement of time for the filing of a Notice of Appeal against the judgment of this court.
13. The reason given by the plaintiffs is that the 1<sup>st</sup> plaintiff, who is the instructing client, was taken ill hence the delay in obtaining instructions on the appeal. They have attached a discharge summary from Mbagathi Hospital confirming that the 1<sup>st</sup> plaintiff was admitted in hospital on 7<sup>th</sup> August 2023 and discharged on 12<sup>th</sup> October 2023. The 1<sup>st</sup> plaintiff in his supporting affidavit avers that the 2<sup>nd</sup> plaintiff is his wife but is illiterate and has not been participating in the proceedings herein and could therefore not give instructions to counsel.
14. The application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants on principally similar grounds. They accuse the plaintiff of inordinate delay in pursuing the application enlargement of time. They both find the reason given by the plaintiffs for the prayers to be untenable, arguing instead that the plaintiffs simply seek to use lame excuses so as to hoodwink this court into expanding time for the appeal to be filed.
15. The 2<sup>nd</sup> defendant submits that he stands to suffer losses as he is unable to collect the monthly rent from the house despite the judgment of this court and that with the appeal he will continue to suffer losses.

### **Analysis**

16. In determining whether or not to expand time, this court is guided by the parameters as set out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral & Boundaries Commission & 7 Others*, [2014] eKLR. For the avoidance of doubt these are as follows:
  - 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;
  - viii. The degree of prejudice to the respondent if the application is granted.”
17. Against this background, the facts of the matter herein are that the impugned judgment was delivered on 10<sup>th</sup> July 2023. The applicant had 14 days by law to file his Notice of Appeal, up to 24<sup>th</sup> July 2023. From the record before me, at this time the applicant had not been hospitalized and was only hospitalized about 2 weeks later. The plaintiffs have not provided any reason as to why the 1<sup>st</sup> plaintiff



or his done pursuant to the power of attorney that has been annexed could not give instructions in this intervening period.

18. What is also interesting is that having failed to file their Notice of Appeal on time, the 1<sup>st</sup> plaintiff was however able to swear an affidavit opposing the application for stay of execution filed by the 1<sup>st</sup> defendant, on 21<sup>st</sup> August 2023. The inference of this as noted by the defendants is that the plaintiff was actually in a proper frame of mind to give instructions to counsel, contradicting the averments in the supporting affidavit.
19. The defendants have also raised the issue and I align myself with their sentiments that even if this court were to consider the case put forward by the plaintiffs, they have not explained why this application was not brought immediately the 1<sup>st</sup> plaintiff was discharged from hospital, on 12<sup>th</sup> October. Instead, the application was filed almost another 2 months after discharge.
20. In the absence of any tenable explanation by the applicant the court presumes that the plaintiff was in a right frame of mind to give instructions on the filing of the appeal and failed to do so on time, demonstrating a lack of commitment in their appeal and indolence.
21. As the defendants have correctly pointed out, expansion of time is a discretion of this Court. That discretion is not opened by dishonesty and bad faith. That discretion is to be exercised in favor of deserving, honest and vigilant litigants. On this occasion I am not convinced that the applicants are deserving of the orders for expansion of time.

### **Disposition**

22. For the reasons set out hereinbefore, the application dated 23<sup>rd</sup> November 2023 is dismissed with costs to the defendants/respondents. Equally, the application dated 26<sup>th</sup> October 2023 is dismissed with costs to the plaintiffs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 17<sup>TH</sup> DAY OF MAY 2024.**

**F. MUGAMBI**

**JUDGE**

