



REPUBLIC OF KENYA



**Nation Media Group Limited v Macharia (Civil Appeal E598 of 2023)
[2024] KEHC 6987 (KLR) (Civ) (12 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6987 (KLR)

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

CIVIL

CIVIL APPEAL E598 OF 2023

JN MULWA, J

JUNE 12, 2024

BETWEEN

NATION MEDIA GROUP LIMITED PLAINTIFF

AND

KENNEDY NJENGA MACHARIA DEFENDANT

RULING

1. By a motion dated 7/07/2023, the Applicant Nation Media Group Ltd approached the court for grant of orders of stay of execution of the decree from the exparte judgment delivered on 13/07/2022 as well as leave to file an Appeal out of time from the ruling dated 13/07/2023 in which the trial court dismissed its application to set aside the ex parte judgment delivered on 13/07/2021 awarding the Respondent Kshs. 856,294 /- plus costs of the suit.
2. At the time of filing the Application, the Respondent by its agents had proclaimed the Applicant's goods to recover the decretal sum of Kshs. 964,601.04. On 7/07/2023 this court granted a temporary stay of the execution proceedings pending hearing and determination of the Application.
3. The grounds for the Application are set out at its face and by a Supporting Affidavit sworn by one Saadia Abdi, Advocate for the Applicant.
4. In opposing the Application, the Respondent filed Replying Affidavits sworn on 10/08/2023 by one Kennedy Macharia and a further affidavit sworn on 31/10/2023 by Sekon Owino a legal officer of the applicant.

I have considered the parties' pleadings and averments in their affidavits and the written submissions.

5. The Respondent in the Replying Affidavits aver that there is no judgment delivered on 13/07/2022 by the trial court, and that the correct date is 24/06/2022; that even if such date were correct, there is



no record of an appeal filed against the judgment delivered on 24/06/2022 and therefore, there being no appeal on record, provisions of order 42 rule 6 of the Civil Procedure Rules are not applicable in the circumstances.

6. Based on the above, the Respondent submits that the Applicant's failure to disclose full material facts lead the court to issue temporary stay orders of execution pending hearing and determination of this application, and hence the same ought to be discharged.
7. It is the duty of the court to ascertain the correct material facts in respect of the orders sought by the applicant in the instant application vis-a-viz the Respondents rejoinder by the replying affidavit. The only way to confirm such facts is from the ruling and/or judgment of the trial court which is the subject of the Appeal or intended Appeal.
8. This appeal is serialized as Milimani High Court Civil Appeal no. E598 of 2023, meaning in my view that an appeal has already been filed. By Prayer no. 3 of the Application dated 7/7/2023 the Applicant seeks extension of time within which the Appellant may file a Memorandum of Appeal and the one filed and dated 7/07/2023 to be deemed as duly filed. In other words, this court is being asked to deem the appeal as duly filed within the statutory period, when it was actually filed out of time.
9. It is now trite that a court of law will not sanitize an illegality committed by a litigant. But with leave, the court may exercise its discretion and grant leave for filing an appeal out of time subject to meeting the conditions set out at the proviso to section 79G of the Civil Procedure Act. It provides;

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.

10. In *Mutiso v. Mwangi* [1997] KLR 630 the court rendered that the decision whether to extend time for appealing is essentially discretionary, and that the court ought to consider three things: length of the delay, reasons for the delay and possible chances of success of the appeal succeeding and the decree of prejudice to the Respondent if the order is granted.
11. The Supreme Court of Kenya in *Nicholas Kiptoo Korir v. IEBC & 7 other* [2014] eKLR rendered and re-emphasized that a party who seeks extension of time has the burden of laying a basis to the satisfaction of the court as to whether the delay has been explained to the satisfaction of the court. See also *Zoa Tala Limited v. James Gitau Kuria* [2022] eKLR.
12. The delay in filing the intended appeal is stated as about four months from the ruling of the trial court captioned as 7/03/2023 assuming that the ruling was against setting aside of the judgment dated 13/07/2022; If that be so, then I am satisfied with the reasons advanced being inability by the applicant to obtain a copy of the ruling from the court registry on time to beat the deadline.
13. However the court is at a loss as to what the ruling subject of the intended appeal was against: - A judgment delivered on 24/06/2022 or 13/07/2022?

Without certainty and clarity of the judgment or ruling would the court be persuaded to stay execution of an unclear judgment or ruling? Would it not be appropriate for the court to be seized with the terms of the said judgment/ruling, to interrogate the same to find out if the applicant meets conditions under Order 42 Rule 6.
14. The Applicant was no doubt served with the Respondent's Replying Affidavit wherein all the above anomalies are highlighted. The applicant faced with the above gray areas never deemed it fit to correct itself on the application and bring to the court the true material facts.



15. That being the case the court would be doing an injustice to both parties if it would proceed to allow and grant the stay of execution orders sought by the Applicant.

Consequently there being no judgment on record delivered on 13/07/2022 or any other date the court will not sanitize a wrong and stay execution of the decree of a non-existent judgment- (prayer no 2 of the application).

16. Consequently, there being no clarity of the Judgment or Ruling to be appealed from, I decline to grant leave to the Applicant to file an appeal out of time from a Judgment and/or Ruling not clearly defined.

17. The Respondent shall have costs of this application.

Orders accordingly.

DELIVERED DATED AND SIGNED IN NAIROBI THIS 12TH DAY OF JUNE, 2024

JANET MULWA

JUDGE

