



Kirimi & another v Standard Digital & another (Miscellaneous Civil Application 9 of 2019) [2024] KEHC 9015 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9015 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CIVIL APPLICATION 9 OF 2019
EM MURIITHI, J
JULY 25, 2024**

BETWEEN

JOEL MUTUMA KIRIMI 1ST PLAINTIFF

SHARON CHEPKORIR KOSKEI 2ND PLAINTIFF

AND

THE STANDARD DIGITAL 1ST RESPONDENT

THE STANDARD GROUP LIMITED 2ND RESPONDENT

RULING

1. By a Notice of Motion under certificate of urgency dated 16th April 2024 brought under Order 45 Rules 1 of the *Civil Procedure Rules*, Sections 1A, 1B and 3A of the *Civil Procedure Act* and other enabling provisions of the law, the Applicants seek:
 - a. Spent
 - b. That this Honorable court be pleased to discharge/set aside/review the stay of execution orders issued on 12th of August, 2020 and varied on the 29th of October, 2020.
 - c. That the costs of this application be borne by the Respondents.
2. The grounds upon which the application is premised are set out on the face of it and supporting affidavit of Joel Mutuma Kirimi, the 1st Applicant sworn on even date. He contends that vide the judgment of 18/6/2020, this court (Mabeya J.) awarded the Plaintiffs Ksh. 8,800,000 plus interest and costs at court rate until payment in full. Soon thereafter, the Respondents lodged their notice of appeal in court on 22/6/2020 subsequent to which they obtained stay of execution orders on 12/8/2020, which were varied on 29/10/2020 on the main ground that the Applicants had omitted to tax their bill of costs as mandated by section 94 of the *Civil Procedure Act* and had failed to prove their capacity to refund the sum decreed if the appeal succeeded. The Applicants have since gone through the rigors of



taxation and a reference and now have a certificate of taxation in place thereby discharging the initial violation of section 94 of the *Civil Procedure Act*. Additionally, the Plaintiffs, who have always been respected members of the society have built up sufficient capacity that would enable them refund the sum decreed if the Respondents' appeal succeeds. It is also imperative for the court to note that he was elected as the Chairperson of the Law Society of Kenya, Mt. Kenya branch, a position that he currently holds. With the foregoing recent facts, further taking into account that both Plaintiffs have over 10 years post admission experience, incapacity to pay the sum of Ksh. 4,400,000 which is the balance of the decretal sum does not arise. The Respondents have not made an application before the Court of Appeal, as the court with original jurisdiction in applications for stay of execution, and this court should allow the said court to make determinations over matters that are before the Court of Appeal, of course at the Respondents' leisure. It is now almost 4 years since this court pronounced itself and the Applicants have maliciously and unnecessarily been prevented from fully enjoying the fruits of their judgment. It is therefore in the interest of justice that the stay orders issued by this court on 29/10/2020 be discharged/set aside/reviewed, especially since the grounds upon which they were granted have since dissipated. Further to the foregoing, the Plaintiffs have since discerned that the 2nd Respondent has been posting losses for the last 3 years and as such, they are exceptionally skeptic about the Respondent's ability to pay the decretal sum plus interest should their financial situation continue to deteriorate. It is in the interest of justice that the application is allowed as the Respondents will not in any way be prejudiced, since they can obtain similar orders from the Court of Appeal where they have sought to lodge their appeal.

3. The application has not been responded to, and thus it is unopposed.

Determination

4. Like in every application for review, an Applicant is required to establish to the satisfaction of the court any one of the following three main grounds as stipulated under Order 45 of the *Civil Procedure Rules*:
 - i. That there is discovery of new and important evidence which was not available to the applicant when the judgment or order was passed despite having exercised due diligence; or
 - ii. That there was a mistake or error apparent on the face of the record; or
 - iii. That sufficient reasons exist to warrant the review sought. In addition to proving the existence of the above grounds, the applicant must also demonstrate that the application was filed without unreasonable delay.”
5. The grounds of review raised by the Applicants herein are that they have being unnecessarily kept away from enjoying the fruits of their litigation for 4 years since judgment was passed, and the Respondents will not suffer any prejudice because they can always obtain similar orders of stay of execution from the Court of Appeal.
6. The Applicants have exhibited a copy of title deed for Ntima/Igoki/798 jointly owned by them valued at Ksh. 9,000,000 to demonstrate their capability to refund the decretal sum in the event of a successful appeal.
7. In its ruling of 12/8/2020, the court (Mabeya J.) rendered thus:
 - “25. In the present case, the decretal sum is Kshs. 8,800,000/-. The substantial loss that is alluded to is that the plaintiffs are persons of unknown financial capability. That the items attached are items of operation for the defendants.



26. The plaintiffs on the other hand stated that they are not persons of straw. That they are capable of refunding the amount if paid over to them and the appeal is ultimately successful. 27. However, I note that the plaintiffs did not produce any evidence to that effect other than stating that they are advocates of the High Court. In my view, they may be officers of this Court but unable to refund the sum if required to refund. They should have, for example have sworn any properties they own or their monthly income to satisfy the aspect that no substantial loss would be suffered. This they did not do.”

8. In its ruling of 29/10/2020, the court (Mabeya J.) rendered thus:

“ 14. In this case, neither the judgment nor the ruling sought to be reviewed has been perfected. The defendants do not seek to introduce new evidentiary documents, save except for the negotiation between them and the plaintiffs. The fact that the defendants may not have filed the appeal does not make this Court to be functus officio. If the plaintiffs feel that the defendants have not filed the appeal, then the proper procedure is to apply to either discharge the orders of stay or strike out the notice of appeal but not to block the defendants from the sea of justice.”

9. The applicants have by this application acted on the counsel of the Court to move either for the “discharge of the orders for stay or striking out of the notice of appeal.”

10. The Respondents, who were duly served with the instant application, as exhibited by the affidavit of service on record sworn by Joshua Mbugua Loshorua on 18/4/2024, have failed to discharge their evidential burden to prove that they are still interested in pursuing the appeal. This court finds no legal justification to continue keeping the Applicants away from their money, now that they have rebutted the presumption that they would be unable to refund it in the event the appeal succeeds.

11. Consequently, this court finds that a proper case and sufficient cause for review of the rulings of 12/8/2020 and 29/10/2020 has been made to warrant grant of the orders sought.

Orders

12. Accordingly, for the reasons set out above, this court grants the Applicants’ application dated 16/4/2024 in terms of prayer (b) thereof.

13. The Costs of this application shall be in the Cause.

Order accordingly.

DATED AND DELIVERED ON THIS 25TH DAY OF JULY 2024.

EDWARD M. MURIITHI

JUDGE

Apperances:

Ms. Kiendi for Mr. Walukwe for the Applicant.

N/A for the Respondent.

