



**Kimani & another v Nzau (Miscellaneous Application 264 of 2017)  
[2023] KEHC 580 (KLR) (Civ) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 580 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
MISCELLANEOUS APPLICATION 264 OF 2017  
JN MULWA, J  
FEBRUARY 9, 2023**

**BETWEEN**

**GABRIEL KIMANI ..... 1<sup>ST</sup> APPLICANT**

**CYRUS MWAURA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**DAVID KATUVA NZAU ..... RESPONDENT**

**RULING**

1. By a Notice of Motion Application dated July 14, 2021, the Respondent sought the following orders against the Applicants:
  1. That this Honourable Court be pleased to set aside its Orders of stay of execution granted on July 4, 2017 vide the court orders issued on July 18, 2017.
  2. That the costs of this Application be borne by the Appellants/Respondents.
2. The application is based on the grounds on its face and supported by an affidavit sworn by the Respondent's advocate, Namada Simoni.
3. The Appellants did not file any response to the Respondent's application despite having been duly served and an affidavit of Service filed in court.
4. The Respondent canvassed the Application by way of written submissions which the court has carefully considered. In the court's view, the only issue that arises for determination is whether the Respondent's application dated July 14, 2021 is merited.
5. The record shows that the Appellant through an application dated July 1, 2017 and filed on July 3, 2018 moved the court seeking for inter alia: leave of court to file appeal out of time against the judgment



and decree delivered on March 15, 2017 in Milimani CMCC No 6380 of 2013 by Hon KI Orege (SRM); and stay of execution of the judgment pending the hearing and determination of their intended appeal. The said application was compromised by a consent reached by the parties and recorded in court on September 18, 2017 in the following terms:

- “ 1. That by consent, the application dated 1<sup>st</sup> July 2017 be and is hereby allowed on the condition that the defendants deposits the sum of Kshs 500,000/- to the plaintiffs advocates on August 2, 2017.
2. That there be no order as to costs.”

6. Following that consent, on August 2, 2017, the Appellants, through their Insurer Directline Assurance Company Ltd, remitted the sum of Kshs 500,000/- to the Respondent’s Advocate.
7. However, instead of proceeding to lodge their Memorandum of Appeal, the Applicants went to slumber and has never complied with the terms of the consent regarding the filing of the appeal to date despite several reminders by the Respondent’s advocates. Notably, vide a letter dated February 20, 2018, the Applicants advocates informed the Respondent’s advocates that they had been unable to file the Memorandum of Appeal as the court registry officials were demanding for the court order that authorized the filing of the same out of time. They also stated that they were in the process of extracting and sealing the said order to enable them move forward. However, to date, no Memorandum of Appeal has ever been filed by the Applicants. It therefore means that the Applicants have been unfairly enjoying a stay of execution of the judgment of the lower court without any formal appeal on record and without making any efforts to file the same.
8. Justice is a double-edged sword which cuts both ways. The Applicants had a right of appeal which they abused by failing to comply with the terms of the consent. The Respondent also has a right to enjoy the fruits of his judgment which he should not be denied without any sufficient cause. In the court’s view, there can be no justice when deliberate delay is exhibited by one party to the disadvantage of the other. This being a court of justice, it shall not allow the Applicants to continue holding the Respondent at ransom for over five years while sleeping on their rights.
9. For the foregoing, the Respondent’s application dated July 14, 2021 is merited, and is allowed with costs. The stay of execution orders dated July 4, 2017 and issued on July 18, 2017 are hereby set aside.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY 2023.**

**J.N. MULWA**

**JUDGE**

