



**M'Itonga v M'Itwemeri (Miscellaneous Civil Application
E069 of 2022) [2023] KEHC 925 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 925 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CIVIL APPLICATION E069 OF 2022**

TW CHERERE, J

FEBRUARY 9, 2023

BETWEEN

ROBERT KINOTI M'ITONGA APPELLANT

AND

NANCY KATHURE M'ITWEMERI RESPONDENT

RULING

1. On 27th July, 2021, the court entered judgment in Nkubu PMCC 59 of 2017 in favour of the Respondent as against the Appellant for KES. 250,000/- general damages and KES. 7,790/- special damages, costs and interest.
2. By a notice of motion dated and filed on 14th November, 2022, Applicant seeks orders for:
 1. Stay of execution of judgment and decree in judgment in Nkubu PMCC 59 of 2017 pending the hearing and determination of this application
 2. Stay of Declaratory Suit No. judgment in Nkubu PMCC E3095 of 2022
 3. Leave to appeal the judgment dated 27th July, 2021 out of time
 4. Costs be in the cause
3. The notice of motion is premised on grounds among others that the Appellant is aggrieved by the judgment of the trial court and has intends to file an appeal, the delay was caused by Covid-19 pandemic, this appeal and Applicant is willing to provide security.
4. The application is also supported by an affidavit sworn by the Applicant on 14th November, 2022 reiterating the grounds on the face of the application.
5. In opposing the Application, Respondent's advocate Musili Mbiti filed an affidavit sworn on 08th December, 2022 in which he avers that notice of entry of judgment was served on Applicant and his and



his insurance by a letter dated 21st July, 2021 but have failed to settle the claim and that this application is meant to delay the Respondent from enjoying the fruits of the judgment. Respondent argues that this application is an afterthought and urges that in the event the application is granted, 2/3rd of decretal sum be paid to Applicant and the balance be deposited in an interest earning account of both advocates.

Analysis and Determination

6. I have considered the application in light of affidavits on record the issue for determination is whether the orders sought are merited.
7. Whereas Applicant avers that he did not participate in the hearing, he does not deny that a notice of entry of judgment was served on him and his insurance by a letter dated 21st July, 2021.
8. That the Applicant could not file an appeal due to the Covid-19 pandemic is unsustainable for the reason that whereas it is true that court operations were temporarily affected, the did not extend for more than a month the Judiciary having put in place mechanisms to enable parties to file their pleading electronically.
9. Be as it may, even if indeed the delay in filing the appeal was caused by Covid-19 pandemic, the same did not extend until November, 2022 when this application was filed.
10. That aside, the Applicant who claims to have a good defence to Respondent's claim has not demonstrated that he ever filed an application before the trial court to allow him to defend the suit.
11. Clearly, it appears to me that the Applicant has woken up from slumber only after Respondent filed Declaratory Suit No. judgment in Nkubu PMCC E3095 of 2022.
12. What amounts to unreasonable delay will depend on the individual circumstances of each case. (See *Jaber Mohsen Ali and Anor vs Priscillah Boit and Anor* (2014) eKLR where the court found a delay of one month and 4 days to be unreasonable. In this case, I find that a 16-month delay is inordinate and has not been explained to the satisfaction of the court.
13. It is an equitable maxim that delay defeats equity or equity aids the vigilant and not the indolent. Granting the orders sought in this application and setting aside a regular judgment will be highly prejudicial to the Respondent.
14. As much as it should be the court's last resort to deny a party a chance to ventilate its case to the highest appeal level, a party approaching the court for a discretionary order must act diligently. This court cannot be said to be promoting the overriding objective to facilitate the just, expeditious, proportionate and affordable resolution of disputes if it is to allow parties to deliberately delay court processes.
15. Having found that the notice of motion dated and filed on 14th November, 2022, I find that it has no merit and it is dismissed with costs to the Respondent.

DATED IN MERU THIS 09TH DAY OF FEBRUARY 2023.

WAMAE. T.W. CHERERE

JUDGE

Appearances

Court Assistant - Morris Kinoti

For Applicant - Ms.Hamo for Kimondo & Gachoka & Co Advocates

For Respondent - Mr. Musili for Musili Mbiti & Associates, Advocates

