



**Kogiri v Munyao (Miscellaneous Civil Application E336 of 2022)  
[2023] KEHC 18442 (KLR) (Civ) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18442 (KLR)

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

**CIVIL**

**MISCELLANEOUS CIVIL APPLICATION E336 OF 2022**

**JN NJAGI, J**

**MAY 18, 2023**

**BETWEEN**

**DANIEL MAINA KOGIRI ..... APPLICANT**

**AND**

**STEPHEN KISILU MUNYAO ..... RESPONDENT**

**RULING**

1. The Applicant has filed an application dated October 13, 2022 seeking for orders that:
  - (1) Spent
  - (2) That the honourable court be pleased to review and extend its orders issued on the June 14, 2022 staying the judgment and decree of the trial court delivered on April 14, 2022 pending the hearing and determination of the application dated June 10, 2022.
  - (3) That costs of the application be provided for.
2. The application was premised on grounds contained on the face of the application and supported by the affidavit of the Applicant. The case for the applicant as deposed in his affidavit is that judgment was delivered against him at the lower court on the April 14, 2022. That he thereafter filed an application dated June 10, 2022 seeking leave to file an appeal out of time and for stay of execution of the judgment pending the hearing and determination of the intended appeal. This court (Meoli J.) on the June 12, 2022 issued temporary orders for maintenance of the status quo subject to the applicant depositing into court a sum of Kshs 700,000/=. The Applicant subsequently made the deposit.
3. The Applicant contends that the application dated 10<sup>th</sup> June was set for hearing on a date when the court did not sit. That his advocate tried to have the orders extended to no avail. That the Respondent



thereafter proceeded to attach the Applicant's property which prompted the Applicant to file the application dated October 13, 2022 that seeks for extension of the orders issued on June 14, 2022.

4. The Respondent did not file any response to the application dated October 13, 2022.

#### **Appellant's Submissions –**

5. The Applicant submitted that he has complied with the order to deposit security which shows goodwill to have the appeal heard on merit. That his counsel has given plausible reason as to why the orders of stay of execution were not extended as the application came up for hearing on a date the court did not sit which made the orders expire.
6. It was submitted that a party should not be made to suffer for mistakes of counsel. In support of that proposition, the Applicant to relied on the case of *Lee G Muthoga v Habib Zurich Finance (K) Ltd & another, Civil Application No Nrb 236 of 2009*.
7. The Applicant submitted that failure to set aside the warrants of attachment would greatly prejudice him as it would amount to denying him his right to be heard on appeal. Further that the he will be prejudiced if the orders sought are denied as the assets proclaimed have been greatly undervalued which would occasion him irreparable loss if the respondent is allowed to sell the goods at throw away prices. That on the other hand the Respondent shall not suffer any prejudice if the orders sought are granted. The Applicant urged the court to extend the orders for stay and set aside the warrants of attachment of the Applicant's assets. The Applicant relied on the Court of Appeal decision in [\*James Kanyita Nderitu & another v Marios Philotas Ghikas & another \(2016\) eKLR\*](#) where it was held that the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire judicial system.

#### **Determination –**

8. I have perused the court file and noted that the application dated June 10, 2022 came up for mention in court on the July 5, 2022 when there was no appearance by the parties. The court gave another mention date on September 29, 2022. On that day the matter was for some unexplained reason not mentioned in court but the file was instead taken to the registry and a mention date was fixed for January 25, 2023. The Applicant contends that the court was not sitting on September 29, 2022 and that that is the reason why the interim orders were not extended.
9. It is clear from the court record that the ex parte orders issued on June 12, 2022 were expiring on the June 25, 2022. That could be the reason why the court had fixed the matter for inter partes hearing on that day. The matter was not mentioned in court on that day. After the orders expired there is nothing from the court record to show that the Applicant attempted to have the matter placed before the judge for extension of the interim orders. Though the Applicant states that his advocate tried to have the application listed for hearing to no avail, he did not produce any documentary evidence to show that the advocate attempted to do so. It would appear that the advocates for the applicant went to sleep after they obtained the exparte orders. Since the orders issued on June 10, 2022 had lapsed there was nothing to stop the Respondent from proceeding with the execution.
10. The above notwithstanding, I have duly considered the application dated October 13, 2022. The same was not opposed. I have considered that the Applicant has deposited security in court pending the hearing and determination of the application dated June 10, 2022. To refuse granting the orders sought in the application dated October 13, 2022 will amount to denial of the orders sought in the application dated June 10, 2022. The Applicant will be prejudiced by the denial of the orders sought in the instant



application. Since the Respondent did not oppose the application there is no evidence that he will suffer any prejudice if the orders sought are granted.

11. The upshot is that the application dated October 13, 2022 is allowed in terms of prayer 2 of the notice of motion and in the premises the orders for stay of execution issued on June 14, 2022 are extended to the next hearing or mention date. Since the Respondent did not file a response to the application there will be no order on costs.

**Delivered, dated and signed at NAIROBI this May 18, 2023.**

**J. N. NJAGI**

**JUDGE**

**In the presence of:**

Mr. Odeng HB for Mr. Nyandoro for Applicant

Mr. Kiptanui HB for Mr. Waiganjo for Respondent

Court - Assistant- Amina

30 days Right of Appeal

