



REPUBLIC OF KENYA



**Muriithi v Mburia (Civil Appeal 5 of 2019) [2023] KEHC 17680 (KLR) (23 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17680 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL 5 OF 2019  
RM MWONGO, J  
MAY 23, 2023**

**BETWEEN**

**BENSON MWANGI MURIITHI ..... APPLICANT**

**AND**

**STEPHEN WACHIRA MBURIA ..... RESPONDENT**

**RULING**

1. The applicant makes this application under section 1A, 1B & 3 of the *Civil Procedure Act*, order 40 rule 1 and order 45 rule 1 of the *Civil Procedure Rules*. It seeks that this court do review and or set aside the ruling/orders given on the November 13, 2019 and extend the time limit issued for depositing security.
2. The application is premised on the following grounds:
  1. That on the November 13, 2019 this honourable court ordered the applicant to deposit half of the decretal sum or in the alternative security worth Kshs 1,500,000/= within 21 days, failure to which the stay orders issued would automatically lapse.
  2. That the applicant has endeavored to comply with the said orders but the delays at the land's registry, Kirinyaga have curtailed the applicant's efforts.
  3. That it is in the interest of justice that the orders sought be issued in order to allow the applicant comply with the orders of this court by depositing his title to land parcel number Mwea/ Tebere/B/6076.
3. In response, the respondent filed grounds of opposition on December 6, 2019 as follows:
  1. The application is an abuse of the court process and the orders sought are not available to the applicant.
  2. That the applicant does not reveal what difficulties he is encountering at the lands office.
  3. That no valuation report has been annexed.



4. That the application is fatally defective and the same ought to be dismissed with costs.
  5. There are no reasons given by the applicant why the orders of November 13, 2019 ought to be reviewed and or set aside.
  6. The applicant had an option of depositing half of Kshs 1,500,000 as security, no reason has been given why he had not deposited the cash.
4. The applicant on February 25, 2020 deposed to a 7 paragraphs further affidavit, of which the following are the major averments: -
1. That I have now concluded the valuation process and it is now quite clear that the property which I intend to deposit in this honourable court as security is sufficiently valuable to cover the security deposit required by this honourable court (annexed hereto and marked Bmm-2 is a copy of the valuation report.)
  2. That I pray this honourable court to allow me deposit the title to the aforesaid land parcel number Mwea/Tebere/B/6076 as security in this court in place of half the decretal amount as earlier ordered.
5. The applicant submits that he has now done a valuation report annexed to his affidavit as number Bmm-2 which discloses the value of the aforesaid land to be estimated at Kshs 2,500,000/=. The total decretal sum being Kshs 1,500,000/=, it is quite clear that the aforesaid property is more than sufficient to cover half of the decretal sum directed to be paid by the court. As such, the respondent stands to suffer no prejudice whatsoever if the instant application is allowed.
6. The respondent submits that the application lacks merit, is an abuse of the court process and should be dismissed with costs. The application is brought under order 40 rule 1. The application does not have any prayer for injunction. Hence, this prayer should fail. Further, he asserts that on order 45 rule 1 of the *Civil Procedure Rules*, in order for a party to enjoy this order he must annex the order he intends to review to the supporting affidavit; and that he has not sought a prayer for injunction. The applicant has not done so rendering his application defective.
7. On the valuation report. The respondent submits that the valuation report is contradictory and does not state the value of the property; that the application is fatally defective and the same ought to be dismissed with costs; and that. The application was brought to court under order 40 rule 1 and order 45 rule 1 of the *Civil Procedure Rules*.
8. In essence, I understand the applicant to be asking the court to vary its earlier orders requiring the applicant to issue a security deposit of 50% of the decretal sum. Instead he seeks that the court should allow him to deposit a land title as a security deposit for the guarantee to the respondent that should the applicant/appellant lose the appeal, the respondent has the equivalent in hand to fulfil the decretal sum.

### **Issue For Determination**

9. The only issue for determination is whether the court should extend the time limit for depositing security, and whether the land can substitute such security.



## Analysis And Determination

10. The court order sought to be extended in the ruling dated November 13, 2019 is as follows at paragraph 16:

“a) There will be stay of execution of the decree and judgment in Baricho Principal Magistrate civil case No 36/2018 pending the hearing and determination of the appeal herein.

b) The applicant will provide security by depositing half of the decretal sum that is Kshs 750,000/= in a joint interest earning account in the names of the advocates of the parties in one of the reputable banks.

Alternatively:

The applicant to deposit a security worth Kshs 1,500,000/= in court.

c) The applicant to comply with the order to provide security within twenty one (21) days.

d) Failure to comply with the order to provide security, the order to stay shall lapse.

11. The court order included a n alternative order in (b) to the effect that:

“The applicant to deposit a security worth Kshs 1,500,000/- in court”

12. As noted, the order was made on November 13, 2019, and would lapse in twenty- one days, that is on December 4, 2019. The applicant’s application herein was filed under urgency on December 2, 2019, prior to the lapse date. Since at the time the application was made the court order was still extant, I hold that there was an order in existence and capable of being extended.

13. Section 3A, 95 of the Civil Procedure Act and order 50 rule 6 of the Civil Procedure Rules are the operative parts in answering the question whether the prayer to extend interim orders is merited. The sections grant the court unfettered discretion to enlarge time where a limited time has been fixed for doing any act or taking proceedings under these rules or by summary notice or by order of the court.

14. Section 3A provides as follows:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

15. Section 95 on enlargement of time provides:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired”.



16. Order 50, rule 6 on enlargement of time by consent provides:

“The time for delivering, amending, or filing any pleading, answer or other document of any kind whatsoever may be enlarged by consent in writing of the parties or their advocates without application to the court.”

17. It is trite law that extension of time is an equitable remedy and a party seeking extension of time must demonstrate, by laying a basis to the satisfaction of the court that he is deserving of the same. The guiding principles for determination that a party deserves of extension of time were stipulated in the case of *Aviation & Allied Workers Union of Kenya v Kenya Airways Limited & 3 others* [2015] eKLR. There the Supreme Court stated at paragraph 25:

1. extension of time is not a right of a party; it is an equitable remedy that is only available to a deserving party at the discretion of the court;
2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the court;
3. whether the court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;

18. Clearly the court has an extremely wide discretion to extend time for fulfilling anything ordered.

19. In *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others* [2015] eKLR, the court stated:

“First of all, the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words “ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here.”

20. The next question is whether the court will allow the land offered by the applicant to substitute the security ordered by the court to cover the decretal sum.

21. The applicant has shown that he has a parcel of land valued at Kshs 2,500,000/=. Given that the court had offered him an alternative security, this parcel more than suffices for the purposes of security.

22. In the circumstances, this court allows the application and orders as follows:

- a. Time is extended for the applicant to provide security;
- b. The parcel No Mwea Tebere/B/6067 Wanguru Town shall be availed forthwith as security for the decretal sum
- c. The applicant shall in addition provide a formal consent to transfer to court as part of the security for decretal sum.
- d. The record of appeal shall be filed within thirty (30) days of this date.
- e. The lower court file to be availed and tied to this file.
- f. Orders accordingly.

**DATED AT KERUGOYA THIS 23<sup>RD</sup> DAY OF MAY, 2023.**



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**R MWONGO**

**JUDGE**

**Delivered in the presence of:**

1. Ndungu - holding brief for Munene for Respondent
2. Macharia - for Applicant
3. **Mr. Murage, Court Assistant**

