



**Directline Assurance Company Limited v Nkaabu (Civil Appeal
E209 of 2021) [2023] KEHC 18839 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18839 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E209 OF 2021
PM MULWA, J
JUNE 15, 2023**

BETWEEN

DIRECTLINE ASSURANCE COMPANY LIMITED APPELLANT

AND

KEVIN MWENDA NKAABU RESPONDENT

(An application for stay of the garnishee proceedings in Kiambu CMCC 266 of 2022)

RULING

1. The court has been called upon to determine the Notice of Motion Application dated September 8, 2022, which seeks the following orders;
 - a. Spent
 - b. An order for stay of the garnishee proceedings filed in Kiambu CMCC No 266 of 2022
 - c. An order to enlarge and/ or extend the time issued by the court to the appellant to comply with the conditions stated in its ruling of June 16, 2022.
 - d. An order to review or vary the orders of June 16, 2022 and order that the applicant be granted stay pending appeal on condition that half the decretal amount is deposited in court as opposed to the joint interest-earning account of both advocates.
 - e. An order that the amount of kshs 2,669,254/= being half the decretal amount deposited in court be sufficient security in line with the ruling of June 16, 2022.
 - f. An order for stay of the garnishee proceedings in Kiambu CMCC 266 of 2022
 - g. Orders as this court deems fit
 - h. Cost of the application be provided for



2. The application is supported by the annexed affidavit of Pauline Waruhiu in which she depones there was a delay in complying with the orders of the court of June 16, 2022, due to the internal processing of the funds at the applicant's company which took longer than expected but the orders were eventually complied with on 25th and July 28, 2022. The applicant deposited Kshs 2,669,254 into the account of the respondent and the balance was deposited in court as opposed to the joint interest-earning account in the name as of both advocates. The applicant has attached the relevant documents as proof that the deposit has been paid.
3. The applicant's advocate vide a letter dated July 29, 2022 wrote to the respondent requesting they enter into a consent to have the money deposited into court as opposed to a joint interest-earning account in the names of both advocates to allow the appeal to proceed. That there is imminent danger of the applicant's monies held with Diamond Trust Bank as the Respondent has taken out garnishee proceedings. And that the application has been brought in utmost good faith and has been made without unreasonable delay. There are new and important facts that have arisen that need to be addressed.
4. The respondent despite being served did not file any response to the application. The application was heard by way of written submissions with only the applicant filing written submissions.

Appellant's/Applicant's submissions

5. The appellant's submissions filed on March 15, 2023, mirrors the grounds of the application and the supporting affidavit herein. Counsel submits the applicable law for enlargement of time is Order 50 Rule 5 of the *Civil Procedure Rules 2010*. The 9 days and twelve days delay is not inordinate and unreasonable as to prejudice the respondent in a manner that cannot be compensated by costs. If the orders sought are not granted the respondent will proceed with execution of Kshs 5,333,508 contrary to the statutory limit of Kshs, 3,000,000/=.
6. Counsel also submits that Order 45 of the *Civil Procedure Rules* gives instances for review, and in the instant case, they rely on the ground of any other sufficient reasons as to the inadvertent error and honest mistake occasioned by the applicant's counsel. The delay in bringing the application was occasioned by the fact that the applicant's counsel was hopeful that the respondent's counsel would accede to their request and consent to the transfer of the deposited amount from the court into a joint account held by both counsels.
7. On the issue of stay of execution of the garnishee proceedings counsel submits it has established a prima facie arguable case, the application was filed without unreasonable delay and the applicant has established a sufficient cause to the satisfaction of the court.
8. In conclusion counsel urged the court to grant the orders sought, and costs be determined by the outcome of the appeal.

Analysis and Determination

9. I have considered the application, the supporting affidavit and the submissions as filed, the issues for determination are:
 - a. Whether this court has the jurisdiction to hear or determine the application for enlargement of time.
 - b. Whether the application meets the threshold for review of the orders of June 16, 2022.



10. By the ruling of this court on June 16, 2022 by Ngetich J., stay of execution was issued on condition the applicant pay half of the decretal amount to the respondent and the other half be deposited in a joint interest-earning account in the names of both advocates within 30 days. The applicant submits that in place of depositing half of the decretal amount in a joint interest-earning account, it inadvertently deposited the same in court and the efforts to have the respondent have the funds transferred into a joint account bore no fruits, and only occasioned more delay and hence the current application.
11. This court notes that it become functus officio when it issued stay orders and thus the respondent was at liberty to commence execution if the orders were not complied with. However, I do note that the orders were later partly complied with, the applicant has attempted to indulge the respondent to enter into a consent to have the funds transferred into a joint interest-earning account but the same has not elicited any response.
12. I have perused the documents attached hereto and I do confirm half the decretal amount of Kshs 2,669,254 was deposited in court on July 28, 2022, while bank cheques were drawn in favour of the respondent's advocate on July 25, 2022, for a similar amount.
13. Sections 3A, 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the *Civil Procedure Rules* give court unfettered discretion to enlarge the time within which a certain act ought to be done.
14. In *Nicholas Kiptoo Arap Korir Salat vs The Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR, the court stated thus: -

“ ... The discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for the delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. “We derive the following as the underlying principles that a court should consider in exercising such discretion: 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; A party who seeks an extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if the extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
15. It is not disputed that the applicant was granted orders by this court and which were partly complied with after the lapse of time. The applicants contend the delay was occasioned by the internal processing of the funds at the applicant's company which took longer than expected but they eventually managed to pay half the decretal amount to the respondent and the other half inadvertently deposited in court. To remedy the error, the applicant sought the indulgence of the respondent by a letter dated July 29, 2022 by having counsel enter into a consent to transfer the amount into a joint-interest-earning account, which letter has not been responded to.
16. The applicant has demonstrated good faith by partly complying with the orders of June 16, 2022, though inadvertently deposited into court the appellant has deposited security which is a condition for stay. This court therefore finds that if the stay is not granted the appeal will be rendered nugatory.



17. There is no prejudice to be suffered by the respondent if time is extended as the applicant has already deposited security which amounts to the entire decretal sum. Enlargement of time is a discretionary remedy that should be exercised judiciously depending on the circumstances of each case.
18. For the above reasons, I find the reasons advanced by the applicant are persuasive to warrant this court to exercise its jurisdiction and enlarge the time within which to comply with the orders of June 16, 2022.
19. This court having exercised its jurisdiction in enlarging time, it is in the interest of justice that it orders the stay of execution of the garnishee proceedings in Kiambu CMCC No 266 of 2022.
20. For the above reasons this court finds the notice of motion dated September 8, 2022 is merited.
21. I direct that half the decretal amount paid in court be transferred into a joint interest-earning account in the name of both advocates.
22. It is so ordered.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU ON THIS 15TH DAY OF JUNE 2023.

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P.M. MULWA

JUDGE

In the presence of:

Mr. Kinyua – court assistant

Mr. Awino h/b for Ms. Kahiti - for the appellant/applicant

Ms. Atieno h/b for Mr. Njuguna - for the respondent

