



**Njeru & another v Musau (Civil Appeal E179 of 2021)
[2023] KEHC 18690 (KLR) (20 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18690 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E179 OF 2021**

**FR OLEL, J
JUNE 20, 2023**

BETWEEN

VICK MUIRUKI NJERU 1ST APPELLANT

DOMINIC BORORE 2ND APPELLANT

AND

BARNUBUS KITONGA MUSAU RESPONDENT

RULING

1. The application before this court is the Notice of Motion application dated September 1, 2021 brought pursuant to provisions of Section 1A, 1(B), 3A & 63(e) of the *Civil Procedure Act*, Article 159(2), (d) of *the constitution* of Kenya 2010 and all other enabling provision of law. Prayers 1 and 2 of the said application are basically spent and the main prayer sought is prayer (5) & (6) that;
 - a. That this Honourable court be pleased to enlarge time for the appellants to comply with the orders issued on 27th July 2022 directing the Appellants to pay the respondent the sum of Kshs 900,000/= and deposit the remaining Kshs 900,000/= in an interest earning account operated in the joint names of the parties on record for a period of thirty (30) days
 - b. That costs of the said application be in the cause.
2. This application is supported by an affidavit of the appellant/applicant counsel, one Faith Wangui Kamau dated 1st September 2021 and further affidavit dated 24th April 2023. This application is opposed by the respondent who filed his replying affidavit sworn by his counsel Evans Mochama dated 16th September 2022. Both parties did file written submissions in support of their respective positions.



Brief Facts

3. The Appellant's averred that on 27th July 2022, the court did issue an order for conditional stay of execution and directed the appellant to pay the respondent the sum of Kshs 900,000/= and deposit the balance of Kshs 900,000/= in a joint interest earning account within thirty days failing of which the application would stand dismissed. On the said date of delivery of the said ruling, the appellant's counsel was not in court as unfortunately they had not diarized the ruling date, which was a regrettable error. The time to comply with the said order had lapsed and they were apprehensive that the respondent would execute the judgment unless the orders sought were granted. The appellant's counsel also confirmed that the respondent advocate had sent them an email on litiagation@mallp.co.ke informing them of the ruling but unfortunately the said email was not brought to counsel attention.
4. The appellant's further averred that, the appeal filed has high chances of success and that they ought to be given an opportunity to have the appeal canvassed and heard on merit. It was therefore in the interest of justice to allow the application to enlarge time by 30 days to enable the appellants comply with the court order. In the further affidavit filed the appellant's stated that in compliance with the orders issued by Justice G.V. Odunga on 6th September 2022, they deposited the sum of Kenya shillings nine hundred thousand (Kshs 900,000/=) into Machakos law court deposit account at KCB Bank Gateway House-Mombasa Road Branch on 23rd September 2022.
5. The respondent opposed this application through the replying affidavit of his counsel filed on 16th September 2022. He deponed that, he who comes to equity must come with clean hands but unfortunately the appellants hands were already soiled and thus were underserving of the orders sought. They had immediately after delivery of the ruling sent an email to the appellants advocate informing them of the terms of stay as granted by court and asked them to comply, which unfortunately they did not. The appellants were victims of their own disorganization by failing to diarize when this matter was coming up and/or attending to it and that mix up or disorganization ought not to be visited upon an innocent party keen to reap the fruits of his judgment.
6. The court orders of 27th July 2022, were issued on mandatory terms and with specific conditions and timelines and what the appellant was attempting to do was to circumvent the court orders and shift goalposts. The application as filed was thus unmerited frivolous vexatious and constituted an abuse of the process of court and thus ought to be dismissed with costs.

Submissions

7. The Appellant's filed their submissions on 25th April 2023 and stated that the only issue for determination was whether this court should enlarge time to enable the appellant comply with the court orders dated 27th July 2023. Provisions of section 95 of the *civil procedure Act* and Order 50 rule 6 of the civil procedure rules allowed the court, at its discretion to enlarge time even though the period originally fixed or granted may have expired. Reliance was placed on [*Nicholas Kiptoo Arap Salat Vs IEBC & 7 Others {2014}*](#) eKLR.
8. The appellants submitted that they had sufficiently demonstrated, the reasons as to why there was a delay in complying with the orders of the court and the main reason given was that when the ruling was delivered, they were unrepresented in court as the matter was inadvertently not diarized. Further though the respondents' advocate informed them of the ruling vide the email sent to their office email; litiagation@mallp.co.ke, the same was not brought to the attention of the counsel dealing with the matter and thus counsel mistake ought to be excused in the interest of justice. Reliance was placed in



the case of *Murai Vs Wainaina (No 4)(1982) KLR 38, John Muthama Vs Associated Battery {2021} eKLR & Kalemera Vs Salaama Estates Ltd {1971} EA 284.*

9. The appellants also did contend that there is no prejudice the Respondent would suffer if the orders sought were granted and therefore the balance of convenience tilted in their favour. Finally, the appellants also stated that the application had been presented without undue delay and sufficient promptitude. The appellant urged this court to allow the said application.
10. The respondent filed his submission on 13th April 2023, and stated that the orders issued on 27th July 2022, were unambiguous and coached in mandatory terms and thus the appellant had no option but to comply with the said orders. The ruling date of 27th July 2022, had been given by consent, when parties did attend court on 9th May 2022 and the appellants filed their submission in support of the application of stay of execution on 31st May 2022. Even after the said ruling was delivered, the respondents' advocate did email the appellant's counsel and informed them of the content of the said ruling, but inexplicably they still failed to comply with the orders issued.
11. The appellants had acknowledged that they indeed received the email, and thus it was unfair to the respondent to be burdened with the appellants' disorganization, omission and mistakes to be driven away from the seat of judgment. It was imperative that the appellant complies with the court orders issued even if they caused hardship or inconvenienced. Reliance was placed on *Onjula Enterprise Ltd Vrs Sumaria (1986) KLR 651 & London Association for the protection of trade & Another Vs Greenland's*.
12. The respondent further relied on the opinion of Kiage JA in *Nicholas Kiptoo Arap Salat Vs IEBC & 6 others* {2013} eKLR, where it was held that the court must seek to do substantive justice in an efficient proportionate and cost-effective manner and court must never succor and give cover to parties who exhibit scant respect for rules and timelines. The said rules and timelines made judicial adjudication and administration fair, just, certain and even handed and shifting goalposts would seem to favour one side and unfairly harm the other.
13. The appellant had not shown good grounds upon which discretion should be exercised in their favour as the reasons advanced for failure to comply were vague and a mockery to the integrity of the court. This court was urged to dismiss the application with costs.

Analysis & Determination

14. I have carefully considered the Application, Supporting Affidavit, further affidavit, the Replying Affidavit as well as the written submissions filed by both parties and the only issue for determination is whether the Appellant has met the conditions necessary for the grant of stay pending appeal.
15. Section 95 of the *Civil procedure Act* provides that;

“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 provides that;

“where a limited time has been fixed for doing any act or taking any proceedings under these rules or by summary notice or by order of the court, the court shall have powers to enlarge time upon such terms (if any) as the justice of the case may require, and such enlargement



maybe ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”

17. There is no doubt that the discretion to extend time is not a right of the party, but is an equitable remedy that is only available to a deserving party after laying a basis to courts satisfaction that there exists reasonable explanation as to why there has been a delay. The court will also consider if any prejudice will be suffered by the respondent and if the application has been brought without unreasonable delay. See *Nicholas Kiptoo arap korir salat Vs IEBC and 7 others* eKLR.

Where the court did observe that;

“Extension of time being a creature of equity, only enjoy, one can only enjoy if he acts equitably: he who seek s equity must do equity. Hence, one has to lay a basis that he was not at fault so at to let time lapse. Extension of time is not a right of a litigant against court, but a discretionary power of the courts, which litigants have to lay a basis where they seek courts to grant the same

18. In *United Arab Emirates Vs Abdelghafar & others* 1995 IRLR 243, the employment tribunal laid down four principals to be observed in exercising of the tribunal’s discretion to extend time and to identify those factors regarded as relevant. At paragraph 7 they stated thus;

“in the light of the guidance contained in these authorities’ it is possible to state, with reasonable precision, the principles which govern the exercise of the Appeal Tribunal’s discretion to extend time and to identify those factors regarded as relevant.

- a. The grant or refusal of an extension of time is a matter of judicial discretion to be exercised, not subjectively or at whims or by rigid rule of thumb, but in a principled manner in accordance with reason and justice. The exercise of the discretion is a matter of weighing and balancing all relevant factors which appear from the material before the Appeal tribunal. The result of an exercise of a discretion is not dictated by any set factor. Discretion are not packaged, programmed responses.
- b. As Sir Thomas Bingham M.R pointed in *costellow Vs Somerset CC* (supra) at 959c, time problems arise at the intersection of two principles, both salutary, neither absolute.

“..... The first principle is that the rules of the court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targeting to be aimed at or expressions of pious hope but requirements to be met.....”

The second principle is that:

“..... a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of a procedural default, unless the default causes prejudice to his opponent for which for which an award of costs cannot be compensated.....”

- c. The approach indicated by these two principles is modified according to the stage which the relevant proceedings have reached. If for example, the procedural default is in relation to an interlocutory step in proceedings, such as failure to serve pleadings or give discovery within the prescribed time limits, the court will in the ordinary way and in absence of special circumstance, grant



an extension of time, unless the delay has caused irreparable prejudice to the other party, justice will usually favour the action proceeding to a full trial on the merits. The approach is different however, if the procedural default as to time relates to an appeal against a decision on the merits by the court or tribunal of first instance. The party aggrieved by that decision has had a trial to hear and determine his case. If he is dissatisfied with the result he should act promptly. The grounds for extending his time are not as strong as where he has yet had a trial. The interest of the parties and the public in certainty and finality of the legal proceedings make the court more strict about time limits on appeals. An extension may be refused, even though the default in observing the time limit has not caused prejudice to the party successful in the original proceedings.

- d. An extension of time is an indulgence requested from the court by a party in default. He is not entitled to an extension and has no reasonable or legitimate expectation of receiving one. His only reasonable or legitimate expectation is that the discretion relevant to application to extend time will be exercised judicially in accordance with established principles of what is fair and reasonable. In those circumstances, it is incumbent on the applicant for an extension of time to provide the court with full, honest and acceptable explanation of these reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default.”

19. Lastly in the *Sayers Vs Clarke Walker (a firm)* (2002) EWCA CIV 645 at paragraph 22, it was observed;

“it follows that when considering whether to grant an extension of time for an appeal against a final decision in a case of any complexity, the courts should consider “all the circumstances of the case” including:

- a. The interests of the administration of justice;
- b. Whether the application for relief has been made promptly;
- c. Whether the failure to comply was intentional;
- d. Whether there is a good explanation for the failure;
- e. The extension to which the party in default has complied with other rules, practice directions and court orders;
- f. Whether the failure to comply was caused by the party or his legal representatives;
- g. The effect which the failure to comply had on each party; and
- h. The effect which the granting of relief would have on each party.

In the case of a procedural appeal the court would also have to consider item (g); “whether the trial date or the likely trial date can still be met if the relief is granted”

20. The applicant’s counsel was present in court on 9th May 2022, when the ruling date for their application for stay was set for 27th July 2022. Indeed, subsequent to the said ruling being delivered, the applicant’s filed their submissions in support of their application on 31st May 2022. On the ruling date, the appellant counsel was not present in court, but the respondents counsel took the liberty to send them an email on the said 27th July 2022 detailing terms of the ruling. Indeed, even the applicant’s counsel,



Faith Wangui Kamau did admit that the said email was sent to the law firm but inadvertently the said email was not brought to her attention and the time to comply lapsed purely on this inadvertent omission attributed on their part for which they regret.

21. The applicant's filed this application dated 1st September 2022 and the same came up ex parte before Hon Justice G.V Odunga on 2nd September 2022. The said application was certified urgent and inter parties hearing date was set for 21st September 2022. In the meanwhile, the Honorable Judge ordered the applicants to deposit in court Ksh.900,000/= within 14 days. The applicant again failed to comply with this condition and only managed to deposit the said amount in the court deposit account at KCB Bank on 23rd September 2022. This was again a clear breach of the court direction which was clear that the same was to be done within 14 days.
22. As clearly enunciated in the United Arab Emirates Vs Abdelghafar citation, the discretionary approach whether to extent time or not is different, when it comes to appeals. The aggrieved party had an extra duty to act to act promptly as the court is stricter in enforcing its guidelines, and an extension of time maybe refused even though the default in observing the time has not cause prejudice to the party successful in the original proceedings.
23. Having fully considered all the facts I do find that even though non attendance of the appellant advocate on the date of the ruling can be excused and was inadvertent, they were served by the respondent's advocate on the same date by email, which email they acknowledged was sent. The excuse given that, the said email was not brought to the attention of the appellants counsel dealing with this matter, is not plausible as the said email (litigation@mallp.co.ke) is obviously the office email used for daily communication and therefore it is unlikely that emails can go unattended to for any long period without a person within the office noticing the same.
24. Therefore, while the application has been made promptly, the explanation given for failure to comply is weak and not plausible. The effect of this failure is that the respondent who had judgment entered in his favour on 4th October 2021 is unfairly being kept away from enjoying the fruits of his judgment with length litigation, which is not in the best interest of administration of justice and fairness to both parties. Further even when the applicant was given a window of opportunity to redeem themselves by the order of court dated 2nd September 2022, the again failed to do so, and complied late.
25. As stated in the Salat case (*Supra*), Extension of time being a creature of equity, one can only enjoy if he acts equitably: he who seek s equity must do equity. Hence, one has to lay a basis that he was not at fault so at to let time lapse. Extension of time is not a right of a litigant against court, but a discretionary power of the courts, which litigants have to lay a basis where they seek courts to grant the same. Further it is not the function of the court to disadvantage the respondent while giving advantage to the appellant. It is the duty of the court to hold the ring even handedly.
26. The constant failure of the applicant's to comply with court orders is not excusable and prejudices the respondent by delaying quick resolution of this appeal and denying him his legitimate expectation to enjoy the fruits of his judgment. It is also noted that since the appeal was filed on 3rd November 2021, the appellant's have not even filed the record of appeal or taken any action to ensure its quick disposal. I do reiterate the finding of Sir Thomas Bingham M.R pointed in *Costellow Vs Somerset CC (supra)* at 959c "the rules of the court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targeting to be aimed at or expressions of pious hope but requirements to be met....."



Disposition

27. Taking all relevant factors into consideration I do find that;
- a. The application dated 1st September 2021 is wholly unmerited and the same is dismissed with costs to the respondent.
 - b. The costs are assessed at Ksh.30,000/= all-inclusive
 - c. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 20TH DAY OF JUNE 2023.

RAYOLA FRANCIS OLEL

JUDGE

Ruling on the virtual platform, Teams this 20th day of June, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant

