



**Bore v Ngumbu (Suing as personal representative of the Estate of Ngumbu Musembi)
(Civil Appeal E110 of 2021) [2023] KEHC 20433 (KLR) (5 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20433 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E110 OF 2021**

FR OLEL, J

JULY 5, 2023

BETWEEN

JOSEPH YONGI BORE APPLICANT

AND

**& CHRISTINAH MUINDI NGUMBU (SUING AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF NGUMBU MUSEMBI. RESPONDENT**

RULING

1. The application before this court is the Notice of Motion application dated 2May 2, 2022 brought pursuant to provisions of Section 1A, 3A of the *Civil Procedure Act*, order 42 rule 6(1), order 45 rule 1(2), order 50 rule 6 and order 51 rule 1 of the *Civil Procedure Rules, 2010* and all other enabling provision of law. Prayers 1, 2 and 3 of the said application are basically spent and the main prayer sought are prayers (3) and (4) of the said application;
 - a. That this Honourable court do alter its order issued via the ruling delivered on March 16, 2023 directing the applicant to deposit the decretal sum of Kshs 2,289,964/=in a joint interest earning account and order the applicant to deposit the same in court.
 - b. That this Honourable court to extend time given in the ruling delivered on 16th March 2023 to allow the applicant deposit the decretal sum in court.
2. The application is supported by the grounds on the face of the said application, and the supporting affidavit of Maureen Njeri Kariuki dated May 22, 2022. The respondent did file a replying affidavit of one Kevin Kinengo Katisya dated June 5, 2023.
3. The Appellant averred that they did file this appeal and sought for stay of execution of the judgment/decree dated June 9, 2021, pending hearing and determination of the said appeal. On March 16, 2023, this court did grant the applicant, an order of stay of execution pending hearing and determination



of this appeal on condition that the applicant do deposit the decretal sum in a joint interest earning account within 30 days from the date of delivery of the ruling.

4. After the said order was issued, the applicant's counsel avers that, they sought the requisite documents from the respondent's advocate to enable them open the said bank account, but the same was not availed. The 30 days period within which they were to deposit the said decretal sum had lapsed and there was need to extend time and also allow them to deposit the decretal sum in court.
5. The respondent did oppose this application vide the replying affidavit dated 5th June 2023. The respondent's counsel stated that his law firm shares the same office building with the applicant's law firm at View Park Towers in Nairobi and nothing prevented the applicant's counsel from walking to his office and getting him to sign the a bank account opening document's. The applicant's representative did not have to meet him and could have sent the said bank account opening forms through email or physically have them dropped in his office for his signature. They did not have to physically meet.
6. Further despite the WhatsApp messages, nothing prevented the applicants from applying to this court to have the money deposited in court, if for any reason they thought that the respondent was for one reason or the other delaying and/or frustrating the process of opening the said bank account. The excuse given was thus not plausible and was a delaying tactic to delay the swift conclusion of this matter. The said application was prejudicial and detrimental to the respondent. It was made in bad taste and thus should be dismissed.

Analysis & Determination

7. I have carefully considered the Application, its Supporting Affidavit, and the Respondent's Replying Affidavit and the only issue for determination is whether, the orders dated March 16, 2023 should be varied and/or reviewed to allow the applicant deposit the decretal sum in court and if time should be extended to allow the applicant to so comply.
8. 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.”
9. 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.”
10. 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 seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as 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

1. 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”.

12. From the affidavits filed, there is no doubt that there was constant communication as between the advocates herein both by formal written correspondence and WhatsApp message, which is acknowledged by the respondents’ advocate. It is unfortunate that the parties could not agree on such a simple matter as opening a joint account where the decretal sum was to be deposited.
13. Having considered the facts herein as pleaded by both parties and the parameters set out in *Sayers Vs Clarke Walker (A Firm)* (2002) EWCA CIV 645, I do find that there is merit in allowing this application. Good reason has been put forth as to why the applicant was unable to have the joint account opened, the delay in so complying was also not intentional. Further it would be in the greater interest of administration of justice and equity to allow the applicant have his day in court and to facilitate a quick disposal of this appeal.



Disposition

- 14. I do then allow the said application as follows;
 - a. The Ruling /order of this court dated March 16, 2023 is reviewed and the order directing the applicant to deposit the decretal sum in a joint interest earning account is varied and the applicant directed to deposit the said amount in court.
 - b. This condition is to be met within 21 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
 - c. The costs of this Application shall be in the cause.
- 15. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 5TH DAY OF JULY 2023.
FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 5TH DAY OF JULY, 2023.

In the presence of;

.....for Appellant
for Respondent
Court Assistant

