



Musyoka v DNW (Minor Suing through mother and next friend CMN) (Civil Appeal E165 of 2022) [2023] KEHC 20626 (KLR) (19 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20626 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E165 OF 2022**

**FR OLEL, J
JULY 19, 2023**

BETWEEN

TIMOTHY MUSYOKA APPLICANT

AND

**DNW (MINOR SUING THROUGH MOTHER AND NEXT FRIEND
CMN) RESPONDENT**

JUDGMENT

1. The application before this court is the Notice of Motion application dated 26th June, 2023 brought pursuant to provisions of Section 1A, 1(B) and 3A, 63(e) of the *Civil Procedure Act*, Order 22 Rule 22, Order 45 rule 1, Order 51 rules 1& 3 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers 1 2, and 5 of the said application are basically spent, while prayer 4 of the said application is untenable as there is no basis for granting unconditional stay. The main prayer sought is prayer (3) that;
 - (a) That the time within which to comply with the consent order/Ruling issued/delivered on 16th May 2023 be enlarged and that the applicants be granted further 45 days or such other time as the court may specify to comply with the orders granted.
2. This application is supported by the grounds on the face of the said application and the supporting affidavit of the appellant's advocate one Ouko Mosweri dated 26th June 2022. This application is opposed by the respondent who filed a replying affidavit sworn by Jerusha Muthoki dated 7th July 2023.
3. The Applicant stated that parties herein filed a consent in court which was adopted on 16.05.2023 and the parties agreed to deposit the decretal sum in a joint interest earning account within 28 days failure of which stay orders would be vacated. The applicant tried their level best to have the joint account opening forms signed by the respondent but the same was not done. The delay in complying with the order was occasioned by the respondent and thus inability to comply with terms of the consent was



not within their control. It was in the interest of justice to allow the application as they had a strong and arguable appeal which had high chances of success.

4. The Respondent in reply stated that the application as filed was baseless, speculative, ill informed, frivolous, vexatious and constituted an abuse of the process of court as the applicant had not demonstrated that the execution process was imminent. The consent executed was adopted on 16.05.2023 and the applicant was to deposit the entire decretal sum of Ksh.326,660.73/= in a joint interest earning account within 28 days and in default the respondent was at liberty to execute.
5. The applicants counsel only forwarded account opening forms for execution after time had lapsed vide their letter dated 14.06.2023, which was received under protest on 15.06.2023. On the following day the respondent's counsel emailed the applicants counsel and intimated to them that the time to comply had lapsed and that they would proceed to enforce the default clause. To this the appellants counsel response was that the delay was occasioned by the bank and sought time to get further instructions from the client.
6. Finally the respondent stated that he who seeks equitable orders must come to court with clean hands and the delay in complying with the terms of the consent order was occasioned by the applicants counsel lack of diligence despite being reminded of their obligation under the consent. The respondents thus stated that this application was unmerited and should be dismissed with costs.

Analysis & Determination

7. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and the only issue for determination is whether time should be extended /enlarged and the applicants be granted a further 45 days or such other time as the court may specify to enable them comply with the orders to deposit the decretal sum.
8. The court's wide discretion to enlarge time is derived from Section 95 of the *civil procedure Act* and order 50 rule 6 of the civil procedure rules. 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 of the *civil procedure rules* 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 which will be suffered by the respondent and if the application has been brought without unreasonable delay



11. In the Supreme court citation of *Nicholas Kiptoo arap Korir Salat v IEBC & 7 Others* (2014) eKLR the court laid down the following principles for extension of time ;

- a. 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.
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on case by case basis;
- d. Whether there is a reasonable explanation for the delay. The delay should be explained to the satisfaction of the court.
- e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- f. Whether the application has been brought without undue delay; and
- g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

12. In *Imperial Bank Ltd (in receivership) & Ano v Alnasir popat and 18 others* the court observed that;

“some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercised its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully ventilate its dispute, against the need to ensure timely resolution of disputes; public interest issues implicated in the appeal or intended appeal and whether, *prima facie*, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration it must be borne in mind that it is not really the role of a single judge to determine definitely the merits of the appeal. That is for the full court if and when it is ultimately presented with the appeal.”

13. In the *Salat case* (*supra*) the supreme court further 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

14. The other issue which arises is whether extension of time can be granted on a consent order. In the case of *Hirani v Kassam* {1952} 19EACA 131, the statement in *senton's judgement and orders* 7th Edition vol.1 page 124 was cited with approval as follows;

“*Prima facie*, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them..... And



cannot be varied or discharged unless obtained by fraud or collusion or by arrangement contrary to policy of the court.... Or if consent was given without sufficient material facts or in misrepresentation or ignorance of such material facts, or in general for a reason which would enable the court to set aside an agreement.”

15. In *June Jebet Moi v Fuelex oil Company Limited & 2 others* HCCC No 305 of 2000 (Milimani commercial court) Justice Ringera (as he was then)allowed such an application and stated that;

“in my opinion the court has power on plain wording of order 49 rule 5 to extend such time. And even if such power were not conferred by the rule, it would be within the courts inherent power for purposes of securing the rights of justice to extend such time if reasonable cause is shown. I agree with submissions of Mr Munga that this is not a case of setting aside or varying a consent judgment. It is a case of extension of time to comply with a court order and the court has jurisdiction to extend time.”

16. The court can therefore can determine this application without being hampered by provision’s which relate to setting aside of consent orders. The applicant’s conduct and that of his advocate can be said to be negligent. They had ample time from 16.05.2023 to 14.06.2023 to ensure that the terms of the consent recorded was adhered too and have the joint account opened. They did not do so and moved to activate the account opening vide their letter to the respondent’s advocate on 14.06. 2023. The emails exchanged too with the respondent’s advocate only started after the 14.06.2023. The reasons advanced for extension of time were thus not sufficiently discharged.

17. Be that as it may, this court also holds that where there is a consent order as was recorded herein, there was also corresponding duty on the part of the respondent to show court what they did to fulfil their obligations in opening of the joint account. This can be done by showing that they had sent the necessary documents to the appellants counsel to facilitate account opening or through correspondence’s exchanged to enable the court appreciate the efforts made in fulling their side of the bargain before blame can be adequately portioned and courts discretion exercised. In this instant application, this was not done and all the court has is the exchange of correspondences on the last days of effecting the consent order.

18. On the likelihood of suffering substantial loss, and or prejudice, it is my considered view that the applicant stands to suffer more prejudice if the orders sought are not granted for the simple reason that the respondent will enforce the decree and that will render the appeal filed to be rendered nugatory. On the other hand, if the decretal sum is secured the respondent will still be able to access and enjoy the fruits of his judgment. The applicant’s application too has been filed without undue delay on 26.06.2023, which was about two weeks from the time the consent lapsed.

Disposition

19. Taking all relevant factors into consideration;
- a. I do allow the notice of motion application dated 26th June 2023 in terms of pray 3 but on terms that the appellant is hereby granted 14 days from the date of this order to deposit the entire decretal sum in court and the same to be held pending the hearing and determination of this appeal.
 - b. In default to comply with order (a) above the application dated 26th June 2023 will deemed to have been dismissed and the respondent will be at liberty to execute.



- c. The costs of this Application are awarded to the Respondent and is taxed at Ksh 20,000/= which shall be paid with 30 days in default execution to issue for the same.

20. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 19TH DAY OF JULY, 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 19th day of July, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant

