



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**NIC Bank Limited v Masila (Civil Appeal E419 of 2021)  
[2023] KEHC 19872 (KLR) (Civ) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19872 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E419 OF 2021**

**AN ONGERI, J**

**JULY 6, 2023**

**BETWEEN**

**NIC BANK LIMITED ..... APPELLANT**

**AND**

**PHILIP WMBUA MASILA ..... RESPONDENT**

**RULING**

1. The application coming for consideration in this ruling is dated 2/03/2023 seeking the following orders:
  - i. that the application be certified urgent and be given an early hearing date.
  - ii. That the decretal sum deposited in a joint interest earning account pursuant to this court's ruling and order delivered on 15<sup>th</sup> July 2021 be and is hereby released forthwith to the applicant through its advocates on record, Mbugua Ng'ang'a & CO. Advocates, together with interest thereon.
2. It is supported by the affidavit of PHilip Wambua Masila in which it is deposed as follows;
  - i. That the appellant/respondent herein filed an application dated 3<sup>rd</sup> February 2021 seeking to lodge an appeal out of time against the judgment delivered in Milimani CMCC no. 1430 of 2014.
  - ii. That vide a ruling delivered on July 15, 2021, the court allowed the appellant to file its appeal out of time on condition that it deposits the decretal sum in a joint interest earning account.



- iii. That through an application dated July 25, 2022, the applicant herein sought an order dismissing the appeal for want of prosecution.
  - iv. That on October 13, 2022 when the application came up for hearing before Hon. Meoli, Judge the appellant was directed to file its record of appeal within 90 days of the order failure to which the appeal would stand dismissed.
  - v. That at the expiry of the 90 days, the appellant had not filed its record of appeal.
  - vi. That on January 31, 2023, pursuant to the aforementioned direction of Hon. Meoli Judge the appeal was marked as dismissed and the file closed.
  - vii. That the applicant herein thereafter wrote to the appellant/respondent's advocates for release of the decretal sum. Despite receipt of the said letter and despite incessant phone calls, the appellant/ respondent has failed and/or declined to release the said decretal sum.
  - viii. That the applicant herein is in financial distress given the harsh economic times and there should be no reasons why he should be kept any further from the fruits of his judgment, which judgment was delivered way back in 2018.
  - ix. That it is in the interest of justice that the orders sought be granted and the decretal sum be released to the applicant to alleviate his financial distress.
3. The parties filed written submissions as follows; the respondent/applicant submitted that the decretal sum was deposited in an interest earning account for security of due performance. The appeal herein however was dismissed for non-compliance with the conditions prescribed by the court and therefore the respondent/applicant should not be kept away from the fruits of his judgement.
  4. The respondent applicant argued that it is common ground that the record of appeal is dated 18/3/2023 and is apparent that it was filed without leave and/or extension of time. That as it stands now there is no appeal before this court and therefore the decretal sum ought to be released.
  5. The appellant/respondent submitted that it is desirous to prosecute its appeal which has a high chance of success and it is in the interest of justice that the decretal sum deposited in the joint interest earning account be maintained. It was indicated that the appellant/respondent does not object to the fact that the appeal was lodged out of time or that it failed to put in the record of appeal within the stipulated time given by the court. However, under the Oxygen principle it urges this court to consider the circumstances leading to this application were not within its control and thus could not be helped.
  6. The appellant/respondent submitted that it was only able to obtain the certified copies of the Proceedings and Judgment on March 15, 2023 and the Record of Appeal was promptly filed on March 16, 2023. There is a Certificate of Delay on record that recounts the same. The Certificate of Delay states that it applied for the certified copies on August 7, 2020 and the period between then and February 27, 2023 was requisite for the preparation and delivery of the same.
  7. The appellant/respondent submitted further that it had filed an application dated April 20, 2023 seeking to reinstate the appeal herein indicating that it is desirous to prosecute the same.
  8. The sole issue for determination is whether the funds should be released.
  9. I find that judgment in the original suit was delivered on 19/9/2018.



10. The appellant was granted leave to file the appeal out of time on 3/10/2022 and he was granted 90 days to prosecute the appeal failure to which the appeal would automatically stand dismissed.
11. This appeal was automatically dismissed at the expiry of 90 days. The appellant did not seek extension of time before the expiry of 90 days.
12. It has been over 5 years since the original suit was heard.
13. This appeal having been automatically dismissed, it follows that the decretal sum which was deposited in a joint interest earning account pursuant to the order of the court ought to be released to the firm of Mbugua Nganga & Co. Advocates together with interest for onward transmission to the respondent.
14. The application dated 2/03/2023 is allowed in the following terms;
  - i. That the decretal sum together with interest be released to the firm of Mbugua Nganga & Co. Advocates.
  - ii. Each party to bear its own costs of the application.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS  
6<sup>TH</sup> DAY OF JULY, 2023.**

**A. N. ONGERI**

**JUDGE**

**In the presence of:**

..... for the Appellant

..... for the Respondent

