



Maina & another v Nyang'aya (Suing as the Legal Representative and Administrator of the Estate of Elijah Mwaniki Kinuthia - Deceased) (Miscellaneous Civil Application 2 of 2023) [2023] KEHC 22414 (KLR) (20 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22414 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
MISCELLANEOUS CIVIL APPLICATION 2 OF 2023
JK SERGON, J
SEPTEMBER 20, 2023**

BETWEEN

ANTHONY MWANGI MAINA 1ST APPLICANT

JOSEPH MUNENE MAINA 2ND APPLICANT

AND

DEVINAH KWAMBOKA NYANG'AYA (SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF ELIJAH MWANIKI KINUTHIA - DECEASED) RESPONDENT

RULING

1. A brief genesis of the matter is as follows, the applicants herein filed an application dated 27th January, 2023 seeking an extension of time to file an appeal against the judgment dated 16th October, 2019 in the matter of Kericho CMCC No. 39 of 2019 Devinah Kwamboka v Anthony Mwangi Maina and Joseph Munene Maina.
2. The applicants' intention in the said application dated 27th January, 2023 was to explain the delay in filing the said application and to distinguish the intended appeal from other appeals which had been filed emanating from that suit. The applicants never had an opportunity to address the court on the application as the court dismissed the application when it was presented to the court *ex parte* for certification that it was an urgent matter, which ought to be heard as a matter of priority.
3. The applicants thereafter filed an application dated 9th February, 2023 seeking to set aside orders of dismissal dated 30th January, 2023 which dismissed the application dated 27th January, 2023 *ex parte* and seeking to have the said application reinstated.
4. The main grounds for reinstatement being that the applicants were deprived of their constitution right to a fair hearing before a court of law and that they were condemned unheard and if the court had



given the applicants an opportunity to be heard and a fair hearing the court would not have come to the erroneous conclusion that the subject matter of the application dated 27th January, 2023 was substantially similar to the subject matter in HCCA No. 18 of 2020 Anthony Mwangi Maina & Joseph Munene Maina v Devinah Kwamboka Nyang'aya.

5. The application dated 27th January, 2023 is a notice of motion seeking the following orders;
 - i. Spent
 - ii. That the intended memorandum of appeal annexed herein be filed out of time
 - iii. That the time for filing the intended memorandum of appeal be enlarged to thirty (30) days of the date upon which this application is determined.
 - iv. That there be an order of stay of execution of the judgment dated 16th October, 2019 in the matter of Kericho CMCC No. 39 of 2019; Devinah Kwamboka Nyang'aya (suing as legal representative and administrator of the estate of Elijah Mwaniki Kinuthia (deceased) v Anthony Mwangi Maina & Joseph Munene Maina pending hearing and determination of this application.
 - v. That there be an order of stay of execution of the judgment dated 16th October, 2019 in the matter of Kericho CMCC No. 39 of 2019; Devinah Kwamboka Nyang'aya (suing as legal representative and administrator of the estate of Elijah Mwaniki Kinuthia (deceased) v Anthony Mwangi Maina & Joseph Munene Maina pending hearing and determination of this appeal.
 - vi. That costs be in the cause
6. The Application is supported by grounds on the face of it and the supporting affidavit of Joseph Munene Maina the Applicant herein.
7. The Applicant avers that he made the affidavit in support of the application for leave to file an appeal out of time against the judgment delivered on 16th October, 2019 on his behalf and on behalf of the co-applicant herein Anthony Mwangi Maina.
8. The Applicant avers that there are several grounds of appeal from the judgment dated 16th October, 2019 and elucidated the said grounds in paragraph 4-23 of the supporting affidavit and others which are stated in the draft memorandum of appeal annexed hereto and duly marked as "JMM3" which have an overwhelming chance of success.
9. The Applicant avers that he has a plausible explanation for the delay in filing an appeal from the said judgment dated 16th October, 2019 and generated a chronology of activities and/or events since the notice of entry of judgment was issued on 17th October, 2019 in paragraph 27-44 of the supporting affidavit. The Applicant further avers that the delay in filing an appeal could be attributed to the mistake of his advocates, the advocates who previously acted for him ignored his instructions to file an appeal and instead undertook actions which they thought were more appropriate and as such the mistake of his previous advocates should not be visited upon the applicants herein.
10. The Applicant avers that taking into consideration the above circumstances and the many previous applications that were made since the judgment was delivered, the application for stay was made without undue delay.



11. The Applicant avers that unless a stay of execution of decree in the lower court is issued the Respondent will proceed to commit him to civil jail, the decree and notice to show cause for committal to civil jail are both annexed hereto and marked as 'JMM10".
12. The Applicant was apprehensive that he would be committed to civil jail and avers that incarceration without lawful excuse and/or justification would cause him substantial loss and harm as he was the sole breadwinner and that the unjust loss of liberty is a loss that cannot be quantified or compensated in monetary terms.
13. The Applicant avers that the Respondent herein would not suffer any prejudice on account of the delay between the time the judgment was delivered and the time the instant application was filed.
14. The Respondent herein Devinah Kwamboka Nyang'aya filed a replying affidavit in response to the application dated 27th January, 2023 in which she avers that the application is misconceived, bad in law, an abuse of court process and that the applicants herein are not entitled to the reliefs sought. The Respondent further avers that the application is incompetent and fatally defective as it is premised on the wrong provisions of the law.
15. The Respondent avers that the applicants being aggrieved with the judgment in Kericho CMCC No. 39 of 2019 where they preferred an appeal vide Kericho HCCA No.18 of 2020, Anthony Mwangi Maina & Joseph Munene Maina v Devinah Kwamboka Nyang'aya which appeal was dismissed with costs on 17th June, 2022 thereby rendering this court functus officio thus incapable of granting any orders being sought by the applicants.
16. The Respondent further avers that following the dismissal of the applicants appeal in Kericho HCCA No. 18 of 2020, the applicants filed a declaratory suit *vide* Kericho HCCC No. E17 of 2022 and alongside the said declaratory suit they simultaneously filed an application for stay which was dismissed with costs on 11th November, 2022.
17. The Respondent avers that the Applicants have not demonstrated that the subject matter of the dismissed miscellaneous application is not substantially the same as the subject matter in Kericho HCCA no. 18 of 2020 to warrant grant of the orders sought.
18. The Respondent further avers that 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 court's discretion and that the party that seeks extension of time has the burden of laying a basis to the satisfaction of the court which basis has not been laid by the applicants to the satisfaction of the court.
19. The Respondent avers that the delay in filing the instant application was unreasonable and had not been explained to the satisfaction of the court and faulted the applicants for filling a plethora of applications in the matter.
20. The Respondent further avers she would suffer prejudice if the extension to file the appeal out of time was granted by this court.
21. The Respondent avers that the application was calculated to frustrate enjoyment of the lawful fruits of judgment which she obtained vide Kericho CMCC No. 39 of 2019 and urged this court to denounce such acts of connivance between the applicants and its insurers to defeat the ends of justice despite being aware of Kericho CMCC No. 39 of 2019 proceedings, judgment, decree and certificate of costs.
22. The Respondent therefore sought to have the instant application dismissed with costs.



23. The Respondent herein Devinah Kwamboka Nyang'aya filed a replying affidavit in response to the application dated 9th February, 2023 she avers that the application was premised on order 51 rule 15, order 12 rule 7, order 10 rule 11 of the Civil Procedure Rules, section 1A and 1B, 3 & 3A of the Civil Procedure Act and article 50 of the Constitution which do not donate any powers to this court to grant the orders sought and further that the application was incompetent and fatally defective as it was premised on the wrong provisions of the law.
24. The Respondent avers that no sufficient cause exists warranting grant of the orders sought and that the grounds adduced for seeking the orders sought were unsatisfactory and therefore the decision of this court to dismiss the Applicants Miscellaneous Application No. 2 of 2023 on 30th January, 2023 was sound in law and cannot be faulted.
25. The Respondent avers that the application seeking to set aside the dismissal order of 30th January, 2023 and have the application dated 23rd January, 2023 reinstated was an abuse of court process and further that the allegations contained in the applicants supporting affidavit were not viable grounds for reinstating the Applicants Miscellaneous Application No. 2 of 2023.
26. The Respondent maintained that the court has a duty to zealously guard against wanton abuse of its processes.
27. The court directed that the applications dated 27th January, 2023 and 9th February, 2023 be canvassed by written submissions, which submissions I have considered.
28. I have considered the application dated 27th January, 2023 and 9th February, 2023 the replying affidavits and rival submissions and the sole issue for determination is whether the applicant herein should be given a extension to time to file and an appeal in the judgment delivered 16th October, 2019 in the matter of Kericho CMCC No. 39 of 2019; Divinah Kwamboka Nyang'aya (suing as legal representative and administrator of the estate of Elijah Mwaniki Kinuthia (deceased) v Anthony Mwangi Maina & Joseph Munene Maina.
29. The Respondents filed submissions in opposition to the application dated 27th January, 2023 and argued that the applicants had not demonstrated that the subject matter of the dismissed miscellaneous application is not the same or substantially the same as the subject matter in Kericho Civil Appeal No.18 of 2020 to warrant the orders sought and further that 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. The Respondents maintained that the 39 months delay in seeking for leave to file appeal out of time was inexcusable and the explanation offered for the delay was not plausible.
30. The Respondents decried the applicant's conduct of the matter and maintained that they had come to court with unclean hands as they had perfected the art of changing advocates on record for purposes of filing numerous applications. The Respondents further argued that mistake of the numerous advocates in the matter, did not warrant the court to exercise its discretion in favour of the applicants.
31. The Respondents further argued that an order of stay pending appeal under order 42 rule 6 (1) of the Civil Procedure Rules, 2010 presupposes the existence of an appeal whereas in the instant case there is no appeal and therefore the court cannot grant stay as it will serve no purpose.
32. The Applicants in their submissions in support of the application dated 9th February, 2023 maintained that the subject matter and objective of the application dated 27th January, 2023 which they were seeking to reinstate was to demonstrate that there had never been an appeal filed on the judgment in Kericho CMCC No. 39 of 2019 and the only appeal filed emanating from the said case was in relation to the dismissal of the application dated 20th November, 2019 by the trial court in CMCC No. 39 of



2020 seeking orders to set aside the *ex parte* judgment and leave to file a defence which was argued in HCCA No. 18 of 2020 and an application for stay in HCCC No. E17 of 2022 which was a declaratory suit.

33. The applicants maintained that the application dated 9th February, 2023 was correctly grounded on provisions of law cited to wit order 51 rule 15 of the Civil Procedure Rules which gives the court mandate to set aside an order made *ex parte*. The applicant therefore argued that they have established that the court has specific jurisdiction to set aside the orders issued on 30th January, 2023 in addition to the general powers donated to the court under article 50 of the Constitution and the overriding objectives set out in sections 1A & 1B and section 3 & 3A of the Civil Procedure Act.
34. The applicants therefore sought to have the orders dismissing the application dated 27th January, 2023 set aside and that the said application be reinstated.
35. I have keenly examined the contents of the file and I concur with the applicants herein that there is no appeal filed in respect of the judgment dated 16th October, 2019 in the matter of Kericho CMCC No. 39 of 2019; Divinah Kwamboka Nyang'aya (suing as legal representative and administrator of the estate of Elijah Mwaniki Kinuthia (deceased)) v Anthony Mwangi Maina & Joseph Munene Maina. I have noted the plethora of applications filed by the applicants in this suit. After having considered the grounds raised in the draft memorandum on appeal contesting both liability and quantum, I find it prudent and in the interests of justice to allow the applicants herein to ventilate their case on appeal. Accordingly, I set aside the orders of this court issued on 30th January, 2023 dismissing the application dated 27th January, 2023 and reinstate the said application.
36. Consequently, the application dated 27th January, 2023 is allowed with the following consequential orders;
 - (i) That the intended memorandum of appeal annexed hereto be filed out of time within 10 days from the date hereof.
 - (ii) That a stay of execution of the judgment dated 16th October, 2019 in the matter of Kericho CMCC No. 39 of 2019; Divinah Kwamboka Nyang'aya (suing as legal representative and administrator of the estate of Elijah Mwaniki Kinuthia (deceased)) v Anthony Mwangi Maina & Joseph Munene Maina pending hearing and determination of this appeal.
 - (iii) That the applicants deposit half the decretal amount in an interest earning account in the joint names of advocates appearing in this matter
 - (iv) That costs abide in the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF SEPTEMBER, 2023

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J.K. SERGON

JUDGE

In the presence of:

Rutoh - Court Assistant

