



**Charangu & another v Wanjeri (Civil Appeal E243 of 2021)
[2023] KEHC 23819 (KLR) (Civ) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23819 (KLR)

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

CIVIL

CIVIL APPEAL E243 OF 2021

JN NJAGI, J

OCTOBER 19, 2023

BETWEEN

LAWRENCE CHARANGU 1ST APPELLANT

DAVID WAHOME MWANGI 2ND APPELLANT

AND

JANET WANJERI RESPONDENT

RULING

1. The Appellants/Applicants` have filed an application in the Notice of Motion dated October 7, 2022, which is brought under Article 48 and Article 159 of the *Constitution of Kenya* 2010, sections 1A,1B, 3A, 63(e) and 98 of the *Civil Procedure Act*, and orders 50 rule 6 of the *Civil Procedure Code*. The application seeks the following orders:
 - (1) Spent.
 - (2) That an order of stay of execution be granted pending the hearing of this application.
 - (3) That the applicant’s Application and orders sought in the Application dated April 7, 2021 be reinstated.
 - (4) That the Applicant be given more time to comply with orders given on July 6, 2021 for stay conditions.
 - (5) That the costs of the application be in the cause.
2. The application dated October 7, 2022 is supported by grounds on its face and the sworn affidavit of the advocate for the applicant, Mr. Magero Obadiah. A summary of the facts of the matter is that the Appellant filed a notice of Motion dated April 7, 2021 seeking stay of execution pending an



intended appeal. The same was allowed on July 6, 2021 with stay conditions that the Applicant pays the Respondent a sum of Ksh.120,000/- within 30 days and to issue a bank guarantee of the balance of the decretal sum within 30 days. The Applicants failed to comply with the said stay conditions.

3. The Applicants now seek that the orders sought in the application dated April 7, 2021 be reinstated and that they be allowed more time to comply with the stay conditions given on July 6, 2021. Their application is based on the grounds that the application has been made immediately the same has come to the notice of the Applicants' advocates and as such they are not guilty of inordinate delay as to be considered inexcusable and inordinate. Further that they have at all times been interested in complying with the stay conditions.
4. The application was opposed by the Respondent vide her replying affidavit sworn on the December 2, 2022 wherein she avers that the Applicants have failed to comply with the stay conditions granted by the court on July 6, 2021. That no plausible explanation has been given for failure to comply with stay conditions. That the Applicants have not demonstrated the loss they would suffer should stay orders not be granted. That the application is not made in good faith and is aimed at delaying payment in this matter and derail the Respondent from enjoying the fruits of his judgment.
5. The Application was argued by way of written submissions. The Applicants submitted that the court has discretion under order 12 rule 7 of the Civil Procedure Rules to grant the orders sought. The order stipulates that:

“Where under this order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

6. They submitted that they stand to suffer substantial loss of over Ksh.300,000 as well as costs and interests if the application is not granted. That the respondent has not demonstrated that he is able to refund the sum if the appeal succeeds.
7. The Applicants further submitted that the circumstances of this case are sufficient to persuade the Court that their failure to comply with the orders of July 6, 2021 was not a deliberate attempt to obstruct justice or delay justice and therefore more time should be given to them to comply with the orders. They cited the decision in Belinda Murai & 9 others v Amos Wainaina [1979] eKLR where the court stated that:

A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.

8. In opposing the Application, the Respondent submitted that the Applicants ignored, neglected and / or failed to comply with the conditions as set by the court for a period of two years. That no cogent reason has been offered for non-compliance. That the application was a tactical and strategic scheme with the sole intention of delaying payments of the decree and as such denying the Respondent an opportunity to enjoy the fruits of their judgment.
9. The Respondent further submitted that the subject judgment arose from a road traffic accident that occurred on October 8, 2016 and that 6 years has since elapsed but the Respondent is yet to be compensated and enjoy the fruits of its judgment. The Respondent urged the court to dismiss the application with costs.



Analysis and Determination

10. I have considered the application and the grounds in support thereof, the grounds in opposition thereto and the respective submission of the parties. The issues for determination are:
- (1) Whether orders for stay of execution pending appeal should be reinstated.
 - (2) Whether the Applicants should be granted extension of time to comply with the orders issued on July 6, 2021.
11. The Court in its ruling of 6th July granted orders for stay of execution, albeit with conditions. The question is whether the conditions granted by the court ought to be reinstated. This is dependent on whether the court is inclined to granting the orders for extension of time to comply with the orders issued on July 6, 2021.
12. This court has wide discretion to enlarge time under section 95 of the *Civil Procedure Act* and order 50 rule 6 of the *Civil Procedure Rules, 2010*. The same provide as follows:

Section 95. Enlargement of time

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.

Power to enlarge time [Order 50, rule 6.]

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 power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

13. The Supreme Court of Kenya in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & others* [2014] eKLR set the following guidelines for consideration in an application for enlargement of time:

“

- “(1) 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;
- (2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- (3) Whether the court should exercise discretion to extend, is a consideration to be made on a case to case basis;
- (4) Whether there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the court;
- (5) Whether there will be any prejudice suffered by the Respondent if the extension is granted;
- (6) Whether the application has been brought without undue delay; and



(7).....”

14. This Court (Ong’udi J.) *vide* its ruling delivered on July 6, 2021 granted stay of execution on conditions, failure to comply with which was to automatically vacate the order of stay. The Applicants did not comply with the orders within the stipulated time of one month granted by the court and the orders for stay stood vacated after the lapse of the said period. It was incumbent upon the Applicants to satisfactorily explain the delay. The Applicants have not given any reason as to why they did not comply with the conditions for stay orders. All that their advocate hinted in his supporting affidavit is that they made the instant application immediately it (not clear what) came to the attention of the advocates. There was no mention as to when the advocates learn of the same. The statement is in itself vague and does not sufficiently explain the reason for non-compliance.
15. The order for conditional stay was issued in July 2021 and the instant application made in October 2022. The application was thus made one year and three months after the orders for stay were granted. I consider the delay of the said period to be inordinate. Considering that no explanation has been offered for the delay, the same is inexcusable.
16. Article 159 of the *Constitution of Kenya*, 2010 is categorical that justice shall be administered without undue delay. It is also trite that litigation must at a certain point come to an end. It is therefore my view that the inordinate delay by the Applicants in this matter disentitles them to the discretion of this court. I associate myself with the decision in *Dickson Miriti Kamonde v Kenya Commercial Bank Ltd* [2006] eKLR where it was held that:

“...The delay cannot be excused and an indolent party must reckon with consequences of inaction.”
17. The upshot is that the Applicants have not persuaded the court that they are deserving of orders for enlargement of time to comply with the orders of the court issued on July 6, 2021. It is thus my finding that the application dated October 7, 2022 has no merit and is in the premises dismissed with costs to the Respondent.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF OCTOBER 2023

J. N NJAGI

JUDGE

In the presence of:

Mr. Magero for Appellants/Applicants

Mr. Machoka for Respondent

Court Assistant – Amina

30 days Right of Appeal

