



Directline Assurance Company v Maina; Kilului (Suing as the legal representative of the Estate of Stephen Munyao (Deceased) (Interested Party) (Miscellaneous Civil Application E002 of 2022) [2023] KEHC 23884 (KLR) (12 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23884 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS CIVIL APPLICATION E002 OF 2022
MW MUIGAI, J
OCTOBER 12, 2023**

BETWEEN

DIRECTLINE ASSURANCE COMPANY APPLICANT

AND

MARY NYAMBURA MAINA RESPONDENT

AND

KAVUTHA KILULUI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF STEPHEN MUNYAO (DECEASED) INTERESTED PARTY

(Being an appeal from the judgment of Hon. A. G. Kibiru (CM) delivered on 16th February, 2022 in Machakos Chief Magistrate's Court Civil Case No. E137 of 2021)

RULING

Notice Of Motion

1. By a Notice of Motion dated 9th March, 2023, brought under Certificate of urgency, the Applicant sought the following orders:-
 - a. Spent
 - b. Spent
 - c. That this Court enlarge and/or extend the time issued by this Court to the Applicant/Appellant to comply with the conditions as stated in its Ruling on 8/11/2022.



- d. That upon grant of prayers above this Court be pleased to review and vary its decision/finding in the Ruling issued on the 8th November, 2023 and order that in the interest of justice that the amount of Kshs.500,000/- paid to the Interested Party/Respondents counsel out of the period of 90 days as stipulated by the Court in its Ruling of 08/11/2022 is sufficient security in line with the Ruling of this Court dated 8/11/2022 amongst the other conditions stated therein.
 - e. That consequently upon grant of prayers as requested about this Court do stay execution of the judgment, decree, execution order and all consequential orders in or emanating from Machakos Civil Suit No. E137 of 2021 pending the hearing and determination of this Appeal.
 - f. That this Court grant orders as it deems fit to grant so as to meet the ends of justice.
 - g. That cost of this application.
2. The Application is supported by the Affidavit of Pauline Waruhiu sworn on an even date stating that there was an inadvertent delay by the Applicant in complying with the orders of 08/11/2022; that the Applicant has embarked on correcting the said mistake and is in the process of releasing the money to the Interested party's Counsel as well as obtaining a bank guarantee for the balance which has been deposited in Court vide its Ruling of 8/11/2022. There will be an imminent danger of the Applicants' properties being sold and/or disposed off in satisfaction of the judgment, decree, execution order all consequential orders in or emanating from Machakos Civil suit No.E137 of 2021 despite the Applicants having complied with the stay conditions granted on the Ruling dated 8/11/2022.

Interested Party Replying Affidavit

3. The interested Party/Respondent herein Kavuthu Kilului filed his Replying Affidavit deponed on 14th March 2023 stating that; the Ruling of 8th November, 2022 granted the Appellant/Applicant stay of execution for a period of three (3) months (90 days) to comply which period has already lapsed and the Appellant has come back to this Court upon execution. The said application ought to have been made before the expiry of the said stipulated period. There are no plausible reasons advanced for review of the Court Orders of 8/11/2022 or extension of the granted timelines.

Respondent Replying Affidavit

4. The Respondent filed her Replying Affidavit sworn by Gladys Gichuki the Advocate on record on 22/03/2023 stating that; the stay of execution period lapsed on 9th February, 2023 and by that date the Appellant had not complied with the orders issued by this Court on 8/11/2022; the Appellant went to slumber and only acted after the execution of 4th March, 2023; the allegation of the Appellant that they remitted/deposited the money to the wrong Advocate's Account is self-defeating as the said firm does not represent any party in this matter; the purported Bank Guarantee issued by the Appellant is not sufficient.

Supplementary Affidavit

5. The Appellant/Applicant filed their Supplementary Affidavit sworn by Pauline Waruhiu the Head of Claims & Legal Officer at Directline on 18/04/2023 stating that the Appellant has since regularized



the payment of kshs.500,000/- to the Interested Party's Counsel vide payment made on 29/03/2023 – marked (PW-8).

6. It was necessary for the Appellant/Applicant to seek the court leave to enlarge the time granted on account of the inadvertent delay and mistake occasioned as stated in Appellant's Supporting Affidavit of 9/3/2023.
7. The Appellant is not interested in prolonging the proceedings and/or denying the interested party's the fruits of judgment rather the Appellant is seeking a chance for the appeal to be heard on merit and justice to be done for both parties.

Written Submissions

Appellant/applicant's Submissions Dated 18th April, 2023

8. Order 50 rule 5 gives the Court power to enlarge time upon such terms (if any) as the justice may require, and such enlargement may be ordered although the application for same is not made until after the expiration of the time appointed or allowed.
9. It is submitted that if this Court does not grant the orders sought then the substratum of the Appeal will be rendered nugatory and the Applicant will be prejudiced as the Respondent will proceed with execution occasioning a situation where the total Decretal Amount of 4,028,556/- will be paid out to the Interested party and or the Applicant executed for the said amount contrary to the statutory limit amount of Kshs.3,000,000/ as provided for in Section 5(b)(iv) of CAP 405 and not considering that a previous amount of Kshs. 1,000/- was already paid out to the deceased's estates which is a ground of appeal.
10. In the case of *Kevin Kinyua Macharia –v- Aisha Motors Dealers limited & 3 others* [2020] eKLR the Court in regard to the subject of review stated thus;
 - “ 16. It is apparent that the present Motion concerns itself with the subject of review. The applicable principles in determining whether to grant an order for review are provided for under Order 45 of the *Civil Procedure Rules*, 2010 and are as follows:
 - a) the discovery of new and important matter or evidence, or
 - b) some mistake or error apparent on the face of the record, or
 - c) any other sufficient reason.
 17. The above provision also requires that applications seeking an order for review be brought without unreasonable delay, a position which was buttressed by the Court of Appeal in the case of *Francis Origo & another v Jacob Kumali Mungala* [2005] eKLR when it held thus:

“...most importantly, the applicant must make the application for review without unreasonable delay.”



11. The objective of a stay is preserve the subject matter pending hearing and determination of an appeal. Reliance is made in the case of *Diamond Trust Bank Kenya Limited v Patrick Mwataki Kanda & Anor* [2021] where the Court held that:-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory.

12. It is submitted that if the execution is not stayed then the interested party and/or Respondent will proceed with execution against the appellant rendering the appeal a nugatory.
13. The amount in question is substantial and if all paid out/released to the interested party there is no guarantee that the Applicant will be able to recover the same. The same will also be contrary to the statutory limit.
14. Reliance is made in the case of *Attorney General v Lucy Nduta Nganga* where Justice Njoki Mwangi quoted from the case of *Abdirahman Abdi –Safi Petroleum Products Ltd & 6 Others* [2011] eKLR where the Court of appeal observed that;

The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice...

In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the *Appellate Jurisdiction Act*, Cap 9 Laws of Kenya, and later, Article 159(2)(d) of *the Constitution* of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of *the Constitution* makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion." (emphasis added).

Respondent's Submissions Dated 28/04/2022

15. It is submitted that the Appellant/Applicant does not deserve extension of time to comply with the court orders. This is based on the fact that the period for compliance is traditionally 30 days but the court was kind enough to the Appellant and granted a period of 90 days. The applicant has not satisfactorily explained the delay and has not laid a proper case for extension of time.



16. The Appellant is seeking to review and vary the Ruling delivered on 8/11/2022. The conditions for review are espoused in the provisions of Section 80 of the Civil Procedure Act Cap 21 as read with Order 45 Rule 1 of the Civil procedure Rules, 2020 which provides;

Sec.80 “ Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

17. In Republic -v- public procurement Administrative Review Board & 2 others [2018] eKLR the Court explained on the ground for review thus:-

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds;

- (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
- (b) on account of some mistake or error apparent on the face of the record, or
- (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.”

Interested Party’s Submissions Dated 19/04/20223

18. It is submitted that the instant apply is Res judicata as the same has already been dealt with in the application brought before this Court on 24/03/2022.
19. The Ruling being sought to be review was delivered in the presence of all the parties whereby if the appellant had been aggrieved by the Ruling ought to have appealed against the same or sought for review.
20. A review is only possible if the following grounds are met namely:-
- a. There must be a discovery of a new and important matter which after the exercise of due diligence was not within the knowledge of the Applicant at the time the decree was passed or the order was made; or
 - b. There was a mistake or error apparent on the face of the record or
 - c. There were other sufficient reasons; and
 - d. The application must have been made without undue delay.



21. Reliance is made in the case of *National Bank of Kenya v Ndungu Njau* (Civil Appeal 211 of 1996) as was held in the case of *Pancras T. Swai – v- Kenya Breweries Ltd* [2014] eKLR this Court held that;

“A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. I will not be a sufficient ground for review that another Judge could have taken a different view of the matter. More can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review.”

“... the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it.”

22. The Appellant has not shown the new evidence discovered to warrant a review of the ruling. There is no indication of where there was an error or omissions on the part of the court. There is no new evidence that was not within their knowledge since 8/11/2022 neither is there an error apparent on the fact of the record.
23. It is finally submitted that the applicant application is meant to keep the interested party away from enjoying the fruits of her lawful judgment.

Determination

24. I have considered the applications, grounds, affidavits, submissions and authorities cited.
25. Issues for determination;
- a. whether the court should exercise its discretion to extend time.
 - b. Whether the applicant is entitled to have the court review its orders.
26. On whether the Court should exercise its discretion to extend time, the law that guides this court on enlargement of time is order 50 Rule 5 of *Civil Procedure Rules* which 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 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.”

27. This Court is guided by the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* {2014} e KLR, where the court laid down the following facets:



- 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 a case-to-case basis;
 - d. Whether there is a reasonable reason 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."
28. In the instant case the Applicant avers that the delay in complying with court orders issued on 8/11/2022 requiring it to pay Kshs 500,00/= to the interested party within 90 days of the delivery of the ruling and provide a specific and personal bank guarantee for the balance in favour of the interested party for the period the appeal shall be heard and determined was occasioned by inadvertent delay due to the internal processing of the decretal amount at Applicant's company which required several internal procedures and approvals before the amount could be disbursed and deposited to the bank issuing the guarantee to enable issuance of the bank guarantee.
29. The Applicant herein further opined that despite the inadvertent delay and mistakes, the Applicant has since regularized the position and corrected its mistakes by effecting payment of the Kshs. 500,000/= to the interested party's counsel and is willing to reissue the bank guarantee with the correct narrative. Previously the Applicant had intimated that it had erroneously deposited the Kshs. 500,000/= erroneously to the Advocate who was previously acting in the matter for the estate on behalf of the deceased mother. That the applicant in striving to comply with the court's ruling of 8/11/2022 processed payment of Kshs 500,000/= in good faith but inadvertently released payment to the wrong advocate.
30. I have keenly perused the pleadings and annexures thereto and I note that indeed there was correspondences that were exchanged between the parties addressing the errors that were inadvertently made and an effort being taken to rectify the said mistakes. I also note the concern of the Respondent in her submission that the Applicant does not deserve extension of time to comply with the court orders stating that the period for compliance traditionally is 30 days but court was kind enough to grant 90 days period.
31. In my considered view having looked at the law and the authority cited I find that the Respondent will not suffer any prejudice if the said extension is granted. Accordingly I am satisfied that the Applicant has proved its reason for the delay to comply with the court order and has shown the willingness to make good the mistakes it made. In this regard I find no reason why extension and/or enlargement of time should be denied.



32. This Court is persuaded by case of *National Union of Mineworkers v Council for Mineral Technology*[1998] ZALAC 22 at para 10, the court held:

“The approach is that the court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.”

33. It is therefore my view that this application for enlargement has been met to the satisfaction of this court having been brought 26 days after the lapse of the 90 days period granted by this court and the degree of lateness having been conclusively rendered.

Whether the applicant is entitled to have the court review its orders.

34. The substantive provisions of Order 45, state as follows:

1.

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) ...”

35. Order 45 provides for three circumstances under which an order for review can be made. To be successful, the applicant must demonstrate to the court that there has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed. A party may successfully apply for review, secondly, if he can demonstrate to the court that there has been some mistake or error apparent on the face of the record. The third ground for review is worded broadly: an application for review can be made for any other sufficient reason.

36. In the instant case, the Applicant opined that the inadvertent error and honest mistake that was occasioned by the Applicant upon the Applicant remitting the amount of Kshs 500,000/= to the wrong advocate and its bank issuing a bank guarantee with an erroneous narrative.



37. In *Muyodi vs. Industrial and Commercial Development Corporation & Another* (2006) 1 EA 243, the Court of Appeal considered what constitutes a mistake or error apparent on the face of the record, and stated as follows:

“In *Nyamogo & Nyamogo vs Kogo* (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal.” (emphasis mine)

38. In *Paul Mwaniki vs. National Hospital Insurance Fund Board of Management* [2020] eKLR, it was said:

“... a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.” (emphasis mine)

39. In *Republic vs. Cabinet Secretary for Interior and Co-Ordination of National Government Ex Parte Abullahi Said Sald* [2019] eKLR, the court observed, with respect to any other sufficient reason:

“A Court can review a judgment for any other sufficient reason. In the case of *Sadar Mohamed vs Charan Singh and Another* [19] it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter. Mulla in the Code of Civil Procedure [20] (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that the expression 'any other sufficient reason'...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement. [21]

I also find useful guidance in *Tokesi Mambili and others vs Simion Litsanga* [22] where they held as follows: -

- i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.



- ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.”

40. The Applicant herein, save for the ground of error on the face of the record, submitted that it mistakenly and erroneously remitted the decretal sum of Kshs. 500,000/= to the wrong advocate and has demonstrated how it is willing to rectify the said error through its correspondences to the counsel of the interested party which are on court record.
41. In view of the above and having relied on the authorities aforementioned I find that the applicant has demonstrated sufficient reason to have the court orders reviewed.

Disposition

- a. The Court orders that time to pay security of Kshs 500,000/= be extended by further 30 days from the date of this Ruling through the interested party's Advocate on record.
- b. The Court orders that its finding in the Ruling dated 8/11/2022 is reviewed with regard to the enlargement time as in (a) above.
- c. Other orders of the court dated 8/11/2022 to remain in force.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT MACHAKOS THIS 12TH DAY OF OCTOBER, 2023 (PHYSICAL/VIRTUAL CONFERENCE).

M.W. MUIGAI

JUDGE

In the presence/absence of:

No Appearance - for the Applicant/Applicant

No Appearance - for the Respondent

Geoffrey/Patrick - Court Assistant(S)*

