



**Mativo v Principal Secretary, Ministry of Public Service and Gender
& another (Judicial Review Miscellaneous Application E119 of 2022)
[2023] KEHC 23027 (KLR) (Judicial Review) (3 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23027 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E119 OF 2022
JM CHIGITI, J
OCTOBER 3, 2023**

BETWEEN

JUSTUS KIATINE MATIVO APPLICANT

AND

**PRINCIPAL SECRETARY, MINISTRY OF PUBLIC SERVICE AND
GENDER 1ST RESPONDENT**

THE ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. The application before this court is the Respondents' notice of motion application dated July 21, 2023 seeking the following orders;
 1. Spent
 2. This Honorable Court be pleased to grant a temporary stay of delivery of Judgment slated for June 22, 2023 pending the hearing and determination of this application inter-parties.
 3. This Honorable Court be pleased to grant a stay of delivery of Judgment slated for June 22, 2023 pending the hearing and determination of the review application.
 4. Costs of this application be in the cause.
2. The application is supported by the affidavit of Mwihaki Gathoga sworn on June 21, 2023.
3. The grounds upon which the application is premised are that the Applicant on September 1, 2017 filed Nairobi CMCC No 6185 of 2017 against the Respondents seeking special and general damages



- together with Costs and interest of the suit at Court rates for injuries sustained as a result of a Road Traffic Accident.
4. The court in a judgment dated October 24, 2019 awarded compensation to the Applicant in the sum of Kshs 800,000 as general damages and for pain and suffering and Kshs 648,170 as special damages.
 5. The Respondent's contend that they have since acquired new and important evidence which after the exercise of due diligence was not within their knowledge and could not be produced at the time when the decree was passed. It is argued that the new evidence is important for scrutiny to have appropriate a determination of the dispute.
 6. The Respondents/Applicants also state that the new evidence will illustrate that the Applicant/ Respondent was to blame for the accident as he is the one who collided onto the 2nd Applicant's motor vehicle on the right side while crossing the said road thereby sustaining injuries. It is argued that counsel previously on record inadvertently failed to attend Court which meant that the Applicant/ Respondent's evidence was not challenged.
 7. The 2nd Respondent is said to have received a copy of the Judgment on April 11, 2023 pursuant to this court's directions of March 27, 2023 and later on established that the matter was undefended and the evidence therein uncontroverted. The 1st Respondent is said to have informed the 2nd Respondent that there was need to file an application seeking review of the said Judgment which application was filed on June 20, 2023.
 8. The Respondents' case is that the current application is necessary in order to arrest the Judgement scheduled to be delivered.
 9. The Applicant/ Respondent in response filed a Replying Affidavit dated July 6, 2023 sworn by Justus Kiatine Mativo and in the affidavit Mr Kiatine depones that contrary to the Respondents'/Applicant's argument at paragraph 2 of said judgment the court observed that the 2nd Respondent who was then the 3rd defendant entered appearance on behalf of the first defendant and even filed a defence denying the plaintiff's claim.
 10. It is also deponed that he who alleges must prove and that the Respondents/Applicants herein have not placed any evidence on record to substantiate their allegations and that they are only attempting to benefit from their negligence in engaging a suitable counsel.
 11. The Respondents it is argued were notified about the delivery of the judgment from way back on September 16, 2019. Also that the remedy of review is an equitable remedy and that he who comes must come with clean hands.
 12. The Applicant/ Respondent also argues that Judgement cannot be arrested as all parties were given an equal opportunity to participate in the trial and nowhere did the Respondents/Applicants complain of any irregularity and further that the instant application is an afterthought.
 13. It is also contended that the application has been made after inordinate delay of close to five (5) years from the date of judgment. The Applicant also states that the purported application filed in the lower court has not been filed upon his advocates on record.
 14. In conclusion the Applicant urges that if the application is granted the Applicant/ Respondent stands to suffer great prejudice in terms of delay in benefitting from the fruits of his judgment.
 15. In their written submissions dated July 5, 2023 the Respondents contend that the correct date for the lower court judgment is May 24, 2019 and not October 24, 2019 as stated by the Applicant/ Respondent,



16. The Respondents also submit that pursuant to section 80(b) of the *Civil Procedure Act* the court has discretion to review judgment. The case of *Corporation Limited vs Rowland and Wangire Ndegwa T/ A Rowland Associates* [2008] eKLR is cited where the court allowed an application for reopening the case on grounds that the defendant would be condemned unheard if the application was not allowed.
17. The *Ex parte* Applicant submits that the Respondents/Applicants have not acted in haste in bring the application before this court as they only brought the same before this court after the JR Application seeking to compel them to pay the decretal sum that was owing. Also, that the judgment remains unchallenged close to 5 years. On costs the Applicant urged that this honourable court be pleased to dismiss the instant application with costs.

Analysis and Determination

18. I have considered the pleadings and the arguments advanced by the parties herein. The issue for determination is whether the Respondents have made out a case for the grant of the orders sought.
19. The Respondents/ Applicants seek a stay of the delivery of this court’s judgment pending the hearing and determination of an application for review which is purportedly before this court I say purportedly because although the Respondents/Applicants have attached to their supporting affidavit a Notice of Motion application dated June 19, 2023 seeking a grant of stay and an order for review there is no evidence of the same having been filed before the Chief Magistrates Court at Nairobi.
20. The Court of Appeal in *Vishram Ravji Halai vs Thornton & Turpin* Civil Application No Nairobi 15 of 1990 [1990] KLR 365 outlined the requirements for granting stay of execution as follows;

‘Thus, the Superior Court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay’.
21. The Court is not convinced that the Respondents/ Applicants have shown sufficient reason for the grant of a stay of execution neither have they produced evidence before this court what substantial loss they would be suffering if the application herein is not granted.
22. The Court also notes that S.G Gitonga Resident Magistrate delivered her judgment on May 24, 2019 which was four (4) years ago yet there was no application for review/setting aside or judgment against the said decision. It is their argument that they did not have a chance to respond during the hearing before the magistrate’s court and that they only become aware of the said judgement on April 11, 2023.
23. The Applicant is partly blaming counsel for failure to attend court. The details around that are scanty. The court cannot go and look for the evidence. The court is not being told of the actual dates or who the counsel was and where the Applicant has been all this time.
24. The argument that counsel who was on record transferred her files an argument that the Applicant only got to know of the judgment on March 27, 2023 is deplorable. Where has the Applicant been since May 24, 2019 when the judgment was delivered?
25. The Civil Procedure Rules have procedures for stay and setting aside judgments. What the Applicant seems to be doing is to pursue an appeal through the back door.



26. I find this hard to believe as I note from the court's judgment dated May 24, 2019 that the 3rd Defendant (the Attorney General) in the suit before the trial court entered appearance for the 1st and 2nd Defendant and even filed a defence in response to the plaint.
27. I also note that despite there being service the Defendants failed to appear in court for hearing on March 18, 2019 and the matter proceeded *ex parte*. The Defendants also failed to file written submissions despite service also having been effected. The failure to attend court and file submissions despite having been served has not been efficiently controverted by the Respondents.
28. The Respondents have failed to convince the court that there was no undue delay on their part in filing the instant application and that it is not an afterthought and a tactic to delay the Applicant's/ Respondent's right to enjoy the fruits of his judgement.
29. One of the legal basis of the doctrine of laches is ensuring that legal claims are brought forth in a reasonable timely period so that evidence and reliable witnesses are can be found.
30. The indefinite delay in the prosecution of the suit occasions the loss of memory of the substantial matters of the case.
31. In the case of *Mwangi S Kimenyi v Attorney General & another* [2014] eKLR the court set down the guiding principles in determining such a matter as being:
 - i. Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;
 - ii. Whether the delay is intentional, contumelious and, therefore, inexcusable;
 - iii. Whether the delay is an abuse of the court process;
 - iv. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;
 - v. What prejudice will the dismissal occasion to the plaintiff?
 - vi. Whether the plaintiff has offered a reasonable explanation for the delay;
 - vii. Even if there has been delay, what does the interest of justice dictate:
32. I find that the delay in moving the court was inordinate. The delay is an abuse of the court that is going to prejudice the Respondent the decree holder.
33. The explanation that the Applicant has tendered is not plausible or convincing in any way whatsoever. The interests of justice will be served if the orders sought are declined.
34. In the case of *Abigail Barma Vs Mwangi Theuri* ELC No 393 of 2013, the court made reference to "*Snell's Equity*, 30th Edition at p 33 para 3-16 (quoting Lord Camden LC in *Smith v Clay* (1767) 3 Bro CC 639n. at 640n) where it was asserted that a court of equity "has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing."



35. In the Court of Appeal Case No 16 of 2012 Nairobi (Civil Application), reference was made to Lord Selbourne L.C. delivering the opinion of the Privy Council in *The Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221, where at page 240 it was stated thus:

“Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material...”

36. The Applicant has simply thrown a general statement about the so-called conduct of his previous advocates who has not even sworn an affidavit. The applicant has not informed the court in what way the late advocate's conduct caused him not to follow up on the case. He has not tendered any evidence to show continuous or any follow up regarding the case since it was filed. The Applicant is simply throwing counsel under the bus at a time when counsel cannot even defend himself.

37. Section 4 (1) of *The Fair Administrative Action Act* provides that Administrative action must be taken expeditiously, efficiently, lawfully.

38. The Respondent is under a duty to explain any delays that may have taken place. Failure to tender any explanation generates a conclusion that there is a breach of the fair administrative rights as guaranteed under Article 47 of the *Constitution*. The delay in settling just claims offended the legitimate expectation of the decree holder in this matter.

It is this courts view that to allow the so called new evidence appears to be an issue that touches on the liability of the parties. The court has looked at the end game that would unfold should the court arrest the judgement. The issue of liability would be reopened. This is an issue that can be best dealt with at the trial court or on appeal and not through the judicial review platform.

Order;

1. In the foregoing I find that the Respondents/Applicants application dated June 21, 2023 lacks merit and I dismiss it with no orders as to costs. It is so ordered.
2. The judgment will be delivered on 30th November, 23.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2023

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J. CHIGITI (SC)

JUDGE

