



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CIVIL CASE NO. 70 OF 2019

ABDUL MUGAMBI.....1ST APPELLANT/APPLICANT

JULIUS NJOROGE GICHIA.....2ND APPELLANT/APPLICANT

-VERSUS-

MARY MUTHONI KANG'ERI

PETER MWANGI GATHERU (*Suing as the Legal Representatives of the Estate of*

ALICE WACHINGA GATHERU (DECEASED).....RESPONDENTS

AND

KYALO GREGORY.....1ST THIRD PARTY RESPONDENT

IRENE MUMBI.....2ND THIRD PARTY RESPONDENT

RULING

1. Before me is a Notice of Motion dated 12th October 2020 filed under Order 22 Rule 22, Order 42 Rule 4 and 6, Order 51 Rules 1 and 3 of the Civil Procedure Rules 2010, section 3, and 3A of the Civil Procedure Act (Cap 21).

2. The application has five prayers, some of which have been spent as follows –

1. (*spent*)

2. (*spent*)

3. *That time within which to comply with the conditions for stay as per the orders of this honourable court issued on 12th February 2020 be extended and /or that the applicant be granted 21 days to comply with the second stay condition order granted by the honourable court.*

4. *That the court be pleased to enlarge time within which the applicants can comply with the 2nd order of the balance of the sum to be secured through a bank guarantee to be deposited with the respondents advocates within 30 days as a condition of stay of execution as per the orders of this honourable court issued on 12th February 2020.*

5. *That the costs of this application be in the cause.*

3. The application has grounds on the face of the Notice of Motion that following the conditional stay of execution orders granted by the court on 12th February 2020, the applicants processed a cheque for Kshs.979,000/= which was paid late due to the Covid-19 pandemic and change of advocates, and the said payment sent to the respondents advocates on 8/9/2020 after the lapse of 21 days period granted by court; and that the applicants also need 30 days extension of time to comply with the condition of providing a bank guarantee as security for the balance of the decretal sum.

4. The application was filed with a supporting affidavit sworn by Christine Momanyi advocate for the applicants, which amplifies the grounds of the application.

5. The application is opposed through a replying affidavit sworn on 29th October 2020 by Geoffrey Kilonzo advocate for the respondents, in which it is deponed that the delay herein of more than 7 months in remitting the Kshs.979,000/= which was to be remitted within 21 days from 12/2/2020 was inordinate, and that the request for 30 more days to deposit the bank guarantee for the balance of the decretal amount was not justified as the long delay was inexcusable.

6. The application was by consent to be canvassed through by filing written submissions, wherein on 23/6/2020 Ms. Wataka appeared for the applicant, and Mr. Nzioka appeared for the respondent and agreed as such. I note that though on 12/10/2021 counsel on both sides informed the Deputy Registrar that they had filed written submissions, I have only seen the submissions of the respondent and take it that the applicant's counsel wanted to rely on the application and affidavit filed.

7. Indeed, this court granted stay of execution orders, but on specific conditions to be fulfilled by the applicant. The time frame set by the court for such compliance was however not met by the applicant, and they have now come under the present application for extension of time to comply with the court's orders.

8. The jurisdiction of the court with regard to extension of time is clear – see Order 50 Rule 6 of the Civil Procedure Rules. Thus though court orders must be obeyed, this court has discretionary power to extend the time within which the court has ordered for compliance. However, the burden is on the applicant for extension of time, to demonstrate to the court the reasons and justification for the delay to enable the court exercise its discretion judiciously.

9. In the present case, the applicant has relied on the effect of Covid-19 pandemic, as well as the change of advocates from Kairu & McCourt to Kimondo and company as the reasons for failure to comply with the court's orders in time.

10. In my view, above reasons on their own without more would not be adequate to persuade this court to exercise its discretion, if the applicants had not taken any steps in compliance with the conditions set by the court. However, in the present case, the applicants have already paid the part of the decretal amount Kshs.979,000/= to the respondent, which in my view is sufficient action in compliance to persuade this court to exercise its discretion in favour of the applicants for the extension of the time requested in the interests of justice.

11. I note that the applicants now seek a further 30 days to comply with the second court's order for provision of a bank guarantee herein. Again, in view of the fact that the applicants have already paid part of the decretal amount Kshs.979,000/= to the respondents, in my view it will not be in the interests of justice to both parties to deny the applicants the requested extension of 30 days, to comply with the second limbs of the court orders as that period of 30 days in my view is not unreasonable.

12. I thus allow the application on the following terms –

1) That the period of 21 days granted to the applicants for payment of Kshs.979,000/= be and is hereby extended to the day the money was remitted and received by counsel for respondents.

2) That the 30 days period ordered by the court for securing the balance of the decretal sum through bank guarantee, is extended for a further 30 days from today.

3) However, if order (2) above is not complied with, then the application herein for extension of time in its totality will stand dismissed with costs to the respondents.

4) Costs in the cause.

DATED, DELIVERED AND SIGNED THIS 1ST DAY OF FEBRUARY 2022, IN OPEN COURT AT MAKUENI.

.....

GEORGE DULU

JUDGE.