



**Evangelical Lutheran Church in Kenya Registered Trustees v  
First Capital Kenya Limited (Commercial Case 416 of 2018)  
[2024] KEHC 13720 (KLR) (Commercial and Tax) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13720 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE 416 OF 2018  
A MABEYA, J  
NOVEMBER 7, 2024**

**BETWEEN**

**EVANGELICAL LUTHERAN CHURCH IN KENYA REGISTERED  
TRUSTEES ..... PLAINTIFF**

**AND**

**FIRST CAPITAL KENYA LIMITED ..... DEFENDANT**

**RULING**

1. This is a ruling on the plaintiff’s application dated 17/7/2023. The same was brought under Article 159(2)(a) and (d) of the *Constitution*, sections 1A, 1B 3A and 95 of the *Civil Procedure Act*. The application sought that time for compliance with the order of 13/10/2022 be enlarged and that the sum of Kshs. 2,447,500/= deposited into the joint interest earning account be deemed to have been duly deposited in compliance with the court order. Further, that the defendant be restrained from executing the decree herein pending determination of *Nairobi Court of Appeal No. E736 of 2022*.
2. The application was supported by the affidavit of George Otieno Ochich sworn on date 17/7/2023. The applicant contended that it was facing financial constraints and that the logistics of opening the account dragged beyond the 45 days period of compliance. That it was wiling to comply save for the said difficulties and is further remorseful for the delay.
3. That the respondent obtained warrants of attachment and on 20/4/2023 proclaimed the applicant’s property. That the warrants were obtained by misrepresentation since the applicant had already deposited the amount on 9/12/2022. That the respondent served the applicant’s finance manager with an undated and unsigned ex-parte Notice of Motion seeking breaking orders on claims that the applicant had denied the respondent access to its premises. That the appeal will also be rendered nugatory.



4. The respondent filed its reply to the application through John Musyoka the respondent's Board chairman sworn on 8/9/2023. It contended that the ruling for stay was delivered on 14/10/22 and period to deposit expired on 26/11/22. That the applicant was indolent since the joint account was opened on 4/12/2022 and the applicant took until 6/12/2022 to deposit the 1 million.
5. That the applicant had not taken any steps as at 3/4/2023 when execution commenced. That parties attempted negotiations and the applicant paid Kshs. 400,000/= into the respondent's account but later deviated and was not keen on the terms of the consent. That it later paid the balance of the decretal amount as security.
6. That the application for extension of time is an abuse of court process and the applicant ought to have sought extension before the time expired if it knew it was not able to comply. Further, that the applicant has not complied with the provisions of Order 42 Rule 6 and the respondent is able to refund the decretal sum if the appeal is successful.
7. That the application is brought after 10 months from date of stay order. The application is intended to have the matter stay in court and to prevent the respondent from reaping the fruits of its judgment. That if the court is inclined to allow the application, the applicant should be ordered to pay the balance of the decretal sum of Kshs. 2,044,000/=, interest of Kshs. 90,000/= and auctioneers fees of Kshs.191,000/= before stay can be allowed.
8. In rebuttal, the applicant stated that the respondent was in charge of opening the joint interest account and is the one who delayed until 2/12/2022. That the delay in depositing the amount was due to financial constraints. That the applicant has since deposited the entire security sum. That the application for extension of time can be made at any time before or after the period has expired. And, that in this case, the application was made expeditiously as it was filed immediately after the applicant had deposited the security amount.
9. Parties submissions are on record which I have carefully considered.
10. Order 50 rule 6 provides: -
  - “ 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.”
11. In applications for extension of time, the matter is in the discretion of the court. However, like in all discretions, the same must be exercised judiciously and not capriciously. In *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR, the Supreme Court held that: -
  - “ ... It is clear that the discretion to extend time is indeed unfettered.
  - It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the



court to exercise its discretion in favour of the applicant. “We derive the following as the underlying principles that a court should consider in exercising such discretion: - 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; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

12. The issue before court is whether the court should extend time for compliance of its order dated 13/12/2022. Whether the execution processes taken were regular and lastly who should settle the auctioneer’s costs.
13. The respondent opposed the application principally because it had been brought after expiry of the period set by the Court. I think there is an answer to that in section 95 of the Civil Procedure Act. It provides: -

“95. 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.”
14. In Compliant International Security Ltd & another v Nicodemus Mulwa Muli [2019] eKLR, the court held that that sections 3A, 95 of the Civil Procedure Act and Order 50 rule 6 of the Civil Procedure Rules are the operative provisions in answering the question whether a prayer to extend interim orders is merited. The provisions give the court unfettered discretion to enlarge time where a limited time has been fixed for doing any act or taking proceedings under the rules or by summary notice or by order of the court.
15. Secondly, the court’s discretion cannot be fettered as submitted by the defendant. The Court is enjoined to exercise its discretion according to the circumstances before it and that discretion should be exercised judiciously. In this case, the applicant has deponed that it faced financial challenges during the 45 day period and was unable to comply within that period.
16. It is also apparent that the joint interest account was not opened until December 2022 while the 45 days period to deposit the decretal sum lapsed on 29/11/2022. It is also clear that by the time the period lapsed the applicant knew it did not have the sum since it only managed to deposit Kshs. 1 million when the account was opened.
17. Although there may have been inordinate delay, I am persuaded that since the order was ultimately complied with, there is no prejudice that the respondent would or might have suffered that cannot be compensated by an order of costs.
18. On execution, I find that the respondent had the right to execute after the order was not complied with. In view thereof, I find that the warrants of attachment and proclamation were not an abuse of process or misrepresentation of facts. The applicant had to pay the full amount on or before 29/11/2022 but was only able to comply on 17/7/2023.



19. My finding is therefore that the respondent had liberty to execute the judgment on 3/4/2023 since stay orders had lapsed. In this regard, the costs of the execution are to be borne by the applicant but subject to verification and taxation of the auctioneer's bill.
20. There is also the appeal that is pending. It is important that the Court of Appeal has the opportunity to pronounce itself on the matter before execution can take place.
21. Accordingly, I find the application to be meritorious and allow the same as prayed. However, the costs of the application assessed at Kshs.15,000/- have to be paid to the respondent. The applicant is also to shoulder the costs of the auctioneers as shall be agreed or taxed by the taxing master of this Court.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

