



Gitonga v Munyaka & another (Suing as the legal representative of the Estate of Joseph Ng'ang'a Munyaka) (Civil Appeal E097 of 2024) [2024] KEHC 14615 (KLR) (15 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14615 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E097 OF 2024
DO CHEPKWONY, J
NOVEMBER 15, 2024**

BETWEEN

STEPHEN GITONGA APPELLANT

AND

LUCY GRACE MUTHONI MUNYAKA 1ST RESPONDENT

JANE NYAMBURA 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOSEPH
NG'ANG'A MUNYAKA**

*(Being an appeal from the Judgment of Honourable Brenda Ofisi
delivered on 9th May, 2024 in Limuru CMCC No.E094 of 2024)*

RULING

1. The Applicant herein filed a Notice of Motion application dated 4th June, 2024 which sought the following orders:
 - a. Spent.
 - b. Spent.
 - c. That this court be pleased to issue an order of stay of execution of the Decree issued in Limuru CMCC No. E094 of 2020 Lucy Grace Muthoni Munyaka & Jane Nyambura (Suing as the Legal Representative of the Estate Joseph Ng'ang'a Munyaka v Stephen Gitonga & John Karugo Gitagio pending the hearing and determination of the appeal.
 - d. That the costs of this application be provided for.



2. On 18th July, 2024, when the application came before court for interpartes hearing the court noted that the application had been served upon the Respondent on 17th September, 2024 as evidenced by the Affidavit of Service filed but there have been no response filed. The court then proceeded to grant a stay of execution on condition that the Applicant deposits a sum of Kshs.750,000/= and files a Record of Appeal within forty-five (45) days from the date of the order.
3. The Applicant has now filed another Notice of Motion application dated 10th September, 2024 seeking the following orders:
 - a. Spent.
 - b. That there be stay pending hearing and determination of this application.
 - c. That this court be pleased to enlarge time within which the Applicant may comply with the orders of the court issued on 18th July, 2024.
 - d. That costs of this application be provided for.
4. The Application is based on the grounds as set out on its face and the Affidavit in support thereof sworn by Mercy Muyuka on the instant date. According to the Applicant, when the court issued the directions, he relayed the information to the insurer, Madison General Insurance on 24th July, 2024 which, on receipt of the same requested for bank details so it could deposit the decretal sum. The Applicant holds that it requested for the court's bank details through a letter dated 26th July, 2024 but only received the invoice via the eFiling Portal on 13th August, 2024 which had been deposited to the insurer. The Applicant states that unfortunately the insurer was unable to process payment of the decretal sum as it had misplaced the claim file. The said file was retrieved on 3rd September, 2024 and a cheque for Kshs. 750,000/= was immediately forwarded although by then, time within which to comply with the court order had already lapsed.
5. It is the Applicant's contention that he is ready and willing to deposit the security sum and comply as directed by the court and is apprehensive that the Respondent may proceed to execute the decree which will then render the appeal nugatory. The Applicant avers that the delay in compliance has not been inordinate.
6. The Respondents opposed the application through Grounds of Opposition dated 9th September, 2024 wherein it has been argued that the application has been filed out of time as the stay of execution has since lapsed. The Respondents also hold that the Applicant has defied the court orders as neither has the security sum been deposited in court nor the Record of Appeal filed. They go on to state that even though the security sum was deposited on 13th August, 2024 which was past the given timelines and the Record of Appeal is yet to be filed and therefore the appeal should be dismissed. However, the Respondents hold that in the event the court is inclined to allow the application, then it should direct the Applicant to deposit the full amount in a joint interest-earning account in the names of counsel for the parties or pay half of the balance of the decretal sum together with costs to the Respondent.

Analysis and Determination

7. In considering the Notice of Motion application dated 10th September, 2024, the court has read through the Supporting Affidavit and the Annexures attached thereto together with the Grounds of Opposition filed in response thereof and finds that the main issue for determination is whether the court should grant the order for enlargement of time within which the th July, 2024.

Applicant should comply with its orders issued on 18



8. The court has sought guidance in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR, where the court outlined the following principles as guidelines in cases where extension or enlargement of time is sought. That:-
- i. 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;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. Whether the application has been brought without undue delay; and
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time”;
9. Having considered the case and arguments advanced by the Applicant on the reason for the delay in complying with the court orders issued on 10th June, 2024, the enlargement of time were made without unreasonable delay and the reasons for the delay are reasonable. Therefore, in exercise of discretion, and in the interest of fair trial and justice, the court proceeds to grant the Applicant an extension of time as sought in the Notice of Motion application dated 10th September, 2024.
10. As a result thereof, the court orders that:-
- a. The Applicant be and is hereby granted leave to deposit the sum of Kshs.750,000.00 and confirm the same within fourteen (14) days from the date of this ruling.
 - b. The Applicant to file and serve a Record of Appeal within fourteen (14) days from the date of this ruling.
 - c. In the event of default, the application will automatically stand dismissed with no recourse for the Applicant.
 - d. Mention on 2nd December, 2024 for parties to confirm compliance and take further directions.

It is so ordered.

**RULING DATED AND SIGNED AT KIAMBU THIS 15TH DAY OF NOVEMBER, 2024.
(UPLOADED VIA ELECTRONIC MAIL)**

**D. O. CHEPKWONY
JUDGE**

