



Kipchumba & another v Munyao & another (Suing as the Legal Administrator of the Estate of Kyalo Munyao) (Civil Appeal E064 of 2024) [2024] KEHC 14519 (KLR) (6 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14519 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E064 OF 2024
DO CHEPKWONY, J
NOVEMBER 6, 2024**

BETWEEN

EDWIN KIPCHUMBA 1ST APPELLANT

COOPERATIVE BANK FLEET AFRICA LEASING LIMITED .. 2ND APPELLANT

AND

ALBUNUS MUTHI MUNYAO 1ST RESPONDENT

ANNASTACIA MUTHOMI MUNYAO 2ND RESPONDENT

**SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF KYALO
MUNYAO**

RULING

1. In this case, the Applicants filed a Memorandum of Appeal and the Notice of Motion application both dated 29th April, 2024 under Certificate of Urgency.
2. In the application, the Applicant sought for the following orders:-
 - a. Spent;
 - b. Spent;
 - c. That pending the hearing and determination of the Appeal, this Honourable court be pleased to stay the execution of the Judgment rendered in the matter in Kiambu CMCC No.E014 of 2021 – Annastasia Muthini Munyao (Suing as the Legal Representative and Administrator of the Estate of Kyalo Munyao) and Albanus Muithi Munyao (Suing as the Legal Representative and Administrator of the Estate of Kyalo Munyao –vs- Edwin Kipchumba & 2 Others) delivered on 2nd April, 2024 by Honourable Emily Ominde.



- d. That the costs of and incidental to this application be provided for.
3. On 3rd May, 2024, this Court granted the Applicant temporary stay of execution of the Judgment dated 2nd April, 2024 in Kiambu Chief Magistrate's Court, civil Suit No.E014 of 2021 on condition that the Applicants deposit a sum of Kshs. 1,000,000/= being part of the decretal sum in an joint escrow account in the name of the advocates on record for the parties within 30 days, which orders were to automatically lapse if the Applicant failed to fulfil this condition.
 4. Later, the Applicants filed another Notice of Motion application dated 2nd July, 2024 seeking enlargement of time within which to deposit the said sum of money and on the same day, the court issued an order enlarging time within which the Applicant would deposit the said sum of money for a further thirty (30) days.
 5. The Respondents also filed an Application dated 2nd July, 2024 which they were seeking the court to vary the orders requiring the sum of Kshs.1,000,000/= being deposited into an account and instead an order issue that the Applicant pays the Respondents the said sum to cater for her needs together with those of her children and the balance of the decretal sum to abide the outcome of the appeal. They have further urged the court to compromise the Notice of Motion application dated 29th April, 2024 so that the matter could proceed for hearing of the main appeal.
 6. When the matter came to court on 8th August, 2024, the counsel for the Applicant urged the court to enlarge time within which to deposit the money into the escrow account. He also stated that since their two applications have not been responded to, the same be allowed as prayed.
 7. The court notes that there is a Replying Affidavit filed by Annastacia Muthini Munyao sworn on 5th August, 2024 wherein she holds that the application is an afterthought aimed at delaying the court process. According to her, the appeal is not arguable and does not have any probability of success, and thus should not be allow the application. She states that she obtained Judgment in the trial court after waiting for trial to end for so long and that she is an eighty (80) years old woman who takes care of the deceased's children, that it would be a travesty of justice if she is denied the fruits of her Judgment.

Analysis and Determination

8. The court has considered the applications and read through the grounds upon which each is premised on their faces and respective Supporting Affidavits. The question for determination is whether the court should enlarge time within which to deposit the security sum as directed on 3rd may, 2024.
9. On enlargement of time, Section 95 of *Civil Procedure Act* provides that:-

[95] Enlargement of Time

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.
10. Order 26 of the Civil Procedure Rules provides for security for costs in the following manner:-

[Order 26, Rule 1.] Security for costs.

(1) In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party.

[Order 26, Rule 5.] Effect of failure to give security.



1. If security for costs is not given within the time ordered and if the Plaintiff is not permitted to withdraw the suit, the court shall, upon application, dismiss the suit.
 - (2) If a suit is dismissed under subrule (1) and the plaintiff proves that he was prevented by sufficient cause from giving the required security for costs the court may set aside the order dismissing the suit and extend the time for giving the required security.
11. The chronology of events in this matter is that on 3rd May, 2024, granted the Applicant conditional order of stay requiring a sum of Kshs. 1,000,000.00 being part of the decretal sum into a joint escrow account in the names of the advocates for the parties within thirty (30) days from the date thereof, which order was to lapse if the Applicant failed to fulfil the condition. However, on 2nd July, 2024, the Applicants filed another application dated 2nd July, 2024 in which they sought extension of time within which to deposit the security sum to be extended and the court extended the same for a further thirty (30) days period. It will be noted that this application was filed a day shy of the day the parties were to attend court and confirm compliance of directions issued on 3rd May, 2014.
 12. The Respondents on the other hand had filed a Notice of Motion application dated 2nd July, 2024 seeking to have the court vary the order for extension of time within which the Applicant is to deposit security and compel them to pay the said sum to the Respondent, have the application dated 29th April, 2024 compromised so that the parties could proceed with hearing and determination of the appeal and the balance of the decretal sum of Kshs.2,920,854 to abide the outcome of the appeal.
 13. On 8th August, 2024, the Applicants' counsel attended court and sought to have their application dated 29th April, 2024 and 2nd July, 2024 allowed in the terms presented as they were unopposed. It is worth noting that even on this day, it is not clear whether or not the Applicants have deposited the said money into the joint account as directed by this Court on 3rd May, 2024 and extended on 2nd July, 2024 and yet it is clear that the orders of stay were to automatically lapse on 3rd August, 2024 in case of default by the Applicant.
 14. It will be noted that counsel for the Applicant told court that the reason they had not complied is because they had sent documents to their counterparts but after several follow-ups, they had refused to honour the same. But counsel did not avail evidence to confirm this claim or justification as to why they had not complied with the court orders issued on 3rd May, 2024 and extended on 2nd July, 2024.
 15. The court also notes that the application was filed way back on 29th April, 2024 and the Applicant was seeking stay of execution pending the hearing and determination of the appeal. The orders granted on this application having automatically lapsed on 3rd August, 2024, this Court finds there is no orders to extend.
 16. Therefore, the Notice of Motion applications dated 29th April, 2024 and 2nd May, 2024 respectively have been overtaken by events and are hereby dismissed with costs to the Respondents.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 6TH DAY OF NOVEMBER , 2024.

D. O. CHEPKWONY

JUDGE

