



Langat v Macharia & another; Trustees Njoro Country Club (Interested Party) (Miscellaneous Application E124 of 2024) [2024] KEHC 16202 (KLR) (16 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16202 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS APPLICATION E124 OF 2024
PN GICHOHI, J
DECEMBER 16, 2024**

BETWEEN

DAVE LANGAT PLAINTIFF

AND

STEPHEN MACHARIA 1ST DEFENDANT

STEPHEN KIARIE 2ND DEFENDANT

AND

TRUSTEES NJORO COUNTRY CLUB INTERESTED PARTY

RULING

1. The subject of this Ruling is the Plaintiff/ Applicant's Notice of Motion dated 25th April, 2024 and brought under Section 1A, 1B and 79 of *Civil Procedure Act* and Order 51 Rule 1 and 42 Rule 6 of the Civil Procedure Rules seeking for Orders: -
 1. Spent.
 2. That this Honourable Court be pleased to grant leave to the Applicant to file and serve Memorandum and Record of Appeal out of time against an Order delivered on 23rd August, 2023 and a ruling delivered on 15th November, 2023 by Honourable Prisca Nyotah (SRM).
 3. That the Honourable Court be pleased to order that there be a stay of execution against the compromised order rendered on 23rd August 2023 and ruling on 15th November 2023 by Hon. Prisca Nyotah in the above Civil Suit pending the hearing and determination of the appeal or intended appeal against the compromised order and the ruling in Nakuru by Magistrate's Court Civil Suit No. E476 of 2023.



4. That this Court orders that the effect of the expulsion letter dated 12th September 2023 irregularly addressed to the Applicant terminating his membership under ulterior motives be stayed until the intended appeal is heard and determined.
2. The grounds of this application and the Applicant's Supporting Affidavit dated 25th April, 2024 are that upon receiving the impugned decision of the court in Nakuru Case No. E476 of 2023, the Applicant herein advised his then advocate on record at the time to appeal against the said decision. However, his advocate did not act on the instructions and instead his phone went off, delaying the lodging of the Appeal and the filling of this application.
3. He states that he still wishes to appeal against the decision by the trial court and urges that he be granted leave to file and serve Memorandum of Appeal out of time. He attributes the delay to mistake of his former advocate which occurred due to break down of communication.
4. He further states that the intended appeal has a high probability of success and that he will be greatly prejudiced and the appeal rendered nugatory if stay orders are not granted.
5. He states that he has suffered irreparable harm by losing membership and being expelled from the Respondent Club which action he terms illegal hence the reason he is beseeching this Court to grant stay orders to allow him continue being a member of the Club as the intended Appeal is being heard and determined.
6. He contends that the trial court acted in excess of her powers in closing his file at ex-parte stage, effectively locking out and frustrating his advocate from articulating the application that was before court. He further states that the magistrate was biased in favour of the Respondent.
7. In opposition to this application, the Respondents filed a Replying Affidavit sworn on 28th May, 2024 by Stephen Macharia (1st Defendant/Respondent) in his capacity as the Chairman of Njoro Country Club and with authority of the 2nd Respondent who is the 2nd Defendant and Secretary of the said Club.
8. He states that the application filed herein is bad in law, unmerited and does not meet the threshold to warrant issuance of the orders sought. He urges that it be dismissed with costs.
9. It is deponed that the application is misconceived for having been made in contravention of Section 51 rule 13 (1) of the Civil Procedure (Amendment) Rules, 2020 and Section 5 of the [Oaths and Statutory Declarations Act](#) in that the Notice of Motion is undated and the Affidavit in support of the application is unsworn. That in the circumstances, both the application and the Supporting Affidavit are defective and incompetent.
10. Further, it is deponed that this application was filed 7 months after the delivery of Ruling subject of Appeal but no good and sufficient cause has been by the Applicant for not filing the Appeal within the stipulated timelines.
11. It is further deponed that the lower court's ruling was delivered on 23/8/2023 and that at all material times, the Applicant was represented by an advocate and that contrary to the Applicant's allegation that the delay in filling the Appeal was occasioned by his former advocate, he stated in his Affiant that when the trial court delivered the subject ruling on 23rd August 2023, he (Applicant) instructed the firm of M/S Nyagaka S.M & Co. Advocates to file an application seeking inter alia, to re-open the case for hearing and for the firm of Nyagaka & Co. Advocates to be allowed to come on record for the Applicant. The said application was heard and orders granted as prayed.
12. The Respondents contend that instead of taking action and moving the court to have the matter heard, the Applicant filed an application dated 16th January, 2024 seeking for recusal of Hon. Prisca Nyota.



13. They contend that directions were taken that the said application be served for inter-partes hearing. However, on the date of hearing, the Applicant informed the court that he had filed an Appeal.
14. It is deponed despite that, the Applicant did not move the court on the fate of the application. The court eventually struck out the application for recusal and the matter was given a mention to ascertain the outcome of this Application. In the circumstances, the Respondents contend that the delay in filling the Appeal cannot in any way be attributed to the erstwhile Advocate.
15. The Respondents term the application herein an abuse of the court process meant to shield the Applicant from due process of law having not complied with court orders for reopening of the case for consideration but instead filed several applications which forced the Respondent to incur expenses to defend the said applications.
16. On whether the Application for stay of execution is merited, the Respondents deponed that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so is fettered by three conditions namely; establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security which must be met simultaneously/conjunctively.
17. The Respondents therefore contend that the intended Appeal herein does not raise any triable issues, is unmerited and has nil chances of success as the trial court carried out its duties properly and its determination was in accordance with the law and the evidence on record.
18. Further, they contend that stay of execution of the court's Orders issued on 23/8/2023 is unattainable since the subject matter of the orders, which is the Annual General Meeting of the Interested Party herein, was conducted in compliance with the court's Orders issued on 23/8/2023 and therefore, the subject matter of the Orders issued is long spent.
19. Further, the Respondents deponed that the Applicant herein has not specifically stated why he needs stay of execution orders and the exact Order he needs stayed and therefore, such stay orders cannot be granted. They further state that the Applicant has not demonstrated any substantial loss he will suffer if the orders are not granted. In the circumstances, they contend that the Applicant is a vexatious litigant who is not vigilant with the many applications filed and therefore, he is not deserving of the orders sought.
20. In a rejoinder vide a Further Affidavit sworn on 29th May, 2024, the Applicant states that the Respondent did not comply with the Court Order of 23rd August, 2023, since no amendments of the notice was done before the same was circulated.
21. He further states that though there is no financial loss demonstrated, he has been a member of the club since 2016 and therefore, losing membership has caused him great embarrassment, mental anguish and emotional stress.
22. He states that he has only filed one Application in the lower court and another before this Court. He therefore denies the Respondents' allegations that he has filed several many applications that derailed him from filling the Appeal.
23. Directions were taken for the application to be canvassed by way written submissions. The Respondents opted to rely on the affidavits filed while the Applicant filed his submissions on 9th July, 2024.
24. The Applicant submitted that the Replying Affidavit was filed out of time without leave of Court and therefore, it should be struck out and the application herein be allowed as unopposed.



25. Arguing that this Court has jurisdiction to handle the application before it as per Article 165 of *the Constitution*, the Applicant submitted that under section 79G of the *Civil Procedure Act*, this Court has power to grant leave and enlarge time to file such an Appeal.
26. The Applicant then embarked on issues that encroach on the merits of the intended Appeal as he responded to the issues in the Replying Affidavit.

Determination

27. Having heard both parties on the application and the affidavits by both parties together with the submissions by the Applicant, the issues for determination: -
 1. Whether both the application and the Supporting Affidavit are defective and incompetent.
 2. Whether the Respondents' Replying Affidavit was filed out of time without leave of Court and hence calling for striking out.
 3. Whether the enlargement of time to file Appeal out of time is merited.
 4. Whether the stay of execution Application is merited.
 5. Whether the Applicant's membership can be reinstated pending the intended Appeal.
28. On the first issue, this Court is alive to the fact that the Applicant herein is acting in person and drew the pleadings as such. It is noted that the application is duly dated and signed by the Applicant. The Affidavit in support is also duly signed and dated by the Applicant. The said Affidavit bears the stamp of Ombongi O. Douglas Advocate & Commissioner for oaths, P.O Box 2751 10140 Nyeri and bears a signature thereon.
29. The Further Affidavit is also drawn and dated by the Applicant. The stamp is said to be of an Advocate & Commissioner for Oaths one Joseph Tarus but the middle name and address are not very clear. In the circumstances and considering the nature of the application herein, this Court opts to deal with substance rather than the form.
30. Regarding the second issue, it is noted that at certificate stage on 2nd May 2024, this Court certified the application as not urgent and directed service on the Respondents within 7 days and that the Respondents file and serve their responses within 14 days. It is not clear when they were served. The Replying Affidavit is sworn on 28th May 2024 a day before the matter came for directions as scheduled. This Court finds no reason to strike it out.
31. On the third issue, Section 79G of the *Civil Procedure Act* provides that: -

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
32. The Applicant herein has to give good and sufficient reason for not filing the Appeal on time. In considering application for extension of time to file appeal, the Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd [2003] eKLR* emphasised decision of the Court in *Leo Sila Mutiso v Rose Hellen*



Wangari Mwangi, (Civil Application No Nairobi 255 of 1997) (1999)2 EA which expressed itself thus:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are:

- a. First, the length of the delay:
- b. Secondly, the reason for the delay:
- c. Thirdly (possibly), the chances of the appeal succeeding if the application is granted: and,
- d. Fourthly, the degree of prejudice to the respondent if the application is granted.”

33. In this case, there are two decisions which are subject of this Ruling. These are the decision of 23rd August, 2023 and the one of 15th November, 2023.
34. The application herein was filed on 25th April, 2024 about 8 months and 5 months respectively. The reason given for delay is that the Applicant’s erstwhile Advocate did not act on instruction given to him on time and that before instructing another advocate, time within which an Appeal had already lapsed.
35. The Respondents objected to the reason given and stated that the Applicant herein, upon delivery of the decision of 23rd August, 2023, instructed another firm of Advocate, being Nyagaka S.M & Co advocates who came on record and filed an application of 8/9/2023 seeking to reopen the trial court case.
36. That application was heard and granted by the ruling dated 15/11/2023, which is also subject of the Appeal and that in the circumstances, the Applicant was aware of the court Orders and therefore cannot blame his first advocate when he had instructed a second advocate to act for him. It is further stated that the Applicant filed yet another Application of 16/1/2024 but failed to prosecute and instead filed this application.
37. From the material before this Court, it is confirmed that that the Applicant actively participated in the trial court proceedings. However, in his Supporting Affidavit, he states that there was break down of communication with his second advocate too and therefore, he was unable to file the Appeal on time and that he did not get advice regarding timeline of filling the Appeal.
38. Though the Applicant’s ignorance of the law cannot be taken as a defence, the explanation given that there was breakdown of communication between him and his advocates which prompted him to file this application in person is reasonable. It is in the interest of justice that he be given a chance to pursue his Appeal.
39. On the issue of stay of execution, Order 42 Rule 6 of the Civil Procedure Rules, 2010 requires that the applicant satisfies:- substantial loss, sufficient cause to warrant grant of stay and the provision of security for the due performance as will ultimately be binding.
40. What is being sought here is stay of execution of the Order of 23rd August, 2023, which had directed the Respondent to amend the notice to include the agenda in the letter of 29th July, 2023 and to circulate the notice afresh before the Special General Meeting.



41. As per the trial court's Ruling of 15th November, 2023, the Special General Meeting was held on 29th September, 2023 and therefore, that the Order has been overtaken by events as rightly indicated by the trial court. In the circumstances, there is nothing to be stayed with regard to the Order of 23rd August, 2023.
42. On the Ruling of 15th November, 2023, the trial court made orders allowing the Applicant advocates (S.M Nyagaka) to come on record and reopened the suit for consideration as per the plaint as prayed by the Applicant. Though some of the prayers sought in the application were disallowed and are subject of the Appeal, issuing stay of execution for the order granted does not have any effect. The Orders sought were granted in favour of the Applicant herein and therefore cannot be aced by the Respondents.
43. On the prayer for stay of the letter of 12th September, 2023, the Applicant has laid no basis for the said prayer for consideration by this Court. It is discerned here that when the suit was reopened, the issue was revived and remains alive before the trial court and is yet to be heard and determined by the trial court. In those circumstances, the prayer for stay of the expulsion letter cannot issue.
44. In conclusion, this Court issues the following Orders: -
 1. Leave be and is hereby granted to the Applicant to file his Appeal out of time on condition that he files and serves the Memorandum of Appeal and the Record of Appeal within 30 days from the date of this ruling.
 2. The prayer for stay of execution is disallowed.
 3. Costs to abide the outcome of the intended Appeal.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 16TH DAY OF DECEMBER, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Dave Langat – Applicant in person

Ms Mwashu for Mr. Githiru for Respondents and Interested Party

Ruto- Court Assistant

