



Musyoki & another v Nyong'a & another (Suing as the Legal Administrators of the Estate of the Late Morris Matheka Mulei - Deceased) (Civil Appeal E120 of 2024) [2024] KEHC 15939 (KLR) (17 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15939 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E120 OF 2024
FR OLEL, J
DECEMBER 17, 2024**

BETWEEN

ALPHONSE MBINDA MUSYOKI 1ST APPELLANT

PHYLIS MUTHEU MBINDA 2ND APPELLANT

AND

ESTHER M'MBONE NYONG'A 1ST RESPONDENT

MONICA MWIKALI MULEI 2ND RESPONDENT

**SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF THE LATE
MORRIS MATHEKA MULEI - DECEASED**

RULING

A. Introduction

1. The Application before this court is the Notice of motion application filed on 04.10.2024 brought pursuant to the provisions of law set out therein. The Applicant's seek the following prayers, that;
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. Pending hearing and determination of the appeal, the Honorable court be pleased to review its orders of 10th July 2024 and substitute them with an order directing that security of the appeal in the sum of Kshs 1,000,000/= be deposited in court in two installments of Kshs 450,000/= within 7 days of determining of this application and the balance of kshs 550,000/= be deposited by 23rd December 2024.



- e. Pending hearing and determination of the appeal, the honorable court be pleased to review its orders of 10th July 2024 and extend the period for the applicant's deposit of the security of this appeal of Kshs one million to such period as it may deem fit.
 - f. Such other orders as the court may deem fit.
 - g. That costs of this Application be in the cause.
2. The Application is supported by the grounds on the face of the said application and the supporting affidavit of the first Applicant, Alphonse Mbinda Musyoki, who depones that this court had stayed the judgment appealed against on condition that he deposits a sum of Kshs 1,000,000/= as security of the Appeal within 90 days. Owing to their dire financial situation, they had conducted a harambee and realized Kshs 450,000/= and were confident of raising the balance of Kshs 550,000/= by 23rd December 2024.
 3. Their advocates representative had visited the registry in order to deposit the available sum, but their request was declined with the registry staff advising that they could only process an invoice for the entire amount as directed by court. His advocate had also reached out to the respondent's counsel and requested that they be indulged and be granted extra time but their request was declined. They had acted in good faith and were desirous of honouring the terms of the stay orders earlier granted. In the obtaining circumstances it was just and proper for the court to grant the orders sought.
 4. The application is opposed by the respondent, who did file her replying affidavit and preliminary objection both dated 14.10.2024. she stated that the application was res judicata and did not meet the threshold required under Order 45, Rule 1 of the Civil procedure rules, hence a non – starter. The court had been lenient and magnanimous with the applicants and only directed them to deposit a sum of Kenya shillings One million as against the outstanding decretal amount of Kenya shillings seven million. A review of the orders issued would disadvantage them and leave them in a worse position against the spirit of equity and equality before the law.
 5. Further, the application as filed did not meet the consideration of review as the reasons advance of inadequacy of funds was not a plausible reason the basis of which orders sought could be granted and it was clear that the applicant's intention was to frustrate her by prolonging litigation and abusing the court process. She urged the court to balance both parties' interest and find that the said application was not merited and be pleased to dismiss the same.

B. Analysis & Determination

6. I have carefully considered the Application and corresponding affidavits thereto on record. The respondent did raise a preliminary objection and stated that this application was res judicata and further did not meet the threshold required under order 45, Rule 1 of the Civil procedure Rules. I have considered the said objection and find that it is only prayer (c) sought, which had been earlier determined vide this court's ruling dated 10th July 2024 and cannot be reargued again. The other prayers sought for review and extension of time to comply with the said orders are not res judicata.
7. The applicant seeks for review of the earlier orders issue don 10th July 2024 and the court be pleased to allow him to deposit the security in court by two instalments of Kshs 450,000/= which he already had and annexed his NCBA bank statement to prove the same and also extend time and grant him until 23rd December 2024 to raise the balance of the security amount being Kshs 550,000/=.



8. Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure summarize the circumstances/ conditions under which orders for review may be issued and they include where the applicant shows :
 - a. discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
 - b. on account of some mistake or error apparent on the face of the record,
 - c. for any other sufficient reason desires to obtain a review of the decree or order may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
9. The applicant does not seek review based on discovery of new evidence nor do they aver that there is a mistake or error apparent on the face of the record. They have basically advanced what they consider to be sufficient reason and grounds the basis upon which the said orders maybe reviewed.
10. As regards “sufficient reason” and “discovery of new evidence” the Court of Appeal in *Pancras T. Swai vs Kenya Breweries Limited, Civil Appeal No.275 of 2010* made the observation that:

“As repeatedly pointed out in various decisions of this Court, the words, “for any sufficient reason” must be viewed in the context firstly, of Section 80 of the *Civil Procedure Act*, Cap 21, which confers an unfettered right to apply for review and secondly, on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order. In *Sarder Mohamed vs Charan Singh Nand Sing and Another* (1959) EA 793, the High Court correctly held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate. In *Shanzu Investments Limited vs Commissioner for Lands* (Civil Appeal No. 100 of 1993) this Court with respect, correctly invoked and applied its earlier decision in *Wangechi Kimata and Another vs Charan Singh* (C.A. No. 80 of 1985) (unreported) wherein this Court held that;

“any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the *Civil Procedure Act*; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”
11. Also, to be included as part of sufficient reason is where the impugned order if reviewed, would lead the court in promoting public interest and enhancing public confidence in the rule of law and the system of justice: see *Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited* (supra).
12. The applicant has annexed his bank statement to prove that he had raised Kshs 450,000/= and sought to have the same deposited in court and also sought to be accommodated by the respondent’s counsel but was not successful, thus filed this application seeking to settle the said amount in two instalments and time be extended for him to do so.
13. While considering the applicants prayer, the court too has to similarly consider the overriding objective and balance the interest of the defendant to ensure, they are not disadvantaged by prolonged litigation resulting in them being denied the fruits of the decree, while at the same time balancing it with the appellants right to have the appeal heard and determined on merit. The Court, in exercising



its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.

14. The court in balancing the two contrasting rights is guided by the provisions of Article 159(2)(d) of *the Constitution* and Section 1A and 1B of the *Civil Procedure Act* in administering justice. The focus being on substantive justice, rather than procedural technicalities, and the just, efficient and expeditious disposal of cases. At this point the court appreciate the sentiments expressed by the High Court in John Gachanja Mundia vs. Francis Muriira Alias Francis Muthika & Another [2016] eKLR that:

“..... However, I will be guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice in *the Constitution* as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief.”

15. The applicant did prove that they made positive effort to comply with the stay condition issue 10th July 2024 but was not successful. He seeks until 23rd December 2024 to deposit the entire amount and considering that is only a few days from the time of delivery of this ruling, it is in the greater interest of justice to so grant the order sought.

C. Disposition

16. Taking all relevant factors into consideration, I do grant issue the following orders;
- a. Time to deposit the security of Kenya shillings One Million (Kshs 1,000,000/=) in court as directed by this courts orders issued on 10th July 2024, is extended by 7 days from the date of delivery of this ruling .
 - b. In default, the stay orders will be deemed to have automatically collapsed and the respondent will be at liberty to execute.
17. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 17TH DAY OF DECEMBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 17th day of December, 2024.

In the presence of;

Mr. Nderitu for Appellant

N/A for Respondent

Susan/Sam - Court Assistants

