



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. CIVIL APPLICATION NO. 301 OF 2017

SIMON KIOKO MUNYILU.....1st APPLICANT

NGUGI MICHAEL.....2nd APPLICANT

VERSUS

JOHN PHILIP NZIOKA KILONZO (Suing as representative of the estate of

JONES KIMEU KILONZO (deceased).....RESPONDENT

R U L I N G

1. This is an Application by the Applicant dated 20/06/2018 seeking for extension of interim orders of stay of execution issued on 5th October, 2017 on grounds *inter alia*: that the court had granted orders of stay of execution and the matter was to be mentioned on 28th November, 2017, the date of expiry of the interim orders; that the said date fell on a public holiday and the interim orders were not extended and which lapsed and the Applicant was unable to get an extension of the said interim orders and thus filed this Application; that the Respondent has proceeded to extract warrants of execution and has served a proclamation notice on the Applicant dated 14th June, 2018 and that if the execution proceeds in the lower court, the intended appeal will be rendered nugatory.

2. The Applicants in the supporting affidavit maintains that the order of stay that was granted by this honourable court was not extended and there is a proclamation notice that has been issued hence execution of the judgment of the lower court is imminent. The Applicant has annexed a copy of the order given on 4th October, 2017 as well as a proclamation notice hence showing that execution is imminent and the stay order has not been extended and which seriously prejudices the Applicants whose appeal is pending determination.

3. The Application is opposed vide the grounds of opposition dated 28/06/2018. The Respondent finds this Application to be *res judicata* and to be an afterthought. First, they point out that the Application has been brought eight months after the interim orders were granted. Secondly, they find the delay in-excusable. Third, the Respondent points out that the law is that a matter that is already heard and determined cannot be relitigated upon.

4. The Applicant seeks orders for extension of orders for stay of execution of the judgment rendered between the parties in the lower Court. The intended appeal is from a judgment delivered in Kangundo SPMCC No. 13 of 2016 on 26/07/2017. The Application is supported by a Supporting Affidavit by the Senior Claims Officer at Directline Assurance Limited, the insurer of the Applicants' motor vehicle which was involved in a road traffic accident which was the subject of the suit in the lower Court.

5. The Application was canvassed by way of written submissions. I have considered the said submissions and the authorities cited.

6. The issues for determination are whether the application is *res judicata* and whether the Applicant is entitled to an extension the interim orders.

7. Section 3A, 95 of the Civil Procedure Act and Order 50 rule 6 of the Civil Procedure Rules are the operative parts in answering the question whether the prayer to extend interim orders is merited. The sections grant the courts unfettered discretion to enlarge time where a limited time has been fixed for doing any act or taking proceedings under these rules or by summary notice or by order of the court.

8. Furthermore the legal basis for grant of stay pending appeal is found in Order **42 Rule 6 of the Civil Procedure Rules, 2010**. Basically, the Applicants are required to demonstrate that:-

Substantial loss may result unless the order is made. The application has been made without unreasonable delay. Such security as the court orders for the due performance of the decree has been given before the applicant.

9. In Nicholas Kiptoo Arap Korir Salat Vs. The Independent Electoral And Boundaries Commission & 7 Others [2014] eKLR the court held thus:

“..... 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.”

10. The last point taken up by the Respondent is that the Application is incompetent because it is *res judicata*. In this regard, the Respondent has called to their aid judicial authorities that are of persuasive value: Hunker Trading Company Limited v Elf Oil Kenya Limited [2010] eKLR and Mohammed Azim Manji v Perpetual Katumbi Nzioki[2017] eKLR. However the Applicant’s earlier Application is yet to be determined and therefore it cannot by any stretch of imagination be *res Judicata*. The Application herein is only seeking for extension of orders.

11. I will begin by dealing with this aspect of the Respondent’s complaint. The respondent has opted to file grounds of opposition to matters of fact. Whether or not the applicant has sought to get a mention date for the application and seek extension of interim orders is a matter of fact that has not been controverted. In addition, the respondent in his submissions has stated that the application has no merit but has no factual basis. In Daniel Toroitich Moi vs. Stephen Muriithi & Another [2014] eKLR, the Court of Appeal expressed itself thus in this regard:

“...Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all.”

Thus, without documents having been availed by the respondent to the Court confirming the subject matter of **the application on 18th October, 2017** and its nexus with the instant application, or whether indeed any correlation exists therein in terms of the orders granted herein, the ground that the matter is *res Judicata* is not convincing at all. The present Application merely seeks for extension of the orders earlier granted and is not a similar Application.

12. Having concluded that the Application is not incompetently before the Court, I will now consider the Application on its substance. Our case law has now provided guidelines on what will be considered “just terms” for purposes of permitting a party whose time is limited by the rules to extend such orders. The most important consideration is for the Court to advert its mind to the fact that the power to extend time is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour.

13. Some of these factors were suggested by the Supreme Court in Nicholas Kiptoo Arap Korir Salat Vs. The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR. They include the following:

- a. **Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court;**
- b. **Whether there would be any prejudice suffered by the respondent, if extension is granted;**
- c. **Whether the application has been brought without undue delay; and**
- d. **Whether in certain cases, like election petitions, public interest should be a consideration for extending time.**

14. I will now consider the Applicants’ application for extension of time against these factors.

15. The Respondent complains that this Application is in bad faith because the Applicant has been jolted by the proclamation. I do not think there is any such principle that says that if you have succeeded in getting a stay order you are precluded from having it extended if it has lapsed and you have demonstrated the same to court.

16. Looking at all the factors in totality, I am unable to agree with the Respondent that this Application is an abuse of the Court’s process and has been brought as an afterthought.

17. First, I note that the Application was brought after time had run out and that attempts had been made to seek a date to have the orders extended. I do not find this to be an afterthought under the circumstances. I believe that the Applicants have acted prudently in getting the

order extended formally. It would be unfair to shut out the Applicant from the equitable relief. It is common knowledge that blunders are always made. The Respondent would be comfortably compensated by an award of costs.

18. I am unable to see any substantial adverse effects granting this order will have on the Respondent other than permitting the Applicants to exercise a preciously cherished right to be heard. In any event both parties herein had already filed their submissions to the Application dated 4/10/2017 and the prudent thing to do is to reserve a date for ruling. Again the Appellant's appeal still remains to be determined.

19. In the result, I find the Appellant's Application dated 20/06/2018 has merit. The same is allowed in terms of prayer (2) thereof. As the parties have already filed written submissions to the Application dated 4/10/2017, a date for ruling is to be reserved forthwith. The costs of the present Application is awarded to the Respondent.

It is so ordered.

Dated and delivered at **Machakos** this **4th** day of **December, 2018**.

D. K. KEMEI

JUDGE