

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
(CORAM: R. MWONGO, J.)
CONSTITUTIONAL PETITION 7 OF 2021

IN THE MATTER OF CONTRAVENTION AND THREATENED CONTRAVENTION
OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 22,26, 27,28 OF
THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE VIOLATION OF NATIONAL VALUES AND PRINCIPLES
OF GOVERNANCE UNDER ARTICLE 10 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF CONTRAVENTION AND THREATENED CONTRAVENTION
OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 48 OF THE
CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE VIOLATION OF NATIONAL VALUES AND PRINCIPLES
OF GOVERNANCE UNDER ARTICLE 10 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF STANDARDS 2295-1:2018, 2295-2:2018

-BETWEEN-

ROAD SAFETY ASSOCIATION OF KENYA

SUING

THROUGH

DAVID

KIARIE,

CHAIRMAN.....PETITIONER/APPLICANT

-AND-

THE CABINET SECRETARY FOR TRANSPORT.....1ST RESPONDENT

THE CABINET SECRETARY FOR INTERIOR.....2ND
RESPONDENT

THE NATIONAL TRANSPORT SAFETY AUTHORITY.....3RD
RESPONDENT

THE INSPECTOR GENERAL OF NATIONAL POLICE SERVICE.....4TH
RESPONDENT

THE COUNTY GOVERNMENT OF EMBU.....5TH
RESPONDENT

KETNNO SACCO.....6TH RESPONDENT

NYAGA NJERU CHRISTOPHER.....7TH
RESPONDENT

THE HON. ATTORNEY GENERAL.....8TH RESPONDENT

R U L I N G

The Application

1. The Petitioner filed a notice of motion dated 02nd April 2025 seeking the following orders:
 - 1) Spent;
 - 2) Spent;
 - 3) That this Honourable Court be pleased to issue an order of stay of execution of the judgment order delivered on 06th May 2024 and all consequential orders pending the hearing and determination of this application;
 - 4) That court be pleased to discharge, vary or set aside the order issued on 06th May 2024 and reinstate the petition herein;
 - 5) That such other orders as to costs as may appear to be just to be made on this application.
2. The application was premised on grounds that the court dismissed the petition for non-attendance by counsel, a matter that the petitioner should not suffer for. That the applicant's previous advocate failed to communicate the court timelines and case number to the petitioner in time. The petitioner was forced to appoint new counsel to represent him but and by the time the new advocate took up the matter, the petition had already been dismissed.
3. It was the applicant's case that he is keen to prosecute the petition to its logical conclusion if the court will deem it fit to reinstate it, considering that it had reached hearing stage. The applicant is apprehensive that he will suffer irreparable loss if execution is levied by way of auctioning his property since he has been condemned to pay costs but this is a matter of public interest litigation. He stated that the petition touched on an issue of loss of lives through an unroadworthy vehicle
4. The applicant stated that failure to attend court on the hearing date was not intentional/deliberate but it was attributed to failure by his advocate. He urged the court to allow the application since the none of the other parties will be prejudiced. That if the petition is not reinstated, the public will suffer injustice and fairness given the circumstances of the case.

Replying Affidavit

5. The 1st, 2nd, 4th and 8th respondents swore a joint replying affidavit through Janet Wesige SSP. She stated that the application was incompetent and the orders sought should not be granted. That the court exercised its discretion under Article 159(2)(b) of the Constitution in dismissing the petition for non-prosecution. She cited Order 12

Rule 7 and Order 17 Rule 2(1) of the Civil Procedure Rules and stated that there is no sufficient reason provided for reinstating the suit. Moreover, that the application was filed so long after the order was made, thus it is an afterthought.

6. That this conduct amounts to inexcusable delay, laches and lack of candor. She also cited Order 9 Rule 9 of the Civil Procedure Rules and stated that the applicant did not inform the court of the intention to appoint a new advocate or intention to proceed in person. She urged that if the court should allow the application, it should be on condition that the applicant deposits Kshs.3,000,000/= being the taxed costs as security.

Parties' Submissions

7. In his submissions, the applicant relied on Order 12 Rule 7 and Order 10 Rule 11 of the Civil Procedure Rules which empower the court to set aside or vary its own orders. He also relied on the cases of **Jomo Kenyatta University of Agriculture & Technology v Mussa Ezekiel Oebah [2014] KECA 143 (KLR)**, **Patel vs. E.A Cargo handling Services Ltd (1974) E.A. 75 at page 76**, **Absolom Opini Mekenye v James Obegi [2018] KEELC 596 (KLR)** and **Belinda Murai & 9 others v Amos Wainaina [1979] KECA 25 (KLR)**. He submitted that the mistakes of his advocate should not be visited upon him and that sufficient reasons have been provided to reinstate the petition. He also relied on the case of **Philip Keipto Chemwolo & another v Augustine Kubende [1986] KECA 87 (KLR)**.
8. The 1st, 2nd, 4th and 8th respondents jointly submitted that the failure in communication between the applicant and his advocate is not sufficient reason to warrant reinstatement of the petition. They emphasized that the order sought is discretionary as indicated in Order 12 Rule 7 of the Civil Procedure Rules. On this, reliance was placed on the cases of **Thathini Development Company Limited v Mombasa Water & Sewage Company & another [2023] KEELC 641 (KLR)** and **Rajesh Rughani v Fifty Investments Limited & another [2016] KECA 829 (KLR)**.
9. They argued that the long delay is inexcusable and that the reasons given are not plausible, even in light of the oxygen principle. The principle of sufficient cause as discussed by the Indian Supreme Court in the case of **Parimal v Veena [2011] 3 SCC 545**, was relied upon. Further reliance was placed on the case of **Patel v E.A Cargo handling Services Ltd (supra)** in support of the argument that a court's exercise of discretion should serve justice to all parties. They insisted that if the

petition is to be reinstated, the petitioner/applicant should be ordered to deposit Kshs.3,000,000/= as security for costs pursuant to the court's inherent powers under section 3A of the Civil Procedure Act.

10. In his submissions, the 5th respondent stated that the conditions for stay of execution as per Order 42 Rule 6 of the Civil Procedure Rules have not been met. It relied on the cases of **Charles Kariuki Njuri v Francis Kimaru Rwara (suing as Administrator of Estate of Rwara Kimaru alias Benson Rwara Kimaru (Deceased) [2020] KEELC 1122 (KLR)**, **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] KEHC 1094 (KLR)**, **Treasure Industries Limited v Selsar Limited [2025] KEHC 7071 (KLR)**, **Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others [2014 eKLR** and **Shah v Mbogo (1967) EA 116**.
11. It stated that there was no valid explanation for the delay in making the reinstatement application and no security has been offered. That, besides, there is no proof of substantial loss if the order is not granted. Further reliance was placed on the cases of **Muchanga Investments Ltd v. Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR** and **Rai & 3 others v Rai & 4 others [2014] KESC 31 (KLR)**.
12. The 7th respondent relied on Order 12 Rule 7 of the Civil Procedure Rules and the cases of **Hajar Services Limited v Peter Nyangi Mwita [2020] KEHC 4652 (KLR)** and **Hassan & 3 others v Ali & 4 others [2024] KECA 1167 (KLR)**. He stated that the applicant's former advocate served him with a notice to cease acting but the applicant did not respond. The court discharged this advocate because he did not have further instructions from the applicant. He argued that the applicant's argument that he did not know the case number is untenable since he was under obligation to pursue the case to its logical conclusion. He argued that if the court allows the application, it would be a move away from the rules of natural justice.

Issues for determination

13. The issues for determination are:
 - a. Whether an order of stay of execution should be made in light of the court's order of 06th May 2024; and
 - b. Whether the court's order of 06th May 2024 dismissing the petition for non-attendance by counsel should be varied and/or set aside.

Analysis and determination

14. The applicant seeks stay of execution given that the matter was concluded and the 5th respondent's bill of costs was already taxed. Stay of execution orders may be granted only when the court is satisfied of the parameters set out in Order 42 Rule 6(2) of the Civil Procedure Rules have been complied with. The provision states:

“(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

***(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant*” [Emphasis added]**

15. The applicant filed the present application seeking stay of execution and reinstatement of the petition, 11 months after the petition was dismissed for non-attendance by counsel. The reason cited for the delay is that his former advocate did not communicate the case number to him before he stopped acting on his behalf. He explained that it took him a while before he could gather the case details and retain the services of another advocate who is now on record.

16. At the time of filing the application, the bill of costs for the 5th respondent had already been taxed. It was the 5th respondent's argument that if the court should allow stay of execution, the applicant should provide security. In his application, the applicant has not offered any security as incentive for granting stay of execution. The applicant stated that if the order of stay is denied, the public will suffer substantial loss as this is a matter of public interest involving death of elderly members of society.

17. He also stated that if execution is levied against him, he will lose his property. In this regard, substantial loss cannot be pegged on execution because execution is a lawful process which is bound to be carried out following court orders. In **James Wangalwa & Another v Agnes Naliaka Cheseto (supra)**, the Court of Appeal held:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case

here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory. [Emphasis added]

In this case, there is no substantial loss demonstrated, that is capable of rendering the petition nugatory.

18. The second issue is that of reinstatement of the petition. Order 12 of the Civil Procedure rules provides for hearing and consequence of non-attendance. Order 12 Rule 7 of the Civil Procedure Rules provides:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

19. This provision gives the court discretion to consider an application such as this one. Everything depends on the circumstances of the case. In the present case, the applicant’s advocate stopped acting for them and he stated that it took 11 months to find a new advocate and instruct him properly. There is indeed a delay whose explanation is as given in the application.

20. The matter in question is a constitutional and human rights petition. Given its nature, it is important that the issues in the petition be ventilated and a determination be reached. On this basis, it is just that the petition be reinstated. However, since the issue of reinstatement is closely related to the issue of stay of execution, stringent orders must be put in place. Thus, the Court must consider the parties’ equal rights to access to justice as provided for under Article 48 of the Constitution and the spirit of the oxygen principle under section 1A, 1B and 3A of the Civil Procedure Act.

Disposition

21. Ultimately, I am persuaded to allow the application, and I do so in the following terms.

a) The application succeeds with orders as follows:

- i) An order of stay of execution is made on condition that the applicant deposits Kshs.2,500,000/= into court within 14 days of this decision, failing which the stay order shall automatically stand vacated;
 - ii) The court's order delivered on 06th May 2024 dismissing the petition for non-attendance by counsel is hereby set aside and the petition is hereby reinstated for hearing;
 - iii) Costs shall be in the cause.
- b) Orders accordingly.

Delivered electronically, dated and signed at Embu High Court this 19th day of November, 2025, pursuant to notices issued on 10th November and 12th November, 2025 as to electronic delivery.

**R. MWONGO
JUDGE**