



**Kurutu v Simiyu & another (Environment & Land Case
239 of 2018) [2024] KEELC 3541 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3541 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 239 OF 2018**

JG KEMEI, J

APRIL 25, 2024

BETWEEN

JOSEPH MUTURI KURUTU PLAINTIFF

AND

JAMES MANASSEH SIMIYU 1ST DEFENDANT

JOSEPH NDIRANGU T/A NDIRANGU STORES 2ND DEFENDANT

RULING

1. The Plaintiff/Applicant filed the instant Motion dated the 21/2/23 and expressed under Article 159(2) of *the Constitution* of Kenya Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Order 45 rule 1(1) and Order 50 rule 6 of the Civil Procedure Rules, 2010 craving for Orders THAT;
 - a. The Court review paras 24 (b) of its Ruling dated the 17/11/2022 by removing the reference of a period of 30 days and replacing the same with 90 days.
 - b. Without prejudice to prayer No 1 above this Honourable Court be pleased to enlarge the time for paying the security deposit referred to in paragraph 24(b) by 7 days only.
 - c. The costs of this Application be provided.
2. The Application is premised on the grounds annexed thereto and the Supporting Affidavit of Gregory Junior Otieno sworn on the 21/2/2023. The Applicant deponed on the 17/11/22 that the Court delivered a Ruling granting conditional stay of execution subject to the deposit of Kshs. 100,000/- in Court within 90 days and based on the Ruling he advised his client as such. That however upon perusing a scanned copy of the Ruling he noted that there is a clear error at para 24 (b) of the said Ruling in so far as it relates to 30 days instead of 90 days. That it is in the interest of justice that the Ruling be corrected and the Applicant be allowed to deposit security within 90 days as ordered. That



unless the Application is allowed the Applicant stands to be prejudiced on account of an error that cannot be attributed to it.

3. The 1st Respondent did not oppose the Application despite service
4. The 2nd Respondent opposed the Application vide his Replying Affidavit dated the 25/4/2023. He contended that the Application is incompetent, premature and vexatious and an abuse of the process of the Court. That the orders of stay of execution was subject to the deposit of the sum of Kshs. 100,000/- in Court by the Applicant within 30 days and not 90 days as pleaded by the Applicant. That the 30 days period lapsed on the 17/11/22 and the Applicant is yet to comply with the orders. That the Applicant is in willful disobedience of the Court orders issued on the 17/11/2022 and is not entitled to the orders being sought in this current Application. Moreso, he argued that the Applicant has not proffered any justifiable reason for the delay in complying with the orders of the Court yet the Applicants counsel was present online when the Ruling was delivered. That the stay of execution should be waived in favour of the 2nd Respondent to enable him enjoy the fruits of the Judgement as a successful litigant.
5. In addition, he averred that the Applicant has approached the Court with unclean hands. That there is nothing to enlarge in terms of time as the Applicant's Application is already dismissed and the order sought cannot be pegged on a dismissed Application.
6. Parties have filed written submissions which I have read and considered.
7. The key issue is whether the Application is merited.
8. The Courts power to review Judgement is provided under Section 80 of the Civil Procedure Act which states as follows;

QUOTE{startQuote “}

Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is allowed by this Act,
- may apply for a review of Judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.”

9. The above provision is further augmented by Order 45 rule 1 Civil Procedure Rules that;

“ Application for review of decree or order [Order 45, rule 1.]

(1) Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or 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.”



10. Discussing the scope of review, the Supreme Court of India in the case of Ajit Kumar Rath Vs. State of Orisa & Others, 9 Supreme Court Cases 596 at Page 608. had this to say:-

“The power can be exercised on the Application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for tabling it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule.”

11. The Court has reviewed the Ruling delivered on the 17/11/2022 which reads as follows;

- a. There is hereby granted a stay of execution of the Judgment and Decree of the Court issued on the 30/9/2021 and the 7/12/2021 respectively pending the hearing and determination of the appeal lodged in E719 of 2021.
- b. The Applicant to deposit in Court Kshs 100,000/- being security for the due performance of the Decree within a period of 30 days from the date hereof.
- c. In default of b above, the Application shall stand dismissed with no further orders from this Court.
- d. I make no orders as to costs.

12. I have reflected on the Ruling and I find no error or mistake on the record. The Applicant having not demonstrated any error or mistake on record, the Application fails on that ground.

13. On the ground of enlargement of time, Section 95 of the [Civil Procedure Act](#) provides as follows;

“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”

14. Similarly Order 50 rule 6 Civil Procedure Rules provide as follows;

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the Application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any Application to extend such time and of any order made thereon shall be borne by the parties making such Application, unless the Court orders otherwise.”



15. The extension of time is a discretionary remedy. The principles for the Court to consider in such an Application were settled by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat Vs. Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR:-

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

1. 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;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court
 3. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the Respondents if the extension is granted;
 6. Whether the Application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
16. The Applicant has pleaded with the Court to enlarge time to enable him comply with the orders of the Court. The 2nd Respondent is of the view that time lapsed and therefore there is nothing to extend. It is not disputed that the Applicant has filed an appeal vide CA No 719 of 2021 which is pending hearing and determination. It is the view of the Court that if the subject matter of appeal is not preserved it shall be rendered nugatory and the appeal pending may end up being an academic exercise.
17. I have considered the correspondence by the Applicant one of which is a hand-written note where the author indicated 90 days instead of 30 days. The Court has already noted that the period given by the Court was 30 days and not 90 days. Proceeding on the self-imposed mistaken position, the Applicant requisitioned for the cheque through the various correspondences which cheque is dated the 9/1/2023. The totality of the actions by the Applicant is that there is no evidence that he failed to comply in the mistaken belief that the period was 90 days.
18. In the case of *Belinda Murai & 9 Others Vs Amos Wainaina* (1979) eKLR where the Court stated as follows;
- “A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”
19. In the circumstances of this Application the Court is of the view that justice shall be served if the Applicant is allowed to comply with the orders of the Court. Consequently, time is enlarged by another 7 days within which time the Applicant should deposit the sum of Kshs 100,000/- in Court.



20. The Applicant shall meet the costs of the Application in favour of the 2nd Respondent.

21. Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 25TH DAY OF APRIL, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Otieno for Plaintiff

1st Defendant – in person

Ngeresa for 2nd Defendant

Court Assistants – Phyllis/Oliver

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