



REPUBLIC OF KENYA



KENYA LAW

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**Wainaina & another v Ekapel (Civil Appeal E1119 of 2024)
[2025] KEHC 947 (KLR) (Civ) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 947 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1119 OF 2024

TW OUYA, J

JANUARY 30, 2025

BETWEEN

SIMON WAINAINA 1ST APPELLANT

JOSEPH KIHICO 2ND APPELLANT

AND

VINCENT OKWARA EKAPEL DEFENDANT

RULING

1. This is an application for stay of execution and extension of time to lodge and serve a memorandum of appeal against the judgement of Hon. Odera delivered in Milimani SCCC E3855 of 2023 on 31st October 2023.
2. The applicant has brought this application under certificate of urgency praying for orders:
 - a. That this application be certified as urgent and heard ex-parte in the first instance.
 - b. That pending the hearing and determination of this application there be a stay of execution of the judgement and decree dated 31st October, 2023 by the respondent as against the appellants/ Applicants.
 - c. That pending the hearing and determination of the appeal against the judgment and decree of Hon. Green Odera delivered on 31st October, 2024 an order of stay be issued staying execution of the decree scheduled to proceed on 28th October, 2024 by the respondent as against the appellant/applicants.
 - d. That the applicants/appellants be hereby granted an extension of time to lodge and serve a memorandum of appeal against the judgement and decree of the small claims court (Hon.



Green Odera) delivered on 31st October, 2023 in, Milimani SCCC/E3855/2023; Vincent Okwara Vs Simon Wainaina & another.

- e. That the Memorandum of Appeal dated 27th October, 2024 lodged by the Appellants against the judgements and Decree of the small claims court (Hon. Green Odera) delivered on 31st October, 2023 in Milimani SCCC/E3855/2023 be deemed to have lodged within time and this Honourable court be pleased to extend the duration for lodging and service accordingly.
 - f. That the cost of this application be provided for.
3. The application is based on the grounds that:
- i. The small claims court at Milimani vide Hon. Green Odera on 31st day of October 2023 delivered its judgement in favour of the respondent against the appellant/applicants for a total sum of Ksh. 952,388.03
 - ii. The applicants/appellants recently came to learn about entry of the judgement on 18th October, 2024 after they were served with a warrant of attachment of movable property in execution of decree for money as well as warrant of sale of movable property in execution of decree for money both issued on 5th September, 2024 together.
 - iii. The applicants/appellants contend that their previous counsel on record did not communicate with them with regards to the judgement to enable them appeal on time and further contend that mistake of counsel not be visited upon them.
 - iv. The applicants/appellants are aggrieved with the judgement and decree of the Honourable court and have instructed us to appeal the whole judgement as well as file an application for stay of execution in this Honourable court and have since prepared the memorandum of appeal.
 - v. Unfortunately, time for lodging and serving the memorandum of appeal has since lapsed.
 - vi. The matter is extremely urgent as the respondent has extracted a decree and proceeded to issue the applicants with a warrant of attachment of movable property in execution of decree for money as well as a warrant of sale of movable property in execution of decree for money set to be executed on or before the 28th October, 2024.
 - vii. The respondent herein as instructed a firm of auctioneers who have since served the 2nd respondent with a proclamation notice claiming a total of kshs.1,043,665.
 - viii. The applicants/appellants have moved with speed and is therefore imperative that this court do exercise its discretion in their favour and allow this application as the applicants are now exposed to execution of the decree.
 - ix. The respondent will not be prejudiced in any way by this application being allowed by this Honourable court.
 - x. This application together with the applicants/appellants intended appeal will be rendered nugatory if the stay is not granted.
 - xi. That the intended appeal raises serious and pertinent issues of facts and law and is not frivolous.
4. The Application is supported by an affidavit sworn by Joseph Kihiko the 2nd Applicant on 27th September 2024 reiterating the grounds and facts above. The gist of the application is that the Applicant seeks to appeal against the default judgement entered against him on 31st October 2023, for stay of execution of the said judgement, leave to appeal out of time and that the memorandum



- of appeal dated 27th September 2024 be deemed as filed. The reason given for the delay in filing this application is that their counsel did not inform them in time about the default judgement and that they came to learn about it through the auctioneer when they were served with a notice of proclamation on 18th October 2024.
5. The Application is opposed by the Respondent vide a replying affidavit sworn by Vincent Okwara Ekapel on 29th October 2024 annexing a copy of the proceedings, default judgement entered on 31st October 2023 and the Ruling delivered on 12th June 2024.
 6. The respondent has raised three issues in opposition to this application. He avers that the Advocate for the applicant is not properly on record as he has he did hold a valid practicing certificate at the time of filing this application. He also avers that the orders for stay should not be granted because the appeal is non-existent. That the Applicant has not demonstrated that he stands to suffer substantial loss if the stay is not granted. And lastly, that the Applicants have not demonstrated that they are deserving of the equity remedy of stay owing to the inordinate delay taken to file this application. That the said delay has not been sufficiently explained.
 7. The parties opted not to file submissions and have relied on the pleadings and documents filed. The guidelines regarding stay of execution applications are enshrined in Order 42 rule 6 of the [civil procedure rules](#) and para-phrased as here below:
 - a. It is discretionary and can be ordered by the court as may seem just.
 - b. the court must be satisfied that substantial loss may result to the applicant if the order is not granted.
 - c. the application has been made without unreasonable delay.
 - d. such security as the court orders for due performance of such decree or orders as may be binding on him has been given by the applicant.
 8. This court underscores that it is discretionary upon the court to grant the orders prayed for based on the circumstances and what is deemed just. The court will therefore take an issue-based approach considering the pleadings filed by the parties. The first issue for determination is whether the delay to this application by the applicant is inordinate and whether it has been sufficiently explained. The default judgement was entered on 31st October 2023. The applicant has stated that the delay was occasioned by their counsel Mr. Kamau who cut communication with them and did not inform them about the judgement on time until they came to learn about it from the auctioneers who served them with a proclamation notice for kshs.1,043,654.95 on 18th October 2024. The said orders are attached. They state that they have moved with speed since learning of the judgement and filed this application on 27th September 2024.
 9. Going by the proceedings filed in response to this application, the Applicant was represented by Mr. Kamau Advocate who came on record at a point when the period for filing response to the claim had lapsed. His prayer for leave to put in a response was disallowed and judgement in default was entered against the Applicant on 31st October, 2023 for kshs.878,720 with interest from the date of the judgement and costs. Counsel for the Applicant made an application to the Lower Court seeking to have the default judgement set aside. The same was declined vide ruling delivered on 12th June 2024. The reasons granted for the outcome was that the Application for setting aside judgement was made after the expiry of the requisite period to wit; 43 days after the judgement was delivered and the same was set down for hearing 53 days after it was filed.



10. This court observes that the Applicant's case was marred with delay from the word go. His counsel appeared late in the matter on the basis that he was instructed late. His attempt to set aside the judgement was not only late in time but was further delayed for failure to set the application down for hearing. There is no explanation so far as to where the Applicant was all this time. The Applicant has stated that the Counsel Mr. Kamau went quiet on him but there is no indication as to what effort the Applicant made to confirm the status of the case. Records are always available in court and the applicant could have checked the status of the case either physically at the court registry or in the court portal. Besides, there was an intervention vide an application dated 11th December 2023 to set aside the said judgement which was decided vide ruling delivered on 12th June, 2024. This court is not convinced that the Applicant instructed counsel to represent him in the matter in October 2023 and then sat back until October 2024 when the auctioneers showed up. This court finds that there was inordinate delay on the part of the Applicant.
11. The Applicant has blamed their former counsel for the delay. Indeed, it is trite that the mistakes by an advocate should not be visited on the client. However, it is not in every case that a mistake committed by an advocate would be a ground for setting aside orders of the court. In *Savings and Loans Limited v Susan Wanjiru Muritu Nairobi* (Milimani) HCCS No 397 of 2002 Kimaru, J (as he then was) expressed himself as follows:-
- “Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocates failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant. (Emphasis added)”
12. The third issue is the validity of the instant Application based on the Counsel's status with the LSK. The court observes further correspondence from the LSK indicating that Counsel Oyuchio Brian Ochieng who has filed this application on behalf of the Applicants did not hold a valid practicing certificate for the year 2024. This confirms the Respondent's position that the counsel is not properly on record. The Counsel Mr. Oyuchio although served, did not seek leave to respond to this issue meaning that the allegation is true. Section 31 *Advocates Act* section 31 deems unqualified persons to be treated as such by the courts. However, Section 34B does not invalidate legal documents filed by an advocate without a valid practicing certificate. The section provides that;
- “(2) ‘Notwithstanding any other provision of this act, nothing shall affect the validity of any legal document drawn or prepared by an advocate without a valid practicing certificate.’
13. This principle was clearly set down by the Supreme Court in *National Bank of Kenya Limited v Anaj Warehousing Limited* (Petition 36 of 2014) [2015] KESC 4 (KLR) (2 December 2015)



Where it held *inter alia* that:

“.....The guiding principle is to be found in Article 159(2)(d) of the Constitution: “justice shall be administered without undue regard to procedural technicalities.....

68. The facts of this case, and its clear merits, lead us to a finding and the proper direction in law, that, no instrument or document of conveyance becomes invalid under Section 34(1)(a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practicing certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes.

69. While securing the rights of the client whose agreement has been formalized by an advocate not holding a current practicing certificate, we would clarify that such advocate’s obligations under the law remain unaffected. Such advocate remains liable in any applicable criminal or civil proceedings, as well as any disciplinary proceedings to which he or she may be subject.”

Based on the above, this court finds that the documents filed in this application are properly before the court and should not be struck out.

14. It is now the duty of the court to determine whether the Application before it meets the threshold for stay of execution as prescribed under order 42 rule 6. I have considered the application in its entirety and found that the only issue hanging is the delay that has been occasioned in filing for which the applicant blames his counsel. This court is persuaded by the finding in *Savings and Loans Limited v Susan Wanjiru Muritu* Nairobi (Milimani) HCCS No 397 of 2002 Kimaru, J that:

“Having said that, I discourage the conduct of parties to automatically blame their former Counsel when orders are entered against them. In such scenarios as is the present one, the erstwhile Advocates are not given the benefit of tendering evidence to demonstrate whether or not they discharged their duties as officers of the court. Be that as it may, the interest of justice dictates that suits are for sustaining rather than dismissing. (Emphasis mine)”

And Winnie Kibinge & 2 others -vs- March Electricals Limited Civil Case No. 222 of 2010 where it was held:

“it does not follow that just because a mistake has been made, a party should suffer the penalty of not having his case heard on merit.”

Determination

15. Based on the above findings, this court determines that:
- i. The application for stay of execution is hereby allowed.
 - ii. Applicants to deposit the entire decretal amount in court within 30 days from the date hereof failure to which the stay will lapse.
 - iii. The memorandum of appeal herein is deemed as filed.
 - iv. Each party to bear their costs for this application.

DATED, SIGNED AND DELIVERED THIS 30TH DAY OF JANUARY 2025.



HON. T. W. OUYA

JUDGE

For Applicant.....No appearance

For Respondent.....Mitula

Court Assistant.....Martin Korir

