Ags Worldwide Movers Ltd v Karanja t/a Jonatec Enterprises & another (Commercial Suit 301 of 2014) [2025] KEHC 12286 (KLR) (Commercial and Tax) (29 August 2025) (Ruling)

Neutral citation: [2025] KEHC 12286 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL SUIT 301 OF 2014

H NAMISI, J

AUGUST 29, 2025

BETWEEN

AGS WORLDWIDE MOVERS LTD .... PLAINTIFF

AND

JONATHAN KARANJA T/A JONATEC ENTERPRISES .... 1ST DEFENDANT

FRANKLIN ALUKONGO .... 2ND DEFENDANT

RULING

1. Before the Court is Notice of Motion dated 9 July 2024 by the 2nd Defendant seeking the following orders:

    i. Spent

    ii. That there be a stay of execution of the judgement and decree herein until the hearing and determination of this Application and the suit herein;

    iii. That the judgement entered herein on 4 May 2020 be set aside;

    iv. That the Honourable Court be pleased to set aside the judgement on 4 May 2020 and all consequential orders arising thereunder;

    v. That in the alternative, this Court be pleased to review the judgements dated 4 May 2020 and all orders arising therefrom;

    vi. That the Defendant/Applicant be granted leave to file pleadings as well as any such documents that he deems fit to support his claim herein;

    vii. That the suit be heard de novo and the suit be set down for full hearing inter partes;

viii. That the Defendant be allowed to present his evidence before delivery of judgment in this cause;

ix. That the cost in this application be cost in the cause.

2. The Application is supported by an Affidavit sworn by the 2nd Defendant/Applicant. The 2nd Defendant/Applicant avers that when the suit was instituted by the Plaintiff/Respondent, he and the other Defendants were served on 16 May 2016 by way of advertisement in the Daily Nation. He engaged a law firm, Ashimoshi & Company Advocates, to represent him in the matter. Counsel entered appearance, filed a Defence and witness statement. The 2nd Defendant/Applicant left the matter in the hands of his Advocates, hoping that they would follow up the matter.

3. It is the Applicant's claim that in 2019, he was summoned to attend Court, which he did on 13 May 2019. On that day, he arrested while leaving the Court precincts and locked up at Embakasi Police Station until 19 May 2019 when he was arraigned at Makadara Law Courts. He was released, but later arrested again in October 2019. This time around, the Court granted the 2nd Defendant/Applicant bond of Kshs 800,000/-, which he was unable to raise and was consequently remanded at Industrial Area Prison.

4. The Applicant avers that following his incarceration, he lost track of this matter. On 3 December 2019, following the Court's directions, the Applicant was presented to Court when the matter was coming up for Defence hearing. He testified and was cross examined by the Plaintiff/Respondent's Advocates. It is the Applicant's averment that he was never given the opportunity to cross examine the Plaintiff's witnesses, which is a violation of his constitutional right to a fair trial.

5. The Applicant states that on 26 May 2023, while in the course of his business, he was arrested by police officers who were executing warrants issued by this Court for enforcement of the judgement. He was committed to civil jail for a period of 3 ½ months. He was later released because the Plaintiff/Respondent had not been paying for his upkeep in civil jail as required.

6. The Plaintiff/Respondent, through its Replying Affidavit, disputes the Applicant's claim of non-representation and lack of participation. The Respondent asserts that the Applicant had legal representation from the firm of Ashimoshi & Company Advocates, who indeed, appeared in the matter. Furthermore, the Respondent contends that the Applicant actively participated in the proceedings on several occasions, even tendering his evidence and cross examining the Respondent's witnesses. These instances include:

   i. On 7 February 2018 when PW1 testified in the presence of Mr. Kariuki who represented the 1st Defendant and holding brief for Mr. Ashimoshi for the 2nd Defendant/Applicant.

   ii. On 13 & 14 May 2019 when Mr. Karanja was present for the 1st Defendant and holding brief for Mr. Ashimoshi for the 2nd Defendant. The Plaintiff's two witnesses were examined and the Plaintiff's case closed.

   iii. On 3 December 2019 when the 2nd Defendant/Applicant testified and the Court directed parties to file their written submissions.

   iv. On 11 December 2019 when the 2nd Defendant/Applicant was served at Industrial Area Prison and Remand with the Decree Holder's submissions and urged to file his submissions. A production Order was also issued requiring his presence in Court on 18 December 2019 for purposes of confirming compliance on the submissions.

7. Based on these instances, the Respondent concludes that the Applicant fully participated in the matter before and even post judgement.

8. In his Further Affidavit, the Applicant avers that he was represented by Frank Ashimoni, Advocate from 2014 until 2017/18, when Counsel joined the Office of the Director of Public Prosecution. The Applicant only came to learn of Counsel's departure from the law firm on 13 May 2019 when he was arrested. The Applicant asserts that thereafter, he represented himself but did not necessarily file the relevant documents indicating a change of Advocates.

9. Interesting, the Applicant introduces a new issue in the Further Affidavit, that of expunged documents. He avers that he has learnt that some documents were expunged from the court record yet these documents form the basis of the judgement rendered on 20 May 2020. The Applicant admits that he learnt of the judgement in October 2020, while still in incarceration. When he was released, he faced the challenge of defending the Notice to Show Cause which was served upon him by the Plaintiff/ Respondent.

10. The Application was canvassed by way of written submissions.

11. In addressing the delay of over four years in filing the present Application, the Applicant contended that it was not due to wilful neglect but rather a consequence of circumstances beyond his immediate control. He stated that he was not aware of the judgement in good time, having learnt of its delivery in August 2020, a period that coincided with the peak of the COVID-19 pandemic when movement and human interaction were severely restricted.

12. The Applicant explained that his attention was subsequently consumed by numerous attempts by the Plaintiff/Respondent to commit him to civil jail pursuant to the judgement. This necessitated his engagement on other legal avenues, including moving to the Court of Appeal for leave to file an appeal out of time, which was ultimately declined. He then sought protection in the Insolvency Court, where he obtained a stay of execution. He clarified that his attempt to appeal was limited to seeking leave to appeal out of time, which was denied, and, therefore, no actual appeal was preferred as per Order 41 Rule 4 of the Civil Procedure Rules.

13. The central plank of the Applicant's submissions is the assertion that the judgment was delivered without his knowledge and that he was not accorded an opportunity to be heard, which is a violation of his fundamental rights. He emphasized that the judgement was rendered while he was incarcerated at Industrial Area Remand Prison on a related criminal matter. The Applicant asserted that this failure to accord him an opportunity to he heard before the impugned judgement was issued constituted a direct violation of his rights under Article 50(1) of *The Constitution*, which guarantees the right to a fair hearing. He strongly argued that a decision made in breach of the rules of natural justice is not cured even if the decision was otherwise correct, and that the denial of the right to be heard rendered any decision null and void ab initio.

14. The Applicant relied on the case of Prime Salt Works Ltd -vs- Kenya Industrial Plastics [2001] EA 528 to affirm the principles of natural justice, especially that no person shall be judged in their own cause and no person shall be condemned unheard. He cited the case of Dickson Ngigi Ngugi -vs- Commissioner of Lands; Civil Appeal No. 297 of 1997 (UR) to reinforce his argument that the right to a hearing before any decision is taken is a basic right that cannot be taken away, irrespective of how hopeless one's case might appear.

15. The 1st Defendant also filed submissions, which he grounded on several authorities. He relied on the provisions of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules,

which form the basis for applications for review. The Applicant specifically relied on the grounds of mistake or error apparent on the face of the record and "for any other sufficient reason".

16. The 1st Defendant relied on the cases of Satyanaran Laxminarayan Hegde -vs- Millikarjun Bhavanalla Tirumale, AIR 1960 SC 137 and Hari Vishnu Kamath -vs- Ahmad Ishaque AIR 1955 Supreme Court 233 for the definition of error on the face of the record and error apparent.

17. The Respondent's primary argument was that the application had been defeated by the doctrine of laches because it was filed more than four years after the judgement was rendered. The Respondent contended that the Applicant has failed to offer any plausible reason for this inordinate delay. They relied on the case of Andrew Shimbiro -vs- Sammy Talam [2021] eKLR where the Court dismissed an application for review filed after 2 years and 4 months, holding that such a delay was inordinate and barred the applicant from the remedy sought.

18. The Respondent rejected the Applicant's assertion that the judgement contains an error apparent on the face of the record due to reliance on expunged material. They argued that the grounds advanced by the 1st Defendant do not fit the criteria for review or setting aside, as there is no genuine error apparent on the face of the record, and no new material evidence has been availed. The Respondent maintained that both the record and judgement are clear as to their contents and the 1st Defendant's claim does not meet the stringent requirement of an error apparent on the face of the record. In support of this position, the Respondent relied on the case of Grace Akinyi -vs- Gladys Kemunto Obiri & Another, which in turn relied on the case of NBK Ltd -vs- Ndungu Njau, Civil Appeal No. 2111 of 1996.

19. The Respondent contended that the applications are brought in bad faith, with the sole purpose of delaying the execution process and preventing the Respondent from enjoying the fruits of its judgement.

Analysis & Determination

20. The first issue for determination is whether this application was filed inordinately late. Section 80 of the *Civil Procedure Act* provides as follows:

    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.

21. Order 45 Rule 1 of the Civil Procedure Rules provides as follows:

    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. (emphasis added)

22. In defining inordinate delay, I turn to the case of Utalii Transport Company Limited & 3 Others v NIC Bank Limited & Anor [2014] eKLR, where it was appreciated that:

> " Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so, on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court's mind on the delay, caution is advised for courts not to take the word 'inordinate' in its dictionary meaning, but in the sense of excessive as compared to normality."

23. It is clear that the litmus test for inordinate delay is that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. In other words, in determining whether or not the delay is inordinate, it is not a matter of arithmetic. All the surrounding circumstances, including the reason for the delay must be considered by the Court.

24. The Applicant stated that although the judgement was rendered in May 2020, he came to learn about it in August or October 2020, upon his release from incarceration. It is at that point that the Applicant embarked on defending a Notice to Show Cause and seeking leave from the Court of Appeal to file an appeal out of time. It is not clear when the application at the Court of Appeal was dismissed. He attributes the delay herein to the COVID-19 pandemic which was at its peak in August 2020.

25. According to the Applicant, the next time this matter came up in Court was following his arrest in May 2023. He was placed in civil jail for about 3 ½ months, then released.

26. In my considered view, the reason advanced by the Applicant of the COVID-19 pandemic is a reasonable one. However, there is no reasonable explanation for the delay following the relaxation of restrictions relating to the pandemic. The Applicant averred that he was busy using other legal avenues to challenge the judgement herein and thus did not concentrate on this matter. Even after his arrest in May 2023 and subsequent release 3 ½ months later, it took the Applicant almost one year to consider filing the present application.

27. Equity aids the vigilant and not the indolent. Without a doubt, the Applicant herein is guilty of inordinate delay. In the circumstances, the Court is not persuaded to exercise its discretion in favour of the Applicant. Consequently, the Notice of Motion dated 9 July 2024 is found to be without merit and is hereby dismissed, with costs to the Respondent.

DATED AND DELIVERED AT NAIROBI THIS 29 DAY OF AUGUST 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Plaintiff/Respondent: Mr. Abidha

1st Defendant/Respondent: Mr. Gakaria

2nd Defendant/Applicant: Present in person

Court Assistant: Lucy Mwangi