



REPUBLIC OF KENYA



KENYA LAW
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**Karenju v Thandi & another (Civil Appeal 34 of 2022)
[2024] KEHC 613 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 613 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL 34 OF 2022
CW GITHUA, J
JANUARY 30, 2024**

BETWEEN

SIMON K KARENJU APPELLANT

AND

JAMES MAINA THANDI 1ST RESPONDENT

**EUNICE WANJIKU MAINA (SUING AS LEGAL REPRESENTATIVE OF
SAMSON KANG'ETHE MAINA (DECEASED) 2ND RESPONDENT**

RULING

1. This is a ruling in respect of the appellant/ applicant's notice of motion dated April 17, 2023. Prayer I of the motion is now spent and what is pending this court's determination are the following prayers;
 - i. That this Honourable court be pleased to grant stay of execution of the Judgement and/or decree issued by Hon. E. Muriuki Nyaga S.P.M on May 17, 2022 and in particular stay of sale of the applicant's Motor Vehicle Registration Number KBL 403 scheduled for sale by public auction at Beta Recovery Auctioneers Yard pending the hearing and determination of the appeal.
 - ii. That time within which to comply with the orders issued by this court on March 22, 2023 be enlarged and/or the applicants be granted a further fourteen days or such other time as the court may specify to comply with the orders granted.
 - iii. That this court allows the appellant to furnish the court with security out of time.
 - iv. That costs of the application abides outcome of the Appeal.
2. The application is anchored on grounds stated on its face and the depositions made in the supporting affidavit sworn on 1 April 7, 2023 by the appellant's counsel, Ms Maureen Orima.



Briefly, the appellant (applicant) contended that though on March 22, 2023 this court granted him stay of execution of the trial court's Judgment on condition that he deposits the decretal sum in a joint interest earning account held by both counsel on record, he was unable to comply with the court order since the respondent's advocates returned the duly completed account opening forms to his advocates offices on April 11, 2023 when the time limited by the court for compliance had already lapsed.

3. Further, the applicant asserted that he was willing, ready and able to comply with the condition of stay as granted by the court and unless the application was allowed, he would suffer irreparable loss and damage.
4. The application is opposed vide a replying affidavit sworn by the respondent's Advocate, Mr Jeremiah N. Mbuthia on April 26, 2023.

In the affidavit, Mr. Mbuthia mainly deposed that the application ought to be dismissed with costs as the applicant had failed to give a credible or satisfactory explanation accounting for the delay in complying with the condition precedent to grant of stay as ordered by the court. Mr Mbuthia further averred that nothing stopped the applicant's advocates from opening the joint bank account on April 11, 2023 after receiving the duly completed bank opening forms from the respondent at 3:12 p.m. and no reason was advanced for failure to comply between April 11, 2023 and April 24, 2023 when the matter was mentioned in court.

5. Additionally, the deponent asserted that the respondents proceeded with execution when orders of stay automatically lapsed by close of business on April 11, 2023 and it will be highly prejudicial to stop the respondents from enjoying fruits of their litigation; that court orders are never made in vain and should not be obeyed at parties' convenience.
6. The application was prosecuted by way of written submissions which I have carefully considered. In their submissions, the respondent raised a preliminary point attacking the competence of the applicant's application on grounds that it contravened section 6 of the Civil Procedure Act since it was similar to the application dated 21st March 2023 which was still pending hearing.
7. Section 6 of the Civil Procedure Act which deals with the principle of subjudice provides as follows;

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title.”

The Supreme Court of Kenya when discussing the rationale behind the subjudice rule expressed itself as follows:

“.....The purpose of the subjudice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits



are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

8. My interpretation of the above provision as interpreted by the Supreme Court in the Kenya National Commission on Human Rights case (Supra) is that the institution of a multiplicity of suits or proceedings over the same subject matter between the same parties though discouraged by the law does not render the later suit or proceeding fatally defective.

Where such a situation arises, the court has power to order stay of the later suit or proceedings to await determination of the previous suit.

9. That said, I have carefully examined the prayers sought in the application dated March 21, 2023 and the instant application and although both of them seek orders of stay of execution, the rest of the prayers in the two applications are markedly different. The Respondents claim that the two applications are similar as they seek similar orders is therefore not correct and cannot be sustained. The Respondents objection is accordingly overruled.

10. Having determined the preliminary issue raised by the respondent, I now wish to address the merits or otherwise of the instant application.

I wish to start with a consideration of Prayer 3 since its outcome will determine whether or not it will be necessary for me to deal with prayer 2 which seeks stay of execution of the trial courts judgement pending hearing and conclusion of the appeal.

I say so because Prayer 3 seeks enlargement of the time this court limited for the applicant to comply with terms of the conditional stay of execution granted on March 22, 2023. In those orders, the court granted stay of execution of the trial courts judgment on condition that the applicant deposited the decretal amount exclusive of costs in a joint interest account held by the advocates on record for both parties within a period of 21 days.

11. The court record as well as the submissions filed by the Respondents show that it is not disputed that although the applicant failed to deposit the decretal amount in an interest earning account held by both advocates on record for reasons partly attributed to the Respondents advocate’s late submission of completed account opening forms to the Applicant’s advocates to enable them comply with the court order on time, the applicant subsequently deposited the decretal amount in an account held by both counsel on record on May 4, 2023. This was however done without first seeking extension of the time earlier limited by the Court. By this time, the respondents had proceeded with execution by way of attachment of Motor Vehicle Registration No. KBL 403 C which was pending sale by public auction.

12. The law governing extension of time prescribed by a court is provided for in section 95 of the [Civil Procedure Act](#) which provides that;

“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.”

Order 50 rule 6 of the [Civil Procedure Rules](#) also speaks to the same subject and stipulates 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.”

13. It is clear from the above provisions that this court has power and discretion to enlarge time fixed by it for the doing of any act whether before or after expiration of such time if sufficient cause for non – compliance within the time prescribed is shown.
14. In this case, it is not disputed that the respondent submitted to the applicants advocates the account opening forms at 3:12 p.m on the day the time limited by the court orders of March 22, 2023 was meant to expire.

The Respondent’s advocate learned counsel Mr. Mbutia did not give any explanation why he had to wait until the last day to submit the forms to the Applicant’s advocates. The Respondent’s argument that the applicant still had time between 3.12 P.M and the time banks close their doors to customers is incredulous taking into account that it is a matter of common notoriety in respect of which I take judicial notice that most banks close their doors on weekdays between 4-5 P.M. The time between 3.12 PM and the time banks normally close their doors to customers was too short for the Applicant’s Advocates to make necessary arrangements to make the required deposit.
15. In view of the foregoing, I am persuaded to find that the applicant’s failure to comply with terms of the conditional stay granted on March 22, 2022 may not have been deliberate and may have been caused by circumstances beyond his advocate’s control.
16. As the applicant is dissatisfied with the trial courts Judgement and decree which he seeks to overturn on appeal, it is my view that it will be just and fair to regularise the applicant’s late compliance with the court order to give him an opportunity to have his appeal heard on its merits before execution is levied. This is not to say that I am oblivious to the fact that as the successful litigants, the respondents have a right to access fruits of their Judgement but this right must be balanced with the Appellant’s constitutional and statutory right of appeal which is likely to be defeated if the respondents were allowed to proceed with execution when the appeal is pending hearing and determination.
17. Given the foregoing, I find merit in Prayer 3 of the motion and it is hereby allowed on terms that the time limited by the court on March 22, 2023 is hereby extended upto May 4, 2023 when the deposit of the decretal amount was made so that the same is deemed to have been properly made in compliance with the order issued by this court on March 22, 2023.

Consequently, the motor vehicle held at Beta Auctioneers Yard is to be released to the applicant upon payment of the Auctioneers fees which shall be agreed upon by the parties or taxed.
18. Having found as I have above, I do not find it necessary to deal with prayer 2 of the motion since it has been rendered superfluous by the outcome of prayer 3.
19. Costs follow the event and are at the discretion of the court. Since the respondents are partly to blame for the circumstances that necessitated filing of the application, each party shall bear its own cost of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG’A THIS 30TH DAY OF JANUARY, 2024.

C.W GITHUA

JUDGE.

