



**Wanyororo Farmers Limited v Simiyu (Civil Suit 2 of 2017)
[2024] KEHC 583 (KLR) (29 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 583 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT 2 OF 2017
HM NYAGA, J
JANUARY 29, 2024**

BETWEEN

WANYORORO FARMERS LIMITED PLAINTIFF

AND

EVANS EZEKIEL WAFULA SIMIYU DEFENDANT

RULING

1. This is the latest application, in a series of them, brought by the defendant.
2. The application now before me is the Notice of motion dated 27th November, 2023, brought under Order 50 Rule 6 & Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 and Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*. It mainly seeks for extension and enlargement of time for compliance with the court orders dated 3/12/2020 by 120 days and variation of the said order by adding and allowing alternative security of equal value to the money deposit ordered by this court as conditional stay of execution pending appeal.
3. The Application is premised on grounds on its face and supported by the Affidavit of the Applicant, Ezekiel Evans Simiyu Wafula sworn on the even date.
4. Briefly, the applicant states that pursuant to the court order dated 3rd December, 2020 he was granted stay of execution on condition that he deposits half of the decretal sum in a joint interest earning account in the names of advocates for both parties. However he unable to garner the ordered sum within the required timelines due to harsh economic situations in Kenya compounded by Covid 19 impact on the economy.
5. He prays that this court allows him secure the decree by an alternative security of equal value of the cash deposit ordered by the Honourable Court.



6. He averred that the Respondent will not suffer prejudice that cannot be compensated by costs if the orders sought herein are granted but on his part he shall be prejudiced if orders sought are declined, as his appeal will rendered nugatory.
7. In response to the application, the respondent filed a replying affidavit dated 1st December, 2023 wherein he deponed that the application has been made in bad faith with intent to prolong this suit which has since concluded.
8. He asserted that the applicant has never acted in good faith by trying to deposit any amount in satisfaction of the decree.
9. He prayed for the dismissal of the application with costs.
10. The Application was canvassed through written submissions.

Applicant's Submissions

11. The Applicant submitted on two issues;
 - i. Whether the court should grant the Applicant an extension to comply its orders on security.
 - ii. Whether based on the circumstances in the Application this Honourable Court should be pleased to review its orders of 3rd December, 2020.
12. On the first issue, the Applicant submitted that this court pursuant to Section 95 of the [Civil Procedure Act](#) and Order 50 Rule 6 of the [Civil Procedure Rules](#) 2010 has unfettered discretion to enlarge time.
13. He referred this court to the case of [Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR where the court set the threshold for extension of time to comply with court orders.
14. He argued that he is not guilty of delay in making the present application as the same has been filed within a month after service of Notice to show cause that was issued on 25th October, 2023.
15. The applicant contended that his business was greatly affected and it is still trying to get its balance but he is desirous of abiding by the court orders, and if granted an opportunity he will make good the aforementioned delay.
16. In buttressing his submissions, the applicant relied on the case of [Francis Ngumbi & another vs Sellah Oyiko Aguvasu](#) [2021] eKLR where the court, in allowing an application for extension to comply with the court orders stated;

“I am however of the view that the respondent will not suffer any prejudice if the applicant is granted additional time to comply with the court order in view of the difficulties attributed to the delay in complying with conditions given by court”
17. Regarding the second issue, the applicant referred to Sections 80, and 63(e) and Order 45 Rule 1 and submitted that this application is on the sole ground of any other sufficient reason.
18. Citing the case of [Pancras T. Swai vs Kenya Breweries Limited](#) [2014] eKLR, the applicant urged this court to adopt the position that “any sufficient reason” must not be analogous to the grounds of discovery of new evidence and/or error apparent on the face of the record.
19. He contended that he has made every effort to secure the decretal sum as ordered by the court but his efforts have borne no fruit. He asserted that the Respondent’s interests will be secured through



an alternative form of security that will serve the same purpose. He thus urged the court to grant the orders sought.

Respondent's Submissions

20. Citing the case of *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others* [(supra)] the respondent submitted that the discretion to extend time is unfettered.
21. It argued that the Applicant upon being granted stay of execution and a time to deposit the amount, he moved the court with an application dated 3rd January, 2021 seeking an extension of time by another 120 days and vide a ruling delivered on 5th March, 2021 the time was extended by another 60 days.
22. It asserted that from that time to date the Applicant has not attempted to pay or make any payment no matter how minimal as directed by the court.
23. It posited that no evidence of any offer or letter addressed to him or his advocate by the Applicant explaining the inability to pay the amount ordered and or an offer to pay a certain amount of monies in attempting to honour the decree.
24. The Respondent contended that there is no good faith on the part of the defendant herein in satisfying the decree issued by this Honourable Court in 2020 but instead the defendant has been filing various applications to prevent it from executing the decree.
25. In addition, the Respondent submitted that the application relates to a ruling that was delivered on 3rd December 2020 which is almost 3 years ago yet no explanation has been given for the delay. It argued that the defendant cleverly failed and or refused to disclose to the court in the current application that he had made a similar application i.e. dated 3rd January, 2021 and the same was allowed on 5th March, 2021.
26. The Respondent submitted that the delay is inordinate and unexplained and urged the court to find as much.
27. In regards to variation orders sought, the Respondent referred this court to the case of *George W. Omondi vs Guilders International Bank Ltd* [2015] eKLR where the court stated that power to vary or otherwise amend the terms and conditions upon which it has given relief is to be invoked sparingly and only for good reason.
28. In light of the above, the Respondent submitted that the defendant/Applicant has not offered the form of alternative security he wishes to provide nor furnished the court with its details as well as valuation to show that the said property is within the range of the amount ordered by the court.
29. It asserted that the defendant wants this court to make a determination in limbo while it continues to suffer loss and damages from the conduct of the defendant.
30. The Respondent urged the court to dismiss the application with costs to it.

Analysis and Determination

31. I have carefully considered the application, the response as well as the written submissions filed herein by the Respective parties. In my view, the only issue for consideration is whether the Applicant is entitled to the reliefs sought, namely, an extension of time and a review of the orders of the court in respect to the deposit of the decretal sum.
32. On the first issue, I don't think I will belabor the point.



33. This court, on 30th April, 2020, entered judgment against the Applicant herein for Ksh.84, 196,042.15. Subsequently, the Applicant filed an application dated 28th May, 2020 seeking stay of execution of the said judgment. Vide a ruling dated 3rd December,2020 stay of execution was granted on condition that half of the decretal amount be deposited in a joint interest earning account in the names of both advocates within 45 days thereof.
34. The Applicant was unable to comply with the said order and he filed another application dated 3rd January, 2021 seeking extension to comply with the above orders. The court in its ruling granted an extension of 60 days from 5th March, 2021.
35. The Applicant did not comply with the said orders and the respondent moved the court with the Notice to show cause why execution should not issue.
36. The Applicant thereafter moved the court with yet another application seeking stay of the said notice and setting aside of the same on grounds that it was irregularly incepted. In the ruling that I delivered on 18th September,2023 I noted as follows:-

“I have looked at the court record and I must state that the Applicant appears to be very determined in delaying the day of reckoning. After the Judgment herein, he has embarked on a flurry of applications, resting with the present one.

Even as he faults the Plaintiff/Respondent for not following procedure, the Applicant himself has not complied with the orders of the court to deposit the decretal sum. Therefore the Respondent is entitled to proceed to execute the decree. The Applicant must know that there has to be an end to litigation. It received a colossal sum of money on behalf of the Respondents and to date, retains a very huge proportion thereof with no justifiable cause. With all due respect, I have to tell him that he has reached a dead end, the court cannot stand and watch as the Plaintiff is taken in circles while trying to recover what it is rightfully entitled to”

37. Clearly, the applicant has had ample time to comply with the orders of the court. I calculate that time to be around 4 years now. Surely, how much more time does he want? He does not state with clarity why he has been unable to comply with the orders for that period. Where is the money paid to him on behalf of the respondent? He is mum about the same.
38. I find no valid reason to grant any further extension of time.
39. I will now deal with the application for review.
40. Section 80 of the [Civil procedure Act](#) provides that: -

“Review:

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.”



41. Under Order 45 Rule 1 of the *Civil Procedure Rules*:

“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.
- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

42. From the above provision, a court can only review its orders if the following conditions exist or are fulfilled:

- “(a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; Or
- (b) There as a mistake or error apparent on the face of the record; or
- (c) There were other sufficient reasons; and
- (d) The application must have been made without undue delay.”

43. The Applicant has filed the present application seeking review of the orders issued on 3rd December 2020 to enable him deposit alternative security of the ordered amount on the grounds that due to harsh economic times and Covid 19 impact on the economy, his business was greatly affected and his efforts to raise the ordered amount have been futile. These were the same reasons he advanced in his aforementioned application dated 3rd January, 2021. There is nothing new to be considered by the court.

44. I do find the Applicant’s argument unconvincing and unsatisfactory. Despite the Applicant citing financial difficulties, it has failed to issue court with any further details of the financial loss. Without proof of the financial constraints that the Applicant has faced in raising the security ordered, this court is unable to make a finding on those allegations.

45. The purpose of security as provided by Order 42 Rule 6 of the *Civil Procedure Rules* is to guarantee the due performance of such decree or order as may ultimately be binding on the Defendant/Applicant.



46. In the case of *Arun C Sharma vs Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others* [2014 eKLR Gikonyo J] stated;

“The judgement is like a debt hence the applicants become and are judgement-debtors in relation to the respondent. This is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree of order as may ultimately be binding on the applicants. I presume, the security must be one which can serve that purpose. When one imagines, if it becomes necessary, the steps required to be taken for such security being offered to be realized by the decree holder, it becomes absolutely clear that mere affidavit by the owner does not convert the said property into any legally binding security for the due performance of such decree or order as may ultimately be binding on the applicant. I, therefore, hold that the security offered is not suitable for purpose of Order 42 Rule 6 of the CPR. The court should always remember that both the applicants and the respondents have rights. The applicant has a right to his appeal and the prospects that it shall not be reduced to pious aspiration or barren results if they pay out the decretal sum to a person who may not make a refund. The respondent, on the other hand, has a right to the fruits of its judgment which should not be taken away; and where the right is postponed, it can only be upon adequate security for the due performance of such decree or order as may ultimately be binding on the applicant. There is no legally binding assignment for the proprietary rights in the proposed security which the court may consider adequate for secure the due performance of such decree or order as may ultimately be binding on the applicant.”

47. The prayer for an alternative security proposed by the Applicant presents several problems. Firstly, it will not just be a review of the orders but will be tantamount to rewriting the judgment and the subsequent orders.

48. Why do I say so? The matter in court is specifically for recovery of money received by the applicant on behalf of the respondent. The subject is that money. The introduction of security implies that this is a normal suit for recovery of money, which is not.

49. Secondly, and assuming that the court can review the order, it is unknown what security he intends to offer. There is no valuation report to ascertain whether its value is equal to the ordered to be deposited by this court.

50. Given the history of this matter, I concur with the Respondent that the Application has been brought in bad faith and with the sole intent of preventing the Respondent from commencing execution.

51. Clearly, the Applicant is undeserving of the exercise of this court's discretion in his favour.

52. I hereby find the instant application is without merit and I proceed to dismiss it with costs to the Respondent. The respondent may, if it wishes, proceed to take further action in the matter.

53. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 29TH DAY OF JANUARY, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Jeniffer



Mr. Mukuha for Bwire fot Applicant

Ms Wangari for Plaintiff/Respondent

