



**Nyabera v Kinyanjui & another (Civil Appeal E847 of 2022)  
[2024] KEHC 15141 (KLR) (Civ) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15141 (KLR)

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

**CIVIL**

**CIVIL APPEAL E847 OF 2022**

**JN NJAGI, J**

**NOVEMBER 28, 2024**

**BETWEEN**

**FRED NYABERA ..... APPELLANT**

**AND**

**PAUL MACHARIA KINYANJUI ..... 1<sup>ST</sup> RESPONDENT**

**NAIROBI BAPTIST CHURCH ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The appellant/Applicant has filed two applications. The first one to be filed is the one dated 5<sup>th</sup> July 2024 wherein the applicant is seeking for this court to issue orders for stay of execution of its orders issued on 14<sup>th</sup> June 2024 pending hearing and determination of an appeal that he has filed with the Court of Appeal against this court’s ruling delivered on 14/6/2024. The application is based on the ground that this court dismissed his application dated 30/6/2023 that sought for reinstatement of his appeal with the court failing to consider that he had already deposited the decretal sum in court.
2. The second application is the Notice of Motion dated 28<sup>th</sup> August 2024 wherein the applicant is seeking for stay of execution in Milimani SRM’s Court Civil Suit No. 5419 of 2011 and for orders of injunction against Betabase Auctioneers from proceeding with Proclamation of Attachment of Movable Property dated 26/8/2024. The application was based on the grounds that the said auctioneers have proclaimed the applicant’s property yet he has deposited the decretal sum in court and the application for stay of execution pending appeal that is dated 5/7/2024 has not yet been heard.
3. The two application were opposed by the 1<sup>st</sup> respondent on the grounds that this court vide a ruling delivered on 25/10/2022 granted the applicant orders for stay of execution that were conditional on him depositing the decretal sum into an interest earning account to be opened between his advocates and the advocates for the 1<sup>st</sup> respondent within 30 days of the order, which conditions the applicant



- failed to comply with. That an application by the applicant to reinstate the appeal was dismissed by this court vide a ruling delivered on 14/6/2024. That the deposit of the decretal sum into court on 4<sup>th</sup> December 2023 was made outside the period granted by the court.
4. The two applications were heard together. The applicant submitted that the application for stay of execution pending appeal is intended to preserve the status quo pending the hearing and determination of the appeal currently pending at the Court of Appeal. It was submitted that this court has power to issue the orders sought pending the hearing of the appeal.
  5. It was submitted that the application for stay pending appeal meets the threshold for stay of execution as provided in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act and Article 50(1) of the the Constitution of Kenya. That the applicant stands to suffer loss as he has provided security.
  6. The appellant submitted that the appeal has a high probability of success as it raises issues regarding both procedural and substantive justice. That the judge who heard the application erred in dismissing the application on the basis of non-compliance with the condition for stay despite evidence that the applicant had already deposited the decretal sum into court which determination was unjust and deprived the applicant of a fair hearing. The applicant urged the court to allow the two applications.
  7. The 1<sup>st</sup> respondent on the other hand submitted that the applicant failed to deposit the decretal sum in an interest earning account as ordered by this court in a ruling delivered on 25/10/2022. That the applicant later proceeded to deposit the decretal sum into court without an order of the court to that effect or an application for review of the orders. That the order of 25/10/2022 was not appealed against nor was an order for extension of time to comply with the order filed. It was submitted that as a result of the above there is no competent appeal and the application is wrongly filed before this court. The 1<sup>st</sup> respondent urged the court to dismiss the two applications with costs.
  8. I have considered the two applications that are before me. The application for stay of execution pending appeal is based on the ground that this court was wrong in dismissing the application for reinstatement of the appeal yet the applicant had already deposited the decretal sum into court as security. The applicant has annexed to his application a receipt issued by the court on 4/12/2023 to demonstrate that he had indeed deposited security into court.
  9. The application dated 30/6/2023 wherein the applicant was seeking for reinstatement of the appeal was based on the ground that he was not able to meet the conditions granted by this court for stay of execution on the matter of deposit of the decretal sum in an account belonging to the advocates for both parties. The applicant never disclosed to the court prior to the delivery of the ruling of 14/6/2024 that subsequent to the filing of the application dated 30/6/2023 he had deposited the decretal sum into court. Since the order of 25/10/2022 was for him to deposit the money into a joint interest earning account of the parties' advocates, on what basis did he deposit the money into court? Which order did he use to deposit the money into court? Why didn't he seek leave of the court before depositing the money into court? Can he then use his own ingenuity of depositing the money into court without a court order to argue that he had complied with the court order to deposit security? I do not think so.
  10. In my view, the deposit of the money into court was a mischievous attempt to obtain the orders sought by the back door as it was done without leave of the court. I do not see any merit in the applications dated 5<sup>th</sup> July 2024 and 28<sup>th</sup> August 2024. The applications are dismissed with costs to the respondents.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH NOVEMBER 2024**

**J. N. NJAGI**



## **JUDGE**

In the presence of:

No appearance for Appellant/Applicant

Miss Muendo for 1st Respondent

Court Assistant - Amina

