



**Masterpiece Investment Ltd & another v Mutuko & another (Suing on behalf of the Estate of Anthony Katumo Mutuko) (Civil Miscellaneous Application E815 of 2022) [2023] KEHC 21705 (KLR) (Civ) (4 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21705 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL**  
**CIVIL MISCELLANEOUS APPLICATION E815 OF 2022**  
**AN ONGERI, J**  
**AUGUST 4, 2023**

**BETWEEN**

**MASTERPIECE INVESTMENT LTD ..... 1<sup>ST</sup> DEFENDANT**

**DAVID ONDIEKI ONDINGA ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**NENARD KYALO MUTUKO ..... 1<sup>ST</sup> APPLICANT**

**WINFRED MWIKALI KYALO ..... 2<sup>ND</sup> APPLICANT**

**SUING ON BEHALF OF THE ESTATE OF ANTHONY KATUMO MUTUKO**

**RULING**

1. The application coming for consideration in this ruling is the one dated September 23, 2022 seeking the following orders;
  - i. That this application be certified as urgent and be heard *ex parte* in the first instance
  - ii. That this honourable court be pleased to grant leave to the applicants to appeal out of time against the judgement of the Honourable S A. OPANDE in Milimani - Magistrate Court Civil Suit No 3764 of 2019 and judgment delivered on 07 July, 2022
  - iii. That this honourable court be pleased to stay execution of the judgment, warrants of attachment of Moveable property in execution of decree for money and decree dated December 15, 2022 from Milimani - Magistrate



Court Civil Suit No 3764 of 2019 of Kshs 431,026/- pending the hearing and determination of the application and the intended appeal herein

- iv. That this Honorable Court be pleased to stay further execution/attachment/sale by public auction of the proclaimed moveable properties motor vehicles: registration KDF075L, KCB128Y AND KCR179A pursuant to the proclaimed properties or any form of execution of the judgment and decree from Milimani - Magistrate Court Civil Suit No E3764 of 2022 by Creater View Auctioneers in the intended attachment of ALL proclaimed properties listed in the Proclamation of attachable/repossession/Distrain of Movable properties dated December 15, 2022, together with all consequential orders pending the hearing and determination of the application and the intended/proposed appeal herein.
- v. That as a condition for stay of execution pending the hearing and determination of this appeal/intended appeal (as the case may be), the applicant /appellant be and is hereby ordered to provide/issue security for the entire decretal sum/amount in the form of a bank guarantee to be issued by Family bank limited this honourable court allow the intended appellants’/applicants’ to furnish the court with reasonable security in the form of a bank guarantee.
- vi. That the appellant’s/applicant’s seeks Creater View Auctioneers to tax the fees which have failed to tax the same up to date.
- vii. That the costs of this application abide the outcome of the intended appeal.

2. It is based on the grounds on the face of it and supported by the affidavit of David Ondieki Ondinga in which it is deposed as follows;

- a. That he is one of the owners of Motor Vehicle Registration number KCB 128Y and his insurer is ready and willing to furnish the Court with a Bank guarantee from Family Bank as security.
- b. The application has a high chance of success as the Respondent did not rove evidence on assessment amounting to an excess award against.
- c. If the Respondent levies execution against the applicants, the Appeal will be rendered nugatory, causing irreparable loss and injury.
- d. The applicants have a good, stable, arguable appeal, raising pertinent issues of law, thus the applicant prays that the judgement delivered on July 7, 2023 be set aside and an appeal be given a chance to be heard and determined.
- e. If the decretal sum is paid to the Respondent, he’d be in no position to refund if the appeal is successful as he has not presented to court any evidence of his financial standing.
- f. This application will not occasion any prejudice to the Respondent that cannot be compensated by an award of costs.

3. The respondent claimed to have filed a replying affidavit dated March 6, 2023 but it does not appear on the e-filing platform.

4. Neither of the parties filed written submissions to this application.

5. The issues for determination in this application are as follows;



- i. Whether the applicant should be granted leave to file an appeal out of time.
  - ii. Whether the applicant should be granted stay pending appeal.
  - iii. Whether stay of sale by the action of the proclaimed vehicles should be granted.
6. On the issue as to whether leave should be granted to file the appeal out of time, the governing provision is Section 79G of the *Civil Procedure Act*, which states as follows;

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.
7. The judgment was delivered on July 7, 2022 and this application was filed on September 23, 2022 after two months.
8. I grant the applicant leave to appeal out of time.
9. On the issue as to whether stay pending appeal should be granted, the governing provision is Order 42 Rule 6 which states as follows;
  - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
  - (2) No order for stay of execution shall be made under subrule
    - (1) unless—
      - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
      - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
    - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
    - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
    - (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
    - (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction



on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

10. The duty of this court is to balance the interests of the parties.
11. The appellant has a right to appeal and the respondent the right to enjoy the fruit of his judgment.
12. I grant stay on condition that the entire decretal sum be deposited in court within 45 days of this date.
13. On the issue as to whether the attached vehicles should be released, I direct that the same be released upon the Applicant paying the auctioneer's fees.
14. The fees to be agreed upon or to be taxed by the deputy registrar of this court.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 4<sup>TH</sup> DAY OF AUGUST, 2023.**

.....

**A. N. ONGERI**

**JUDGE**

**IN THE PRESENCE OF:**

.....**FOR THE 1<sup>ST</sup> APPELLANT**

.....**FOR THE 2<sup>ND</sup> APPELLANT**

.....**FOR THE RESPONDENT**

