



**Katheka v Maina (Suing as the administrators of the legal representative
of the Estate of Duke Ongeri Mekenye (Deceased) (Civil Appeal
E719 of 2022) [2023] KEHC 24195 (KLR) (Civ) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24195 (KLR)

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

CIVIL

CIVIL APPEAL E719 OF 2022

AN ONGERI, J

OCTOBER 27, 2023

BETWEEN

WILLIAM KATHEKA APPELLANT

AND

**PETER MEKENYE MAINA (SUING AS THE ADMINISTRATORS OF THE
LEGAL REPRESENTATIVE OF THE ESTATE OF DUKE ONGERI MEKENYE
(DECEASED) RESPONDENT**

RULING

1. The application coming for consideration in this ruling is the one dated 12/4/2023 brought under Order 22 rule 22, Order 42 Rule 4, 6 and 7, Section 79G of the *Civil Procedure Act*, Order 51 Rules 1 and 3 of the *Civil Procedure Rules* 2010, Section 3 and 3A of the *Civil Procedure Act* and all other enabling provisions of the law.
2. The applicant is 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 extend the orders granted on the 22nd September, 2022 and thereafter enlarge or extend time within which to comply with the said court orders pending the hearing and determination of this application.
 - iii. That the honourable court be pleased to extend and or grant interim orders of stay of execution of the judgment/decreed issued by the honourable court on



22nd September 2022 pending hearing and determination intended civil appeal HCCA E719 of 2022.

- iv. That upon reinstatement and enlargement of time, the deposit made by the applicants in the joint interest earning account be deemed as duly deposited in compliance with the order of the 22nd September, 2022.
- v. That this application be heard interparties on such date and time as this honourable court may direct.
- vi. That this honourable court be pleased to issue any other orders That it may deem fit, just and expedient in the interest of justice.
- vii. That the costs of this application be in the cause.

3. The application is based on the grounds on the face of it which are as follows;

- i. That vide a ruling delivered on 22nd September, 2022 the applicants application dated 20th September, 2022 was allowed on conditions That the entire decretal sum be deposited in a joint interest earning account in the names of firms representing parties within 45 days from the date of the ruling.
- ii. That the applicants were not able to comply within the set timelines as the respondent's counsel only availed joint account opening forms on 15th January, 2023 and as such there was a short window for the applicants to comply with the said court orders.
- iii. That despite the delay explained above and occasioned by the respondents, the applicants have since made the deposit as ordered by this court, and prays That the deposit be deemed as duly deposited in compliance with the order of the 22nd September, 2022.
- iv. That the applicants are apprehensive That the respondent may levy execution if the orders for stay of execution are not granted.
- v. That the applicants stand to suffer substantial and irreparable loss and damage as there is a likelihood That the applicant will be unable to recover the decretal sum awarded herein from the respondent.
- vi. That unless the orders sought in this application are granted, the respondent shall proceed to execute the judgment and this application will be rendered nugatory.
- vii. That the applicants are desirous of preferring an appeal against the judgment of the trial court and have already filed a memorandum of appeal.
- viii. That this application has been made without unreasonable/ inordinate delay.
- ix. That in any event this application has been filed timely.
- x. That this application ought to be granted in the interests of equity and justice.

4. The respondent opposed the application by filing the replying affidavit dated 28/4/2023 in which it is deposed That Appellant filed an application and a draft memorandum of appeal dated 20/9/2022 seeking orders of stay of execution of the decretal sum awarded to the Respondent on 19/8/2022. The



application was heard and allowed on 29/11/2022 on condition That the Appellant deposits the entire decretal to an interest earning joint account in the names of the Advocates of the parties herein, within 45 days failure to which the Respondent shall be at liberty to execute.

5. The matter was mentioned before the Deputy Registrar to confirm if the Appellant had complied with the order but they had not complied and were given 14 more days to comply with the orders. when the matter came up for mention on 28/3/2023, the Appellant was absent and had not complied with the orders issued on 29/11/2023 compelling the Honourable court to vacate the stay orders and this prompted the instant application.
6. The applicants did not file written submissions. The respondent submitted That the applicants have exercised unreasonable delay on account of being unable to comply with the orders dated 29/11/2022 which they sought. Even when the applicant's application came for mention on 28/3/2023, the applicant was absent from court demonstrating lack of seriousness in having the matter concluded.
7. There was inordinate delay by the applicant in complying with the orders issued on 29/11/2022 as well as in filing the instant application since it was done after the respondent began seeking the execution of the judgement decree by the trial court. the application herein is therefore unmerited and is an abuse of court process and the same should be dismissed.
8. The sole issue for determination is whether the applicant should be granted stay of execution pending the intended appeal herein (HCA E719 of 2022) and the deposit be deemed as properly made.
9. I find That the deposit has been made although outside the time granted by the court.
10. The applicant has therefore complied with the condition for stay pending appeal.
11. The deposit be and hereby deemed as duly deposited in compliance with the order of the 22nd September, 2022.
12. The applicant is granted 60 days to fully execute this appeal failure to comply this appeal to stand automatically dismissed at the expiry of 60 days from this date.
13. The costs of this application to abide the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 27TH DAY OF OCTOBER, 2023.

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A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

