



**Mwambo & another v Mueni & another (Suing as Administrators  
to the Estate of Josephine Mueni Katuma - Deceased) (Civil Appeal  
339 of 2018) [2022] KEHC 14500 (KLR) (Civ) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14500 (KLR)

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

**CIVIL**

**CIVIL APPEAL 339 OF 2018**

**JN MULWA, J**

**OCTOBER 27, 2022**

**BETWEEN**

**ALBERT SIMON MWAMBO ..... 1<sup>ST</sup> APPELLANT**

**MGANGA ALBERT ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MARTIN MULWA MUENI ..... 1<sup>ST</sup> RESPONDENT**

**BONIFACE NGINA ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS ADMINISTRATORS TO THE ESTATE OF JOSEPHINE MUENI  
KATUMA - DECEASED**

*(Justice Sergon J)*

**RULING**

1. By an application dated May 11, 2022, the respondents, Martin Mulwa Mueni & Boniface Ngina, seek orders that; the sum of Kshs 947,377/- together with accrued interest deposited in court in account number 1xxxxxx3 in the names of Mutuku Wambua & Associates Advocates and Kairu McCourt Advocates held at NIC Bank be released to the advocates on record, Mutuku Wambua & Associates Advocates. They also pray for costs of this application.
2. The said amount was deposited pursuant to a court order dated November 25, 2016 as a condition for stay of execution of the final court's judgment delivered on the March 8, 2016 in CMCC No 4569 of 2014. The said amount was the decretal sum thereof pending hearing and determination of the appeal.



3. It is the applicant's submission that, the appeal was dismissed for want of prosecution on the April 28, 2022 (Sergon J) – and costs of the appeal awarded to the applicant. The application is grounded on the supporting affidavit sworn by one Faith Mutio Mutuku Advocate having conduct of the appeal on behalf of the applicants/respondents in the appeal.
4. In opposing the application, the respondents filed a replying affidavit sworn by their advocate Victor Ng'ang'a on the June 10, 2022, stating principally that, the appellants are still interested in pursuing the appeal but are yet to obtain proceedings from the trial court to facilitate filing of the record of appeal, and therefore seeks for stay of execution of the trial court's decree.
5. In the applicants' further affidavit sworn on the July 14, 2022, the applicants have given a chronology of applications by the respondents subsequent to and before the dismissal of the appeal.
6. The applicants have urged that, the respondents have not demonstrated any prejudice they may suffer if the orders sought are granted, nor have they stated any hardship they have had over the years in obtaining proceedings from the trial court. Further, the applicants submit that, the issues raised by the respondents (appellants) ought to have been canvassed during the hearing of the notice to show cause why the appeal ought not to have been dismissed, and therefore, bringing the said issues before this court would amount to resjudicata.
7. As at the time of filing of this application, the applicants submit that, there was no appeal in place and therefore, the money ought to be released to the applicants. The appellants (in the dismissed appeal) and now respondents' submissions are dated August 2, 2022.

I have stated earlier that there is an application dated June 10, 2022 by the respondents seeking among many other prayers, an order of stay of execution of the order dismissing of the appeal, and reinstatement of the said appeal.

8. I have carefully read through the proceedings in this appeal. The application dated June 10, 2022 has never been fixed for hearing, and if it were, the respondents never attended court to prosecute it. The only application that came up for hearing before me on the June 16, 2022 was the present application dated May 11, 2022, the hearing date having been taken before the Deputy Registrar on the May 17, 2022. As such, I find and hold that the dismissal of the appeal issued by Justice Sergon J on the April 1, 2022, is in force having not been set aside.
9. In effect therefore, there is no appeal on record. Against the above brief background, should the applicants' application dated May 11, 2022 be allowed?

Without an appeal on record, the security for the due performance of the decree, being the decretal sum deposited in the account stated above must be released to the depositor, as it was so deposited pending hearing and determination of the appeal, which has since crystalized in the dismissal of the appeal.

10. To that end then, the applicants' application dated May 11, 2022 is hereby allowed.

The sum of Kshs 947,371/-, together with all accrued interest deposited at NIC (now NCBA) in account number 1xxxxx3 in joint names of Mutuku Wambua & Associates Advocates and Kairu McCourt Advocates be released forthwith to the respondents' advocate, Mutuku Wambua & Associates Advocates for onward transmission to the respondents Martin Mulwa Mueni and Boniface Ngina.

There shall be no orders as to costs on this application

Orders accordingly.

**DATED, DELIVERED AND SIGNED IN NAIROBI THIS 27<sup>TH</sup> DAY OF OCTOBER, 2022**



**J. N. MULWA**  
**JUDGE**

