



**Ogutu (Suing as Legal Representative of the Estate of Jackson Ogutu Osende - Deceased)
v Okumu & 2 others (Civil Appeal E023 of 2022 & Miscellaneous Civil Application
E015 of 2024 (Consolidated)) [2025] KEHC 165 (KLR) (20 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 165 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E023 OF 2022 & MISCELLANEOUS
CIVIL APPLICATION E015 OF 2024 (CONSOLIDATED)**

WM MUSYOKA, J

JANUARY 20, 2025

BETWEEN

**SYLVESTER ODHIAMBO OGUTU APPELLANT
SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF JACKSON OGUTU
OSENDE - DECEASED**

AND

**VICTOR ODUORI OKUMU 1ST RESPONDENT
FRANCIS OKUMU WERE 2ND RESPONDENT
ONGUMWE AUCTIONEERS 3RD RESPONDENT**

RULING

1. The appeal herein arose from orders made by the lower court on 23rd June 2022 and was initiated by way of a memorandum of appeal, dated 6th July 2022, which was subsequently amended on 8th February 2022 and on 25th September 2023. Directions on the disposal of the appeal were made on 27th May 2024, for canvassing of the appeal by way of written submissions.
2. The miscellaneous cause was initiated by way of an originating Motion, dated 22nd April 2024, for extension of time for filing of an appeal against orders that the lower court had made on 13th December 2022.
3. The 2 orders above, of 23rd June 2022 and 13th December 2022, were made with respect to separate applications, and any appeals against them could only be initiated separately. The ruling of 23rd June 2022 was on an application, dated 13th May 2022, at the behest of the 1st respondent; while that of 13th December 2022 was on an application, dated 28th November 2022, brought by Peter Otieno Ogutu



and Levis Ouma Ogutu, and not the appellant and applicant herein, Sylvester Odhiambo Ogutu. Peter Otieno Ogutu and Levis Ouma Ogutu were not party to the application, dated 13th May 2022, they were not affected by the ruling of 23rd June 2022, and they are not party to the appeal herein.

4. When the appeal herein came up for hearing on 14th October 2024, I was asked to consolidate it and the miscellaneous cause. I did not accede to that request, for I did not consolidate the 2 matters. Instead, I fixed the appeal for ruling, given that the miscellaneous cause was not before me, and it was the appeal which had come up for mention, that day, to confirm filing of written submissions on it.
5. The effect of the above is that the miscellaneous cause, by way of the Motion, dated 22nd April 2024, is still pending, as it was not determined simultaneously with the appeal, as the 2 files were never consolidated.
6. I delivered my judgment on the appeal on 27th November 2024, where I dismissed it. The appellant in the appeal was aggrieved by that dismissal and lodged a notice of appeal on 3rd December 2024.
7. He sought a mention of the 2 matters, on grounds that there was a pending application which had not been addressed in the judgment in the appeal. The mention happened on 18th December 2024, and I directed that I would peruse both files, and thereafter give directions. The 2 files were placed before me. I have perused them.
8. The only pending application is in the miscellaneous cause, and not in the appeal. The miscellaneous cause was never consolidated with the appeal, and, for that reason, that application, the Motion, dated 22nd April 2024, was not up for determination in the appeal. That Motion is still pending.
9. There was no pending application in the appeal, as of 27th November 2024, when the appeal was determined. The only application, filed in the appeal, was that dated 25th September 2023, for stay of execution, which was canvassed, and a ruling on it was delivered on 14th February 2024, dismissing it. Having been dismissed, it could not come up again for determination, with the appeal, on 27th November 2024.
10. So, what should be the way forward?
11. Regarding the appeal, as the appellant has filed a notice of appeal against the judgment of November 27, 2024, let him go ahead, and file his appeal at the Court of Appeal, to canvass the issues that were the subject of the said judgment. To facilitate the filing of the said appeal, I hereby direct the Deputy Registrar to cause the proceedings and judgment in the appeal to be typed and certified, to be made available to the appellant, subject to payment of costs or fees, if any, for typing and certification.
12. Regarding the miscellaneous cause, let the applicant, in that cause, obtain a date from the Deputy Registrar, after the 2 files have been separated, so that the miscellaneous cause can be placed before the Judge, for directions on disposal of the Motion, dated April 22, 2024.
13. Orders accordingly.

DIRECTIONS GIVEN, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 20TH DAY OF JANUARY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Sylvester Odhiambo Ogutu, the appellant, and applicant, in person.



Advocates

Mr. Ouma, instructed by BM Ouma & Company, Advocates for the 1st respondent.

Mr. Wanyama, instructed by Wanyama & Company, Advocates for the 2nd respondent.

