



REPUBLIC OF KENYA



Zehyle v Maithya t/a Yambo Merchants & Auctioneers (Civil Appeal E908 of 2022) [2025] KEHC 211 (KLR) (Civ) (16 January 2025) (Ruling)

Neutral citation: [2025] KEHC 211 (KLR)

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

**CIVIL
CIVIL APPEAL E908 OF 2022**

**JN MULWA, J
JANUARY 16, 2025**

BETWEEN

EBERHARD ZEHYLE APPELLANT

AND

**MATHIAS MBOYA MAITHYA T/A YAMBO MERCHANTS &
AUCTIONEERS RESPONDENT**

RULING

1. This ruling is in respect of the Notice of Motion dated 12/07/2024 brought by the respondent/applicant and supported by the grounds set out on its face and the facts stated in the affidavit of the applicant, seeking an order for release of the decretal sum which was deposited in a joint interest account in the names of the parties' advocates (W. G Wambugu & Ngala Morara), namely Account Number 04169821 at I&M Bank, to the applicant's counsel. The applicant also sought costs of the Motion.
2. The Motion is opposed by way of a replying affidavit sworn by the appellant/respondent on 31/07/2024 and annexures thereto. The applicant rejoined with a further affidavit sworn on 9/10/2024.
3. The Motion is to be determined on the basis of the affidavit evidence on record.
4. The court upon considering both the grounds set out on the face of the Motion and the facts deponed to in the affidavits supporting and challenging the Motion, finds that the sole issue for determination is whether the decretal sum deposited in the abovementioned interest earning account ought to be released as prayed.



5. A brief background of the matter is that the applicant filed a suit at the Magistrate's Court in Nairobi, against the respondent and a party not before this court, and sought the sum of Kshs. 1,750,130/- plus costs of the suit and interest at court rates from 21/07/2009, arising from the taxation proceedings in HCCC No. 22 of 2005. The respondent and his co-defendant filed a statement of defence denying the key averments in the plaint therein.
6. The record shows that the applicant subsequently filed an application dated 22/06/2021 seeking to have the statement of defence struck out for inter alia, failing to disclose a reasonable defence and for being scandalous, frivolous and vexatious. The said application was opposed by the respondent.
7. Upon hearing the parties on the aforementioned application, the trial court allowed the application and consequently struck out the statement of defence whilst entering judgment in favour of the applicant in the sum of Kshs. 1,750,130/-, vide its ruling delivered on 22/09/2022.
8. The above ruling was the subject of the present appeal which was instituted by way of the memorandum of appeal dated 4/11/2022. Upon the respondent's application dated 4/11/2022, Serگون, J. vide the ruling delivered on 28/03/2023, granted the order for a stay of execution sought therein, pending the hearing and determination of the appeal on the condition that the respondent deposits the entire decretal sum in a joint interest earning account in the names of the parties' advocates/firm of advocates within 45 days thereof; which order was later extended for a further 30 days.
9. The record shows that the appeal proceeded for hearing before Ongerі, J. and was consequently dismissed for want of merit, by way of the judgment delivered on 22/03/2024.
10. The applicant is now before this court seeking to have the decretal sum earlier deposited released to his advocate.
11. In his supporting affidavit, the applicant states that upon delivery of the ruling of 28/03/2024 granting the respondent a stay of execution, a joint interest earning account was opened on 18/08/2023 and the sum of Kshs. 4,735,566/- (being the principal decretal sum plus interest awarded by the trial court and costs of the suit) was deposited by the respondent, as security for the due performance of the decree.
12. The applicant further states that in the end, the respondent's appeal was dismissed and that whereas he was subsequently granted an order for a stay of execution set to last 30 days from 26.05.2024 to enable him move the Court of Appeal accordingly, there are currently no stay orders in place and hence the applicant is entitled to receive the fruits of his judgment.
13. In reply, the respondent asserts that upon delivery of the judgment in the present appeal, Ongerі, J. initially granted a 30-day stay of execution, but which stay was later extended for a further period of 30 days, following an application dated 18/04/2024 by the respondent.
14. The respondent equally asserts that he has since filed an appeal with the Court of Appeal, against the judgment delivered in the present appeal; namely Court of Appeal Civil Appeal No. E514 of 2024, adding that the delay in lodging the appeal was primarily occasioned by the time taken in obtaining copies of the typed proceedings.
15. He also avers that if the instant Motion is allowed, the appeal before the Court of Appeal will be rendered nugatory and he will likely suffer financial loss and damage. He equally avers that the applicant does not stand to suffer any prejudice if the Motion is dismissed since the decretal sum will continue to be held in the joint interest earning account, pending hearing and determination of the appeal.



16. In view of the foregoing, the respondent urges this court not to grant the order for release sought at this stage.
17. In rejoinder, the applicant through his further affidavit sworn on 9/10/2024 restated his earlier averments, save to add that the stay orders earlier issued in the present appeal have since lapsed and hence there are currently no existing stay orders in place. He further states that in any event, an appeal does not operate as a stay of execution and that in the absence of any orders for a stay, there are no proper grounds for declining to allow the Motion as prayed.
18. Upon considering the rival positions taken on the subject, the court notes that it is not in dispute that the respondent complied with the stay orders previously issued on 28/03/2024 by depositing the decretal sum of Kshs. 4,735,566/- in a joint interest earning account, pending the hearing and determination of the appeal. It is also not in dispute that the respondent's appeal was ultimately dismissed vide the judgment delivered by Onger, J. on 22/03/2024.
19. The record shows that upon dismissing the present appeal, the learned Judge granted a stay of execution for 30 days. The record further shows that subsequently, the respondent filed an application dated 18/04/2024 seeking an extension of the stay order for a further 60 days, to enable him lodge an appeal with the Court of Appeal. When the application came up before Onger, J. on 28/05/2024 counsel for the applicant indicated that he would not be opposing the said application. Consequently, the application was allowed and directions were given for the respondent to file the relevant appeal within 30 days thereof. Going by the annexures to the replying affidavit, it is apparent that the respondent filed a Memorandum of Appeal before the Court of Appeal sometime on or about 18/04/2024, against the judgment delivered in the present appeal.
20. Suffice to say that, the respondent has not tendered any material to indicate that a stay of execution was either sought before or granted by the Court of Appeal, or to show that the stay orders previously sought in the present appeal subsist. As it stands therefore, there are currently no orders in place in respect of a stay of execution. Furthermore, pursuant to Order 42, Rule 6 of the Civil Procedure Rules, 2010, no appeal or second appeal shall operate as a stay of execution or proceedings unless an order has been made to that effect, upon an application being made by the relevant party.
21. In the court's view, in the absence of any existing stay order there is really no plausible reason for denying the applicant access to the decretal sum currently being held in the joint interest earning account.
22. Further to the foregoing, it is noteworthy that the respondent cannot predict the length of time it would take for the appeal before the Court of Appeal to be heard and determined. The court therefore finds that it would be prejudicial to the applicant if he is denied entitlement to the fruits of his judgment without any proper basis and for an indefinite period of time.
23. Additionally, the respondent has made no indication or brought any evidence to show that the applicant is unable to repay the decretal sum should the circumstances require him to do so.
24. In view of all the foregoing circumstances, the court finds no reason as to why the decretal sum should not be released to the applicant and/or his advocate.
25. The upshot is that the Notice of Motion dated July 12, 2024 is merited and the same is hereby allowed as prayed.

Consequently, an order is hereby issued that the decretal sum of Kshs. 4,735,566/- plus interest being held in the interest earning account in the joint names of M/S W. G. Wambugu & Co. Advocates,



and Ngala Morara & Co Advocates- Account Number 04169821 at I&M Bank, be released to the applicant through his Advocates within the next 45 days.

Upon considering the nature of the Motion, the court finds that a fair order on costs would be to order each party to cater for its own costs of the Motion.

Orders accordingly

DELIVERED SIGNED AND DATED AT NAIROBI THIS 16TH DAY OF JANUARY 2025

JANET MULWA

JUDGE

