



**Intra Africa Assurance Company Limited v Ouma (Suing as Personal Representative of the Estate of George Ouma Oloo - Deceased) (Civil Appeal E714 of 2022) [2025] KEHC 6032 (KLR) (Civ) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 6032 (KLR)

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

**CIVIL**

**CIVIL APPEAL E714 OF 2022**

**TW CHERERE, J**

**APRIL 24, 2025**

**BETWEEN**

**INTRA AFRICA ASSURANCE COMPANY LIMITED ..... APPELLANT**

**AND**

**PEREZ ATIENO OUMA (SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF GEORGE OUMA OLOO - DECEASED) ..... RESPONDENT**

**RULING**

1. This ruling concerns a post-judgment application arising from an appeal allowed by this court. The Applicant seeks the release of funds deposited in a joint account pursuant to a consent order for stay of execution pending appeal. The application raises important issues on the right to property under Article 40 of *the Constitution*, finality of judgments, and post-appeal restitution.
2. The court record reveals that by an application dated 28<sup>th</sup> October 2021, the Respondent urged the trial court to strike out the Appellant's defence on the ground that the deceased was a third party within the meaning of the Act and that the Respondent had complied with all the pre-requisites for filing the declaratory suit. In response, the Appellant reiterated the contents of its defence and contending that it raised triable issues deserving full hearing.
3. By a ruling delivered on 26<sup>th</sup> August 2022, the trial magistrate agreed with the Respondent and struck out the defence, holding that it comprised bare denials and raised no triable issues.
4. Aggrieved, the Appellant lodged an appeal and concurrently filed a notice of motion dated 08<sup>th</sup> September 2022 seeking stay of execution of the ruling.



5. By consent recorded on 10<sup>th</sup> November 2022, the parties agreed to a conditional stay of execution, the condition being that the Appellant deposits KES. 2,988,715 in a joint account held in the names of the parties' respective advocates.
6. A joint account was opened at Co-operative Bank, City Hall Way Branch, into which the Appellant deposited the requisite sum on 29<sup>th</sup> December 2022.
7. The appeal was subsequently heard and allowed on 12<sup>th</sup> March 2024. The trial court's ruling of 26<sup>th</sup> August 2022 that struck out the Appellant's defence was set aside and substituted with an order dismissing the Respondent's application for striking out of the defence dated 28<sup>th</sup> October 2021, with costs to the Appellant.
8. The Appellant has filed the present notice of motion dated 12<sup>th</sup> September 2024 seeking:
  - (1) Leave for Evan Mbugua Advocate to come on record for Appellant;
  - (2) Disclosure by Respondent of the account details held pursuant to the consent order dated 10<sup>th</sup> November 2022
  - (3) Orders for release of the deposited funds and accrued interest
  - (4) Costs of the application.
9. The motion is supported by an affidavit sworn on 20<sup>th</sup> September 2024 by Solomon Mwangi, the Appellant's Claims Analyst, deposing that the previous advocate Mr. A. B. Shah passed away and Evan Mbugua Advocate has been appointed to act for the Appellant. He additionally avers that the Respondent's counsel has declined to release the funds, which Appellant urgently requires for business operations.
10. The Respondent, through counsel James Okao, opposes the application, asserting that the court did not set aside the judgment and referred to an earlier ruling of 08<sup>th</sup> April 2022, which dismissed a preliminary objection.
11. Having considered the affidavit evidence on record as summarized hereinabove, I have deduced the following issues for determination to be as follows:
  - a) Whether Evan Mbugua Advocates should be allowed to come on record.
  - b) Whether the Appellant is entitled to the release of the sum of KES. 2,988,715 and accrued interest.
  - c) Who bears the costs of the application.

## **Determination**

### **a. Change of Advocate**

12. Under Order 9 Rule 9 of the Civil Procedure Rules, where there is a change of advocate after judgment, the new advocate must obtain leave of court.
13. In *Lalji Bhimji Sanghani Builders & Contractors v Nairobi Golf Hotels (Kenya) Ltd* [1997] eKLR, the Court reaffirmed that adherence to Order 9 Rule 9 is mandatory. In this case, the Appellant's former advocate is deceased, and Evan Mbugua Advocate has duly approached the Court. The right to legal representation is a fundamental principle. The request for change of advocate is therefore merited.



## **b. Entitlement to Release of Funds**

14. The deposit of KES. 2,988,715 was made as a condition for stay of execution of the trial court's ruling of 26<sup>th</sup> August 2022. With the appeal having been allowed and the impugned ruling set aside, the basis for the deposit no longer subsists.
15. Article 40 of *the Constitution* guarantees the right to property and the continued retention of Appellant's funds without legal basis constitutes a breach of that right. The Respondent's reliance on the preliminary ruling dated 08<sup>th</sup> April 2022 which has no relevance to the deposited security is misplaced given the final judgment dated 12<sup>th</sup> March 2024.

## **c. Costs**

16. Section 27(1) of the *Civil Procedure Act* provides that costs follow the event unless the court directs otherwise. In *Party of Independent Candidates of Kenya & Another v Mutula Kilonzo & 2 Others* [2013] eKLR, the Court reaffirmed this principle and this court has no reason to depart from it.

## **Disposition**

1. Leave is granted for Evan Mbugua Advocate to come on record for the Appellant.
2. In view of the fact that the Respondent has already disclosed the requisite account details through a statement of account annexed to the replying affidavit, the Court finds no justification to issue a further order in that regard.
3. The Deputy Registrar is hereby authorized to sign all necessary documents to facilitate the release to the Appellant of the KES. 2,988,715 together with all accrued interest held in account number 01103249386400 in the name of Okao & Co and Shah Amritlal held at the Co-operative Bank City Hall Way Branch
4. Costs of this application shall be borne by the Respondent.

**DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF APRIL 2025**

**WAMAE.T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Ubah

For Appellant - Mr. Kamau for Evan Mbugua Advocate

For Respondent - Mr. Okao for Okao & Co. Advocates

