Mbunu & another v Nyakwara & another (Suing on their own behalf and as the Administrators of the Estate of Jesca Kayoli Mutunga alias Jesca Kanyoli Mutunga) (Civil Appeal E102 of 2024) [2025] KEHC 9788 (KLR) (13 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9788 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL E102 OF 2024

TM MATHEKA, J

JUNE 13, 2025

BETWEEN

BONIFACE MBUNU ..... 1ST APPELLANT

EDNA KWAMBOKA NYAKWARA ..... 2ND APPELLANT

AND

MUTUNGA MWIVITHI ..... 1ST RESPONDENT

MWIKALI KISILU ..... 2ND RESPONDENT

SUING ON THEIR OWN BEHALF AND AS THE ADMINISTRATORS OF THE ESTATE OF JESCA KAYOLI MUTUNGA ALIAS JESCA KANYOLI MUTUNGA

RULING

1. The application before me is dated 18/10/2024. It is brought under certificate of urgency and Sections 1A, 1B & 3A of the *Civil Procedure Act* (CPA) Cap 21 of the Laws of Kenya, Order 2 Rule 15(1)(d) and Order 51 Rule 1 of the Civil Procedure Rules 2010 (CPR). The applicant seeks the following orders;

    a. Spent.

    b. That this honorable court be pleased to strike out the instant appeal for being an abuse of the court process.

    c. That upon granting order No. 2 above, this Honourable Court be pleased to issue an order releasing the monies held at Family Bank ltd in the joint interest account under the name of Regina & Company Advocates and K Itonga and Company Advocates Account Number 033xxxxxxxx amounting to Kshs. 2,340,215 plus interest to the Respondents in settlement of part of the decretal sum in Kilungu CMCC NO. E258 OF 2022.

d. That the costs of this application be borne by the Appellants.

2. The application is supported by the grounds on its face, the supporting and supplementary affidavits sworn by Mutunga Mwivithi on 18/10/2024 and 25/11/2024 respectively.

3. He deponed that the Appellants moved this court through an application dated 12/02/2024 filed under certificate of urgency where they were substantively seeking for leave to file an appeal out of time and for stay of execution of the judgment/decree issued on 03/11/2023 by Hon. G.L Okwengu in Kilungu CMCC No. E258 of 2022 pending the hearing and determination of the appeal.

4. That a ruling was delivered on 27/08/2024 whereby the Appellants were granted leave of 30 days to file their appeal out of time. A conditional stay of execution was granted on the condition that within 30 days thereof, the Appellants would pay to the Respondents the sum of Kshs. 1.5 million out of the total award (after contribution) and the balance would be deposited in Court or in a joint interest account in the names of counsel for the parties. That in default thereof, the stay would lapse automatically and the application would stand dismissed with costs to the Respondent. The Application and Ruling are exhibited as MM 1 & 2 respectively.

5. He deponed that the default clause took effect on 27/09/2024 as the Appellants had not complied with the conditions given by this court and as such, this appeal should be struck out forthwith. That it was not until 07/10/2024 when the 1st Appellant's insurer, Geminia Insurance Company, deposited the sum of Kshs. 1.5 million into the Respondents' Advocates' Client Account and later on 08/10/2024, the Appellants' Advocates on record deposited the sum of Kshs. 2,340,215 into the joint interest account opened on 20/09/2024 at Family Bank Ltd. An email from Family Bank Ltd and Remittance advice are exhibited as MM 3 & 4 respectively.

6. He deponed that at the time of filing this Application, the Appellants had not deposited the entire balance of the Subordinate's Courts award into the joint interest account as ordered by this Honourable Court as per the decree of the Subordinate Court which they relied on to obtain the stay of execution orders. That the Appellants have expressly indicated their unwillingness to fully comply with the orders of this Honourable Court as issued in the Ruling of 27/08/2024 hence they are not ready to rectify the default. Email extracts are exhibited as MM 5.

7. He deponed that it was absurd for the Appellants to purport to comply with the orders now yet they were aware of the default order in the Ruling of 27/08/2024. That the appeal deserves to be struck out for being an abuse of the court process.

8. The application is opposed through the Replying Affidavit of Edna Kwamboka Nyakwara sworn on 05/11/2024. She deponed that the application is frivolous, vexatious and an abuse of the court process meant to delay the appeal, embarrass the court by making draconian orders and exploit the Appellants and their insurer.

9. She deponed that the court's ruling on Appellants' application seeking leave to appeal out of time was scheduled for delivery on 27/08/2024 on the virtual platform. That the advocates logged in ready to take the ruling but the court was not sitting. That the advocates called the registry and were informed that the ruling would be delivered via the Court Tracking System (CTS). That they kept track on the CTS but were only able to access the ruling on 29/08/2024.

10. She deposed that following the availability of the ruling, their advocate notified the insurer promptly and reached out to the Respondent's counsel with a payment proposal. That the insurer instructed that the sums be deposited in a joint interest earning account to be held by the parties' advocates and

the advocate relayed the position to the Respondents' advocate. The correspondence is exhibited as EK 1, 2 & 3.

11. She deposed that according to information from her advocates which she verily believes to be true, the insurer could only process the sums ordered by court collectively and as such, they had to wait for the joint account details in order to process the kshs 1,500,000 and kshs 2,340, 215 for payment to the Respondent's advocates and into the joint account respectively. That by the time the joint account was set up and account details shared, time was much spent and the insurer could not process the entire sum within the 4 or so days remaining to the lapse of the period given by court. That the insurer instructed the advocate to seek an extension of 14 days from the Respondents' advocate who undertook to indulge the insurer as long as the payment was made within the shortest time possible. That the payments were finally made on 7th and 8th October 2024. The correspondences and remittance slips are exhibited as EK 4 & 5 respectively.

12. She deponed that the delay in paying the sums was not inordinate or negligent as the insurer was simply unable to process the sums within the remaining days owing to multiple approvals needed for release of the money and the time needed to marshal the sums. That the Respondent's had no qualms whatsoever as regards to when the sums were released as they had agreed to indulge the insurer. That they did not serve any correspondence indicating their displeasure as they are well aware of the time taken in opening the account.

13. She deponed that the award by the trial court was kshs 3,850,215 whereupon kshs 1,500,000 was paid to the Respondent's Advocates and the balance of kshs 2,340,215 (after contribution) was deposited in the joint interest earning account and as such, there is no outstanding sum as alleged. Correspondence is exhibited as EK 6. That the court's directions on payment of the sums was an order touching purely on the issue of stay pending appeal and not on filing the appeal itself.

14. She deponed that the appeal as filed is proper and the application does not in any way impugn its merits. That summary dismissal of the appeal is draconian and an affront to the Appellants' right to a fair hearing under Article 50 of *the Constitution* of Kenya. That the Respondent is not being candid with the court for the reason that having received 1,500,000 from the insurer, the balance payable by the insurer is Kshs 1,500,000 in light of the statutory cap envisaged under cap 405.

15. In a rejoinder, Mr. Mutunga Mwivithi deponed that failure to comply with order No. 3 of the Ruling of 27/08/2024 meant that the stay of execution would lapse automatically and the entire application where the said stay had been sought would stand dismissed with costs.

16. He deponed that his Advocate received an email on 27/09/2024 from the Appellants' advocate seeking an additional 14 days to comply and the email was promptly followed by a phone call from Advocate Waweru of K. Itonga & Co. Advocates. That his Advocate responded that it was only the court which could extend the said timelines as they had been granted sufficient time to make financial arrangements towards compliance. That the Appellants' advocate was also reminded that the default clause was also taking effect on that same day.

17. He deponed that the total decretal sum after deducting contribution is Kshs. 4,132, 785 while the amounts deposited so far is Kshs. 3,840, 215. That this Honourable Court in its wisdom in the Ruling of 27/08/2024 directed that "the Appellants/Respondents deposits the balance of the total award..." That it is therefore absurd for the Appellants/Respondents to insist on depositing the amounts less the costs and interest as awarded and clearly assessed in the decree which they relied on in obtaining orders that they are presently enjoying.

18. He deposed that from the correspondences annexed to the Replying Affidavit marked EK 1, 2 & 3, the Appellants and their insurer have themselves to blame for their failure to comply with the Ruling of 27/08/2024. That his advocate responded to correspondences from the Appellants' advocates in good time and the joint account was opened in good time but they waited until the subject application stood dismissed to make the payments.

19. He deponed that the conduct of the Appellants and their insurer points to frivolous and vexatious litigants who are only interested in engaging the minds of the judicial officers when they are not keen on obeying resultant court orders.

20. The application was canvassed through written submissions

The Applicants' Submissions

21. The Applicants identified the issues for determination to be;

    a. Whether the Application herein should be allowed as prayed.

    b. Whether upon striking out the instant Appeal, this Honourable Court should release the monies held at Family Bank Ltd in the joint interest account under the names on the Advocates for the Appellants and the Respondents in settlement of part of the outstanding decretal sum

    c. Who should bear the costs of the Application?

22. As to whether the application should be allowed, it was submitted that the orders issued by this court via the ruling of 27/08/2024 were explicit and included an automatic default clause. That the leave to file appeal out of time was conditional and failure to comply meant that the application which sought for the said leave and stay of execution would automatically stand dismissed. That the default clause automatically took effect on 27/09/2024 for non- compliance and the Appellants ought to seek fresh leave to file their appeal out of time. That presently, this court lacks jurisdiction to hear and determine the appeal on its merits and its decision would amount to a nullity.

23. Reliance was placed on Sino Hydro Corporation Limited -vs- Tumbo t/a Dominion Yards Auctioneers (Civil Appeal E105 of 2021) [2022] KEHC 15545 (KLR) (17 November 2022) (Ruling) where the Court held that where a proceeding or appeal is filed out of the stipulated statutory timelines, the Court is deprived of jurisdiction to hear and determine the appeal on its merits and its decision would amount to a nullity. The Court went on to find the appeal before it as incompetent and struck the same out for having been filed out of the stipulated statutory timelines without seeking leave of court to enlarge the time.

24. Reliance was also placed on Mae Properties Limited -vs- Joseph Kibe & another [2017] eKLR where the Court of Appeal held that the timelines appointed for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals that come before it and that the Rules, expressed in clear and unambiguous terms, command obedience.

25. Further reliance was placed on Peter Nyaga Muvake -vs- Joseph Mutunga [2015] eKLR where the Court of Appeal found that no appeal lies without seeking leave of Court as the Court would have no jurisdiction to entertain, hear or determine the applicant's appeal.

26. As to whether the money held in the joint account should be released upon striking out the appeal, it was submitted that the trial court judgment subject of this appeal was delivered on 03/11/2023 but the Appellants have never requested for certified copy of typed proceedings and this clearly shows that they are not keen on prosecuting the appeal. That the decretal award after contribution was kshs.

4,132,78 but the Appellants have depositedkshs. 3,840,215 in the joint account at Family Bank hence there is a balance. That the joint account was ready and operational as early as 20/09/2024 but the Appellants and their insurer waited until after 2 weeks to pay the kshs 1.5 million on 07/10/2024 and kshs 2,340,215 on 08/10/2024.

27. It was submitted that the Appellants and their insurer were aware of the Ruling of 27/08/2024 but they elected not to comply with the pre-conditions hence the default clause automatically took effect on 27/09/2024. That the Appellants and their insurer have not given any plausible reason as to why the amounts deposited in the joint interest account should not be released to settle part of the outstanding decretal sum. That the stated omissions coupled with failure to comply with express court orders point to litigants who are in blatant abuse of the judicial process and busy contributing to the backlog of cases in the Courts.

28. It was submitted that upon striking out the instant Appeal, this court should award the costs of the Appeal to the Respondents. Reliance was placed on Cecilia Karuru Ngayu -vs- Barclays Bank of Kenya & Anor (2016) eKLR where the court (Mativo J) stated;

> " ...To my mind, in determining the issue of costs, the court is entitled to look at inter alia (i) the conduct of the parties, (ii) the subject of litigation,(emphasis ours) (iii) the circumstances which led to the institution of the proceedings, (iv) the events which eventually led to their termination,(v) the stage at which the proceedings were terminated, (vi) the manner in which they were terminated, (vii) the relationship between the parties and (viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of *the Constitution*. In other words, the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs..."

The Respondents' Submissions

29. The Respondents submitted that it is the application that is frivolous and an abuse of court process and not the instant appeal. That the prayers sought are tantamount to summarily dismissing the appeal without giving the Appellants an opportunity to be heard.

30. It was submitted that the Appellants have explained in detail the reason for delay in depositing the sums as ordered by court. That the reasons include the delivery of the ruling on notice without being informed, delay in parties' counsel agreeing on whether to deposit the sums in court or joint account, delay in parties' counsel agreeing on where to open the account, delay in setting up the joint account and remittance of the sums. That the delay of about 11 days cannot be said to be inordinate in any measure.

31. It was submitted that whereas the Appellants delayed in depositing the security, the appeal was filed within 30 days of delivery of the ruling hence there was partial compliance with the court orders. That the orders on filing of the appeal and deposit of security were quite distinct with the effect of non-compliance with the former being that there was no appeal and non-compliance with the latter being that the Respondent was at liberty to execute for the decretal sum. That the appeal is therefore properly on record contrary to the Respondents' submissions.

32. It was submitted that the application fails the test under order 2 Rule 15 (1)(d) of the Civil Procedure Rules and reliance was placed on Evanson Jidraph Kamau Waitiki -vs- Kenya Power & Lighting Co. Ltd (2017) KECA 526 KLR where the Court of Appeal observed that;

> " The application that was before Omollo, J was brought pursuant to Order 2 rule 15(1) (d) of the Civil Procedure Rules. That provision has been the subject of interpretation in numerous decisions, as such we do not intend to spend more time than is necessary on its application to the facts before the trial judge. The application having been brought specifically under rule 15(1)(d), the respondent was expected, indeed required to present evidence to show that the pending suit is an abuse of the court process. It has repeatedly been stressed that, because of its far-reaching and drastic nature, the remedy of striking out pleadings is resorted to very sparingly and only as a remedy of a last resort. Instead, courts are encouraged to have recourse to amendment. An application for striking out pleadings does not require the court to engage in a mini-trial."

33. Further reliance was placed Energy Regulatory Commission -vs- John Sigura Otido [2021] eKLR where the Court of Appeal (Musinga, Gatembu & Kantai JJ. A) stated that;

> " 24. We start with the issue of alleged abuse of the court process.
>
> What is the meaning of "abuse of the court process"? That term has been the subject of consideration in a number of decisions by this Court and other Courts. In Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others (supra) this Court observed that it is difficult to comprehensively list all possible forms of conduct that constitute abuse of judicial process. The Court cited the Nigerian case of Sarak v Kotoye [1992] 9 NWLR 9Pt 264 where abuse of judicial process was defined as follows: -
>
> > " The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice..."
>
> 25. The same Court went on to cite examples of abuse of judicial process which include: -
>
> > " (a) Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
> >
> > b. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
> >
> > c. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice."

34. It was submitted that the appellants are seeking re-evaluation of the evidence and fresh award by this court as is their right under the rules of natural justice. That it has always been the position of court that striking out pleadings is a draconian step to be taken only as a last recourse. Reliance was placed on Kivanga Estates Ltd -vs- National Bank of Kenya Ltd (2017) KECA 591 (KLR) where the Court of Appeal stated;

> "It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the courts must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations. Although the court exercises discretionary powers in striking out pleadings, because of its far reaching consequences, Order 2 Rule 15 of the Civil Procedure Rules has established clear principles which guide the court in the exercise of that power.... The language as highlighted demonstrates that, as a drastic measure in litigation, the remedy must be resorted to sparingly. It is only where a pleading cannot be salvaged by an amendment that the court will utilize this procedure hence the use of the word 'may'."

35. Relying on section 5b (iv) of the Insurance (Motor Vehicle Third Party Risks) Act, it was submitted that the Respondent seeks to have the Appellants' insurer pay out more than their statutory cap of kshs 3,000,000. Reliance was placed inter alia on Gateway Insurance Co Ltd -vs- Jamila Suleiman & another [2018] eKLR where the court stated;

> "65. My understanding of the said section is that in respect of a claim by one person the insurer's liability ought not to exceed Kshs Three Million. In other words, the Court may only enter judgement against the insurer up to a maximum of Kshs Three Million. That however does not mean that a person who is entitled to file a declaratory suit against the insurer but to whom an award has been given exceeding Kshs Three Million is thereby prevented from filing a suit against the insurer. He can do so but his entitlement as against the insurer cannot exceed Kshs 3,000,000.00."

36. The Appellants urged the court to dismiss the application with costs and to set down the matter for directions since the Record of Appeal has already been filed.

37. I have anxiously considered the application, the supporting affidavit, the replying affidavit and the rival submissions, and the only issue for determination is whether the appeal should be struck out for being an abuse of the court process.

Whether the appeal should be struck out

38. The Applicants contend that the Appellants did not comply with the conditions, in the ruling of this court delivered on 27/08/2024, within the prescribed period and as such, the default clause took effect on 27/09/2024.They argue that since the default clause took effect automatically, this court has no jurisdiction to hear the appeal on merits and that the Appellants should seek leave to appeal afresh.

39. The ruling is worded as follows;

> 1. That the applicants be and are hereby granted leave to file an appeal out of time against the judgment delivered by Hon. Geno L. Okwengu (SRM) in Kilungu CMCC No. E258 of 2022. The Appeal be filed and served within 30 days hereof and a mention before the DR for compliance.
>
> 2. That an order to stay of execution of the judgment and decree in Kilungu CMCC No. E258 of 2022 be and is hereby issued pending the hearing and determination of the Applicants' intended appeal.
>
> 3. That the stay is on condition that within 30 days hereof, the applicant do pay to the respondent the sum of kshs 1.5 million out of the total award (after contribution) and the balance be deposited in court or in a joint interest account in the names of the counsel for the parties. In default, the stay will lapse automatically, the application will stand dismissed with costs to the respondent.

40. The application which resulted in the ruling was two-fold in that it sought for leave to appeal out of time and for stay of execution of the judgment intended to be appealed against. The leave to appeal out of time was granted and the attached requirement was that the appeal had to be filed within 30 days from 27/08/2024. The Memorandum of Appeal was filed on 02/09/2024 which was within the 30 days granted by the court. Order 42 Rule 1 of the CPR provides that every appeal to the High Court shall be in the form of Memorandum of Appeal signed in the same manner as a pleading. The appeal is therefore properly on record and having looked at it vis-à-vis Order 2 Rule 15 of the CPR, the appeal cannot be described by any of those grounds enumerated therein.

41. Further, courts have repeatedly held that striking out of pleadings is draconian and should be an act of last resort.

42. A conditional stay of execution was also granted in the ruling and the consequence for failing to comply with the conditions was that the stay would lapse automatically and the application for stay would stand dismissed (emphasis added). Order 3 of the ruling was specifically addressing the application for stay and as such, non-compliance with the conditions for stay does not defeat the appeal which is properly on record. Non- compliance with the conditions for stay would mean that the Respondents were free to execute.

43. It is evident from the exhibited annexures that there was a delay of about 11 days in complying with the conditions of stay. The thread of email correspondence between the parties shows that on 30/08/2024, the Appellants' advocate proposed to deposit the balance in court owing to the lengthy process of opening a joint interest earning account. The Appellants' advocate also advised the insurer to deposit kshs 1.5 million to the bank account of the Respondents' advocate held at Family Bank.

44. On 10/09/2024, the Appellants' advocate informed the Respondents' advocate that the client's instructions were that the balance should be deposited in a joint interest earning account instead of court owing to the issue of interest. On 11/09/2024, the Appellants' advocate requested for the relevant documentation to open the joint account in ABSA Bank which was preferred by their client. On 12/09/2024, the Respondents' advocate stated that their client preferred the Family Bank and on 13/09/2024, the Appellants' advocate indicated that they were okay with the joint account being opened at Family Bank. On 19/09/2024, the Appellants' advocate sent the relevant documents for account opening and on 20/09/2024, the account was opened.

45. On 23/09/2024, the Appellants' advocate sent an email to the insurer stating;

> " Attached herewith is the bank's email extract indicating the account details for the joint account held by us and the TPA. Kindly deal urgently to deposit the balance of the decretal sum as ordered by court. do also let us have the remittance slip towards payment of kshs 1, 500,000 to our counterparts as ordered by court. the compliance timeline lapses on 27th September 2024. Needless to say, time is of the essence."

46. On 27/09/2024, the insurer sent an email to the Appellants' advocate stating; "Kindly engage the third-party advocate for an extra 14 days to comply with the stay orders." The request for extension was communicated to the Respondents' advocate the same day.

47. It is evident that shortly after the delivery of the ruling, the Appellants' advocate reached out to the Respondents' advocate for discussions on how compliance would be achieved within the shortest time possible. This can be seen in the proposal to deposit the money in court in order to avoid the lengthy process of opening a joint interest earning account. The proposal however was not embraced by the insurance company which is the instructing client and as such, the long route of opening the joint account had to be taken. It is also evident that the correspondence between the parties was consistent up to the time the account was opened. Consequently, and contrary to the Respondents' submissions, the Appellant did not just sit and elect not to comply with the pre-conditions. In my view, the delay is not inordinate and has been sufficiently explained.

48. It is not in dispute that the default clause on lapse of stay was automatic upon failure to comply with the pre-conditions. In the circumstances of this case, where I find that the appeal was filed in time do I have the jurisdiction to consider what ought to have been done as having been done? From the foregoing the parties were engaged and the applicants did not just sit down and do nothing. They filed the appeal in time, the deposit of the funds took some time and it is noteworthy that the respondent did not take out execution proceedings despite being at liberty to so but instead engaged in the process of having the moneys deposited as required by the court order.

49. It appears to me that the respondent was complicit in the delay in the noncompliance and cannot now turn around and seek to have the court make the orders it is seeking. Going by the orders of this court the most immediate action on their part would have been to start execution proceedings. They did not need any application to do so. But that they could not do because the money was already deposited as ordered.

50. It is clear that the order was in two limbs.

51. Considering the circumstances of this case, taking into account that the appeal is properly on record, failure to reinstate the stay will leave the Appellants exposed, requiring them to file another application for reinstatement thus prolonging this matter unnecessarily and making the litigation expensive in terms of time and money. That kind of trajectory will certainly be an affront to the overriding objective of the Act.

52. In the interests of justice of this case it is appropriate to invoke the application of section 3A and 1A of the CPA, the court has a duty to give effect to the overriding objective of the Act which is; 'to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.'

    a. In the circumstances I decline the application and order that each party bears its own costs.

    b. Now that the record of appeal has been filed, the matter be mentioned before the DR within 14 days hereof to confirm its completeness, and the availability of the lower court file.

c. Thereafter the file be placed before me for directions.

DATED SIGNED AND DELIVERED VIA EMAIL AS CTS IS DOWN THIS 13TH JUNE 2025

MUMBUA T MATHEKA

JUDGE

CA Chrispol

Applicants' Advocates

Regina & Co. Advocates

Respondents' Advocates

K. Itonga & Co. Advocates