



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Maina v Francis & 10 others (Civil Case E112 of 2021)**  
**[2025] KEHC 12644 (KLR) (Commercial and Tax) (24 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 12644 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**CIVIL CASE E112 OF 2021**  
**F GIKONYO, J**  
**JULY 24, 2025**

**BETWEEN**

**DR. SAMUEL THENYA MAINA ..... APPLICANT**

**AND**

**BRIAN MARTIN FRANCIS ..... 1<sup>ST</sup> RESPONDENT**  
**THE ESTATE OF THE LATE HIRAM NGARUIYA ..... 2<sup>ND</sup> RESPONDENT**  
**ISAAC NJOROGE GITOHO ..... 3<sup>RD</sup> RESPONDENT**  
**JAMES NJUGUNA GITOHO ..... 4<sup>TH</sup> RESPONDENT**  
**KRISCO HOLDINGS LIMITED ..... 5<sup>TH</sup> RESPONDENT**  
**MUIBORO ENTERPRISES LIMITED ..... 6<sup>TH</sup> RESPONDENT**  
**KCB BANK KENYA LIMITED ..... 7<sup>TH</sup> RESPONDENT**  
**BILHA W MWANGI & KEMBOY JULIUS KIPKOSGEI T/A KEMBOY LAW  
LLP ..... 8<sup>TH</sup> RESPONDENT**  
**NJERI BENSON NGUGI ..... 9<sup>TH</sup> RESPONDENT**  
**IGERIA ARTHUR KONYE ..... 10<sup>TH</sup> RESPONDENT**  
**NJOROGE DAVID NGUMBU T/A IGERIA & NGUGI  
ADVOCATES ..... 11<sup>TH</sup> RESPONDENT**



## RULING

### Convicted Contemnor

1. The 1<sup>st</sup> to 6<sup>th</sup> applicants filed the notice of motion dated 24<sup>th</sup> June 2025 seeking an order directing I & M Bank Limited to release the monies and accrued interest held in the joint account number 0020364258581200 deposited pursuant to the Order of Court issued on 19<sup>th</sup> May 2022 to the firm of Gichuki King'ara & Co. Advocates for onward transmission to the applicants.
2. The application is expressed to be brought under Section 1A, 1B, 3A, of the Civil Procedure Act, Order 51 Rule 1 and 6 of the Civil Procedure Rules, 2010, Section 7 of the Arbitration Act, Article 159 of the Constitution.
3. The application is based on the grounds set out in the body of the application, the annexed affidavit sworn by the 3<sup>rd</sup> applicant, Isaac Njoroge Gitoho on 24<sup>th</sup> June 2025. It is also supported by written submissions dated 3<sup>rd</sup> July 2025.
4. The grounds are: -
  1. That pursuant to the Order of interim measure of protection issued on 19<sup>th</sup> May 2022, the joint account Number 0020364258581200 in the names of advocates or the parties was opened and the applicant's sum of Kshs. 102, 278, 022.98 deposited therein.
  2. That pursuant to the Ruling of court delivered on 15<sup>th</sup> May 2025, the Respondent to: -
    - i. Deposit the of Kshs. 53, 270, 698/- in the same joint account within 30 days from the date of the ruling. The said time expired on 15<sup>th</sup> June 2025.
    - ii. To commence the arbitration proceedings within 21 days. He is yet to commence the same.
  3. The court made it clear that the interim measure of protection would lapse if Respondent/ Applicant failed to commence arbitration proceedings within 21 days or fails to deposit the sum of Kshs 53, 270, 698/- in the joint account within 30 days.
  4. That the interim measure of protection has lapsed and the Respondent/Applicant has admitted non-compliance.
  5. That the interim measure of protection having lapsed, there is no justification for the Applicant's funds to continue being held in the said account and the court has no further jurisdiction to deal with the said funds.
  6. It is in the interest of justice that the application be allowed and the funds be released.

### Response

5. The application is opposed by the respondent through a replying affidavit sworn on 27<sup>th</sup> June 2025 and written submissions dated 9<sup>th</sup> July 2025.
6. The respondent's core contentions are that it has filed a notice of appeal dated 20<sup>th</sup> May 2025 against the ruling of 15<sup>th</sup> May 2025. That he has instructed his advocate to seek certified typed proceedings to facilitate the lodging of the Record of Appeal and Memorandum of Appeal. That he has filed an application in the court of appeal for stay of execution of the court orders pending determination of the



intended appeal being civil application number COACAPPL/E358/2025 Dr. Samuel Thenya v Brian Martin Francis and The Estate of The Late Hiram Ngaruiya and 9 Others and the same was certified urgent and the court issued directions dated 18<sup>th</sup> June 2025 on the determination of the application.

7. The respondent argued that the proceedings in the court of appeal are at an advanced stage and the ruling will be delivered sooner rather than later. He also argued that, in the circumstances, it makes judicial sense for the deposit to be retained as it is pending the outcome of the court of appeal application. He asserted that no prejudice will be suffered by any of the parties if the said deposit is retained at the Bank pending determination of the appeal.

### **Submissions**

8. The applicants submitted that the court is functus officio on the issue of interim measure of protection under Section 7 of the Arbitration. That therefore, the court cannot continue to hold the Respondents funds. They asserted that any further continuous holding of the funds amount to reviewing the Ruling of 15<sup>th</sup> May 2025. They relied on *Muvokanza Limited v Muri Mwaniki Thige & Kageni LLP & another (Environment & Land Case E120 of 2021) [2023] KEELC 18072 (KLR) (11 May 2023) (Ruling)*.
9. The applicants asserted that the respondent has been in contempt of the orders of the court issued on 13<sup>th</sup> July 2022, and despite a reprieve of the court on 15<sup>th</sup> May 2029 to purge the contempt, he remains defiant and disrespectful. The applicants argued that a contemnor, has no audience until the contempt is purged. They relied on *Mberia & 3 others v County Secretary, County Government of Meru & 2 others; Kwiriga & 4 others (Interested Parties) (Petition 1 of 2022) [2023] KEELRC 2310 (KLR) (29 September 2023) (Ruling)* and *Steward Robertson v Her Majesty's Advocate (2007) HCA C63*.
10. The applicants thus submitted that the interim measure of protection having lapsed, the court cannot deny its plea to order the release of the funds, without a lawful basis.
11. Finally, the applicants contended that it is great injustice that the respondent received and has been enjoying his bargain in shares, assets, accounts and management of Adlife Plaza Limited but denying the applicants the purchase price for the last 8 years.
12. On his part, the respondent submitted that releasing the funds will be premature due to live proceedings. He pointed out that an application for leave to appeal the ruling dated 31<sup>st</sup> January, 2025 setting aside the arbitral award is coming up for ruling on 27<sup>th</sup> October 2025 in *HCCOMMARB/E034/2023*.
13. The respondent argued that the release of the deposit before the pending application is heard and determined would render the said application nugatory as the substratum will be lost. If the deposit is released and the intended appeal succeeds, then he will not be able to recover the funds.
14. The respondent relied on *Safaricom Limited v Ocean View Beach Hotel Ltd & 2 Others [2010] eKLR* to argue that the deposit should only be disturbed where it is clear no useful purpose would be served by its continuation.
15. The respondent also relied on *Butt v Rent Restriction Tribunal [1982] KLR 417*, on the general principle is that where there is an appeal, the status quo should be maintained so that the appeal is not rendered nugatory.
16. The respondent submitted that the balance of convenience lies in the funds being preserved pending the determination of the application for leave to appeal. This is because the funds which are earning interest will eventually be released to the party that succeeds.



17. The respondent concluded with the submission that it is in the interest of equality of arms between the parties that the deposit be maintained.

### **Analysis and Determination**

18. The issue in controversy revolves around the orders made in the ruling of 15<sup>th</sup> May 2025. The relevant parts are reproduced below: -

“47. The record shows that on 13<sup>th</sup> July 2022, the court issued an order to the effect that the 1<sup>st</sup> respondent deposits the sum of Kshs. 53, 270, 698/- in the same joint account. The sum was accumulated interest in respect of the decretal amount.

48. The 1<sup>st</sup> respondent was acutely aware of the order of the court requiring him to deposit a sum of Kshs. 53, 270, 698/- in the same joint account.

49. But, the 1<sup>st</sup> respondent did not make the deposit as was ordered. He purports to provide the reason for non-compliance; that the applicants are not entitled to interest on the deposited sum since they are not entitled to the decretal amount.

50. A person cannot unilaterally and without an order of the court discharging the impugned order, determine not to obey a court order. Feeling or holding a view, however strong it may be, that a person is not entitled to the order, are mere excuses which will not avail any relief to the contemnor.

51. Accordingly, the 1<sup>st</sup> respondent is in contempt of court.

52. I will however, give him reprieve; to purge the contempt by depositing the Kshs 53, 270, 698/- in the same joint account within 30 days of today which failing he may be sentenced to a punishment that the court will determine upon expiry of the period allowed for purging the contempt.

53. This will also have a bearing on the interim measure of protection herein.

Conditions for the interim measure of protection

54. The sums of Kshs 53, 270, 698/- to be deposited by the 1<sup>st</sup> respondent in the joint account is part of the funds which constitute the interim measure of protection. Accordingly, the interim measure of protection will lapse if, the 1<sup>st</sup> respondent: -

a. Fails to commence competent arbitration proceedings in accordance with the arbitration agreement and the *Arbitration Act* within 21 days of this order; the arbitrator be appointed within the same period; or

b. Fails to deposit the sum of Kshs 53, 270, 698/- in the same joint account within 30 days of today.”

19. The above orders were succinct, conditional, time-bound and self-executing. There is no dispute that the respondent has not complied with any of the conditions stated by the court. The time has lapsed. He is still guilty of contempt.



20. To my mind, in accordance with the orders of 15<sup>th</sup> May 2025, the interim measure of protection lapsed upon expiry of the time given to the respondent to comply with the conditions stated in the order.
21. In my considered view, the contemnor remains guilty of contempt of court and has not purged the contempt. It is surprising that the contemnor haughtily takes the view that the status quo should be maintained, and most ominously, it appears that he thinks the status quo is to retain the order of protection. The status quo is that he is guilty of contempt and the order of protection lapsed. The filing of a notice of appeal against the ruling herein and the application for stay do not suspend the self-executing orders or purge the contempt or revive the order of protection. He is simply seeking the court to rewrite the consequences of the orders it made in succinct terms as well as absolve his guilt for contempt through the back door. Such would not be a just or fair approach as it cares not about the rights of the other party. In the circumstances of this case, a proportioned balance or convenience would not favour the contemnor despite the array of litigation fronts he has adopted in these proceedings.
22. Contrary to the assertion by the contemnor, the applicants stand to suffer prejudice. Accordingly, the application dated 24<sup>th</sup> June 2025 is allowed in terms of prayer 2. Costs to be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JULY, 2025 THROUGH TEAMS ONLINE APPLICATION.**

**F. GIKONYO M**

**JUDGE**

In the presence of: -

Miller for the Respondent-Dr. Thenya

Mirie/King'ara for applicant

Kinyua C/A

