



REPUBLIC OF KENYA



**Munguti & another v Simiyu & another (Suing as Administrator of the Estate of the Late Frank Mwasi Mwabaga) (Civil Appeal 45 of 2019) [2023] KEHC 4117 (KLR) (10 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4117 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL 45 OF 2019  
RN NYAKUNDI, J  
MAY 10, 2023**

**BETWEEN**

**FRANCIS NZIVO MUNGUTI ..... 1<sup>ST</sup> APPELLANT**

**SOUTH SIOUX FARM ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JANET NDUTA SIMIYU ..... 1<sup>ST</sup> RESPONDENT**

**LINDA MUTIEMBU SIMIYU ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS ADMINISTRATOR OF THE ESTATE OF THE LATE FRANK MWASI  
MWABAGA**

**RULING**

**Coram: Before Hon. Justice R. Nyakundi**

Ngala & Company Advocates

Ms. Nyairo & Company Advocates

1. This ruling pertains to two applications presently before this honourable court. The first application dated January 11, 2023 by the respondents herein seeks the following orders;
  1. Spent
  2. That pending the hearing and determination of this application there be stay of execution of the judgment and decree herein the subject of the intended appeal
  3. That there be stay of judgment and decree herein pending the hearing and determination of the intended appeal to the Court of Appeal.



2. The application is premised on the grounds set out therein and the contents of the affidavit in support of said application.
3. The second application is a notice of motion dated January 25, 2023 seeks the following orders;
  1. Spent
  2. That the sum of Kshs 2,417,001/= deposited in a joint interest earning account at Consolidated Bank of Kenya Limited, Eldoret Branch in the names of M/s Nyairo and Company, Advocates and M/s Ngala and Company, Advocates together with all accrued interest be released to M/s Nyairo and Company, Advocates for the appellants/applicants.
  3. That the respondents be ordered to immediately refund to the appellants/applicants the sum of Kshs 393,951/= overpaid to the respondents pursuant to the subordinate court.
  4. That costs of the application be borne by the respondent.
4. The application is premised on the grounds set out therein and the contents of the affidavit in support of said application.

#### **Application Dated 11<sup>th</sup> January 2023**

5. The applicants are seeking stay of execution pending the appeal in the Court of Appeal. The brief facts underlying the appeal are that on September 25, 2018, the trial court entered judgment in favour of the respondents/applicants as against the appellants/respondents. Being aggrieved by the trial court's judgment, the appellant/respondent lodged the instant appeal to this honourable court. The appellant was granted conditional stay of execution, the condition being that half the judgement sum be paid to the applicants and the other half be deposited into a joint interest earning account. This court's finding on appeal substantially reduced the trial court's award. The respondents then lodged a notice of appeal to the court of appeal dated October 17, 2022 and consequently, they filed the application dated January 11, 2023 seeking stay of execution pending appeal.
6. The principles that determine whether a court shall grant stay of execution are set out under order 42 rule 6(2) of the [Civil Procedure Rules 2010](#) which in essence are; Substantial loss may result to him unless the order is made; That the application has been made without unreasonable delay; and The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

#### **Substantial Loss**

7. I have considered the judgement sum and I note that the appeal is premised on the same. It is my strong view that if the appeal succeeds, the applicant is likely to suffer substantial loss as the quantum may rise to a sum that at this point in time this court is not sure about. Therefore, I find that the applicant may be occasioned substantial loss if the order for stay is not granted.

#### **Unreasonable Delay**

8. The applicants had filed an application for review alongside the application for review dated October 13, 2022. The impugned judgement was delivered on October 12, 2022 whereas the application for stay was filed on January 11, 2023. In my view, the application was filed timeously and without undue delay.



## Security

9. The decretal sum is already deposited in a joint interest earning account in the names of the parties' advocates therefore, there is already security provided and as such, this requirement has been satisfied.
10. In the premises, the application dated January 11, 2023 succeeds in its entirety.

## Application Dated 25<sup>th</sup> January 2023

11. The applicants seek the release of the decretal sum held in a joint interest account. Essentially, what the applicants seek is restitution. It is their case that the advocate for the respondent has refused to sign a consent form to release the funds. It is their position that as this court interfered with the judgement by reducing the decretal amount, they are entitled to a refund/restitution.

12. Section 91 of the Civil Procedure Act provides as follows;

Where and in so far as a decree is varied or reversed, the court of first instance shall, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

13. The orders to deposit half the decretal sum as security emanated from this honourable court. However, the matter itself did not come before this court as a court of first instance. It was before the trial court before arriving in the High Court as an appeal. Therefore, this court does not have the jurisdiction to grant the order for restitution. Further, if the court had the jurisdiction to order restitution, the subject matter of the appeal is the quantum of the decretal sum. as this forms the sub stratum of the suit, it is my considered view that allowing the deduction of any amount of money from the security deposited would interfere with the subject matter of the appeal. Therefore, I find that an order for restitution is untenable in the circumstances.

14. Having considered the pleadings, affidavits in support of the same and the attendant responses and submissions, it is my considered view that the application dated January 11, 2023 is merited. However, the application dated February 25, 2023 has no merit and is hereby dismissed. I hereby order as follows;

1. The respondents are hereby granted stay of execution pending the determination of appeal, with costs to the respondent.
2. The application dated February 25, 2023 is dismissed with costs to the respondent therein.
3. Leave to apply granted in any event.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 10<sup>TH</sup> DAY OF MAY 2023.**

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**R. NYAKUNDI**

**JUDGE**

