



Healthspan Medical Centre Limited v Makhoha (Suing as the personal representative and administrator of the Estate of Elizabeth Alivisata Mbao) & another (Civil Appeal E009 of 2021) [2023] KEHC 18792 (KLR) (Civ) (15 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18792 (KLR)

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

CIVIL

CIVIL APPEAL E009 OF 2021

AN ONGERI, J

JUNE 15, 2023

BETWEEN

HEALTHSPAN MEDICAL CENTRE LIMITED APPELLANT

AND

PRISCILLA MAKHOHA (SUING AS THE PERSONAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF ELIZABETH ALIVISATA MBAO) 1ST RESPONDENT

FRANTON GLOBAL LIMITED 2ND RESPONDENT

RULING

1. The application coming for consideration is this ruling is the one dated November 15, 2022 seeking the following prayers:
 - a. That this honorable court be please to grant stay of the withdrawal of Kshs 3,100,000 plus interest accrued deposited in the joint interest earning account in M-Oriental Bank Limited Account No xxxx in the names of Ligunya Sande & Associates and Tariq Khan & Associates the advocates for the parties pending the hearing of the intended appeal.
 - b. That costs of this application be provided for.
2. The application was based on the grounds on the face of it and on the supporting affidavit of Priscilla Makhoha. In it she deponed that the court delivered its judgement on October 31, 2022 in favor of the appellant/respondent.
3. The 1st respondent/intended appellant being dissatisfied with the said judgement filed a notice of appeal dated October 31, 2022 intending to appeal to the court of appeal.



4. That on account of the judgement delivered and the 1st respondent's arguable appeal the 1st respondent is apprehensive that the appellant/respondent will proceed to withdraw the sum of Kshs 3,100,000 deposited in the joint interest earning account plus interest.
5. She deponed that it is in the interest of justice that the court maintains the status quo.
6. The 1st respondent /applicant further submitted that under the special but rare circumstances presented before this honorable court, while it is the norm, and going by precedents before, that the intending appellant ought to deposit security for costs on account of the impending appeal, the 1st Respondent submits that the risk of injustice being carried out on account of the 1st Respondents appeal being successful, by the Appellant/ Decree-Holder absconding the jurisdiction of this honorable court, is higher than that that the appellant/ decree-holder stands to suffer in the event that the court stays the withdrawal of the decretal sums herein pending the appeal.
7. The application was opposed by the replying affidavit of Omar Mahmood dated December 14, 2022. He deponed that the appellant deposited Kshs 3,100,000 in M-Oriental bank Limited Account No xxxx in the names of both firms. This court delivered its judgement on October 31, 2022 in favor of the appellant where the appeal was allowed and judgement of the lower court was set aside and substituted with an order dismissing the suit.
8. That upon the application of the release of the said monies to the bank the respondents advocate on record unfairly withheld her consent and demanded that an order be made to that effect.
9. There is a subsisting order dismissing the suit with costs in the lower court in Misc Civil Application No E465 of 2020 and in the current appeal against the 1st respondent which requires security for due performance pending the hearing and determination of the intended appeal.
10. That the security can only be furnished by the 1st respondent and not the appellant therefore, the application dated November 15, 2022 is intended to hoodwink the court into shifting the liability for security from the 1st respondent to the appellant herein.
11. The appellant/respondent further submitted that there being an order for dismissal of the Lower Court Case CMCC No 1856 of 2016 as per the judgement of this Court dated October 31, 2022, it follows that there is no money decree. The Applicant herein has failed, refused and/ or neglected to substantiate what decree the Appellant herein is called upon to give security for its due performance.
12. The sole issue for determination in this Application is whether this Court should grant stay of the withdrawal of Kshs 3,100,000 plus interest accrued deposited in the joint interest earning account in M-Oriental Bank Limited Account No xxxx in the names of Ligunya Sande & Associates and Tariq Khan & Associates the advocates.
13. There is no dispute that the said amount was deposited as security pending the appeal filed by the Appellant which appeal was allowed with costs.
14. The High Court on first appeal set aside the Judgment and Decree of the Trial Court and awarded the Appellant costs.
15. This Application seeking stay of the decretal sum has no basis in law and the same is premised on the wrong provision since the intended appeal is against the dismissal of the suit and in the circumstances there is no money decree that the Appellant herein is being called upon to give security for its due performance.



16. I find that there is no evidence that the Appellant will not be able to pay the decretal sum should the Respondent succeed in the second appeal to the Court of Appeal.

17. The Application dated November 15, 2022 is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 15TH DAY OF JUNE 2023.

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A. ONGERI

JUDGE

In the presence of:

.....for the Appellant

.....for the 1st Respondent

.....for the 2nd Respondent

