



**Okoyo v Masika & another (Suing as Legal Representatives of the Estate of Rehema Peninah Okova) (Civil Appeal E149 & E150 of 2024 (Consolidated)) [2024] KEHC 12899 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12899 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL E149 & E150 OF 2024 (CONSOLIDATED)  
RN NYAKUNDI, J  
OCTOBER 25, 2024**

**BETWEEN**

**JAMES OKOYO ..... APPELLANT**

**AND**

**JOHN KARANI MASIKA ..... 1<sup>ST</sup> RESPONDENT**

**WYCLIFFE OKOVA KILAMBO ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF REHEMA  
PENINAH OKOVA**

**RULING**

**Representations:**

M/S Nyairo & Co. Advocates

M/s Munyaga Githaiga Advocates LLP

1. The jurisdiction of this court in determining the applications in Civil Appeal 149 & 150 of 2024 shall be guided by Section 1A, 1B and 3A of the *Civil Procedure Act* to secure expediency and utilization of scarce judicial resources. In essence, the final orders of this court shall apply to both applications.
2. What is pending before me for determination are Notice of Motions Application dated 5<sup>th</sup> September 2024 and 9<sup>th</sup> September, 2024 all premised upon Art. 22, 48, 50(1) and 159 of *the Constitution* of Kenya, Section 1A, 1B, 3A, 63(e) of the *Civil Procedure Act*, Order 42 Rule 6, 7 and 51 Order 51 Rule 1 of the Civil Procedure Rules in which the Applicant's counsel Ms. Halwenge Odwa in both Civil Appeal E149 & 150 of 2024, is seeking similar orders framed as follows:
  - a. Spent.



- b. That service of this application be dispensed with in the first instance.
  - c. That pending the hearing and determination of this application inter partes, there be temporary orders of stay of execution and/or further execution in Eldoret CMCC. No. E77 & 078 of 2020.
  - d. That there be stay of execution and/or further execution in Eldoret CMCC E77 & 078 of 2020 pending the hearing and final determination of the appeal herein.
3. The Applications are based on the grounds on the face of the record, inter alia:
- a. The Respondents obtained judgment in their favor in Eldoret CMCC. No. E77&078 of 2020 in the sum of Kshs. 306,880 and Kshs. 2,509,200/=.
  - b. That the Appellant/Applicant has appealed vide this appeal against the judgments of the court below dated 25<sup>th</sup> day of June 2024.
  - c. That there are no orders of stay of execution in force at the moment for reasons that the primary court in the first instance declined to grant any such orders pending the hearing and determination of the appeal.
  - d. That should the Respondent execute the decree in Eldoret CMCC. No. E77&078 of 2020, the Appellant/Applicant stands to suffer irreparable loss in the event the appeal succeeds, as the Respondent does not have assets which are sufficient to recover any sum paid to him.
  - e. That the appeals has very high chances of success as the Appellant/Applicant.
  - f. That the Appellant/Applicant is ready and willing to provide security for the due performance of the decree. However, any order for provision of security be made in line with Order 42 Rule 6 of the Civil Procedure Rules, 2010 and not punitive such that it results in denying the Respondent/Applicant access to justice as guaranteed under Articles 22 and 48 of *the Constitution* of Kenya, 2010.
4. As at the time of preparing this ruling, I did not have the advantage of the responses in the form of grounds of opposition or replying affidavits as it is the requirement of procedural law. This may be due to the e-filing system issues or the Respondent never made an attempt to file any pleadings to that effect. However, I hold the view that in exercising discretion I will take into account the balancing act of the parties' rights.

### **Analysis and Determination**

- 5. Having read through the applications and the affidavits in support, the sole issue I find for determination is whether stay orders can be granted. I have to take note of the fact that the Appellant/Applicant at the trial court sought stay orders through a similar application and the same was denied.
- 6. Order 42 Rule 6(2) of the *Civil Procedure Act* sets out the principles that the court should consider while deciding whether to grant Stay of Execution Pending Appeal. These are: -

“No order for stay of execution shall be made under sub rule (1) unless—

- (a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and



(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

7. In *Hunker Trading Company Limited v. Elf Oil Kenya Limited* [2010] eKLR, the Court of Appeal held that to file an application in the appellate court for stay of execution, after having failed to comply with the terms of an order of stay granted upon a similar application before the trial court, is an abuse of the process of the court.
8. I am of the view that a similar application was considered at the trial court at length and dismissed for reasons that the applicant did not meet the conditions required for stay of execution to issue. I am therefore hesitant not to delve into the conditions precedent in matters stay as they have already been addressed by the trial court in its ruling dated 5<sup>th</sup> September, 2024 and that decision has not been challenged so far. There is no new evidence given before this court that there are any change of circumstances to warrant the same orders under Order 42 Rule 6 of the Civil Procedure Rules.
9. I particularly agree the decision of the Court of Appeal *Hunker Trading Company Limited v. Elf Oil Kenya Limited* [2010] eKLR where the court stated as follows:

“In the circumstances, we find that the exercise by us of any original jurisdiction would be inappropriate where, as in this case, the lower court has exercised a parallel jurisdiction, it must be demonstrated to this Court that the jurisdiction of the lower court has not been properly exercised, otherwise we would be encouraging duplication of effort and poor management of the available resources.

The applicant is seeking the same orders it declined to obey. We think that we have the jurisdiction to stop it in its tracks in order to attain or further the “O2” principle. We would act unjustly if we were to allow it another chance in this Court to defeat the cause of justice by failing to obey an important order of the superior court.”

Indeed, where such applications have previously determined the matter the subsequent applications are barred by the principle of *res judicata* (see *Mburu Kinyua v. Gichini Tuti* (1978) KLR 69); where an application is dismissed for want of appearance, the applicant cannot be allowed to bring a second application unless he seeks reinstatement of the application for good cause (*Wanguhu v. Kania* (1987) KLR 51) and where the earlier one is not concluded, a similar subsequent application is sub judice by virtue of section 6 of the [\*Civil Procedure Act.\*](#)”

10. The Appellant in the instant applications seems to be revisiting the ruling on stay of execution duly delivered by the trial court. However, I take cognizance that having lost in the court below, it is postulated in the law that he can also approach an appeals court on the issue of stay of judgments in view that the subject matter of appeal is domiciled in this appropriate forum.
11. Notwithstanding the prevailing circumstances surrounding this proceedings, I take cognizance of the fact that a memorandum of appeal w in itself is not an appeal. It is trite law that an appeal is deemed to have been filed to this court when a record of appeal is admitted in the appropriate registry. From the available evidence before this court, the applicant has merely filed a memorandum of appeal against the impugned judgments of the trial court without more. There is no valid appeal which has been entered against the judgment of the trial court. Moreover, in applying the traditional yardstick in Order 42 of the Civil Procedure Rules the applicant prima facie cannot be said to have disclosed any special circumstances in the affidavits in support of the motions to warrant stay of execution. The courts as independent tribunals under [\*the Constitution\*](#) are to act according to the rules of reason and justice and



not according to private opinion, hence the purposeful approach in interpretation of the applicable law on appeals. A cursory look at the applicant's Memorandums of Appeal, the applicant's motions do denote a desire to have a second bite at the cherry before this court, which sometimes is inevitably based in the Constitutional imperative of the right of appeal in accordance with our system of administration of justice.

12. If indeed it is true that the court below failed to properly evaluate and ascribe proper evidential or probative value to the appellant's counter evidence in terms of Art. 48 and 50 of *the Constitution*, I am persuaded to exercise discretion in the circumstances of this case to grant stay of execution preconditioned on the following:
- a. That the Appellant deposits half of the decretal sum in a joint earning interest account in a reputable financial institution in the joint names of the Appellant's and Respondents' legal counsels within 45 days from today's Ruling.
  - b. That in the alternative, the applicant adequately provides a bank guarantee from a financial institution of Kshs. 1,000,000/= pending the hearing and determination of the appeal within the timelines set in clause (a) above.
  - c. That the Deputy Registrar of the High Court facilitates supply of certified copies of the trial court record for purposes of an appeal.
  - d. That the appellant has 45 days within which to file his record of appeal.
  - e. That in default of any of the above conditions precedents, the Respondents be at liberty to enforce and execute the said judgment of the trial court.
  - f. That these orders apply mutatis mutandis to Civil Appeal No. E149 of 2024 given their interlocking issues, subject matter and the appellant as the common denominator save for the differentia on the condition of a deposit of Kshs. 300,000/= in the joint earning interest account of both counsels or an equivalent bank guarantee from a reputable financial institution.
  - g. The costs of this application abide the outcome of the appeal.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 25<sup>TH</sup> DAY OF OCTOBER 2024**

In the Presence of

Wahome for the Applicant

Esther Mbugu for the Respondent

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**R. NYAKUNDI**

**JUDGE**

