



**Atenya & another v Atenya & 2 others (Suing as the Legal Representative of the Estate of Joyce Mukye Mwove - Deceased) (Civil Appeal E018 of 2023) [2025] KEHC 15075 (KLR) (24 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15075 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CIVIL APPEAL E018 OF 2023  
CM KARIUKI, J  
OCTOBER 24, 2025**

**BETWEEN**

**RAHAB ATENYA ..... 1<sup>ST</sup> APPELLANT**

**HERMAN ATENYA ODERO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**KELITA MWOVE MUTHENGI ..... 1<sup>ST</sup> RESPONDENT**

**ANNAH MUTINDI ..... 2<sup>ND</sup> RESPONDENT**

**RICHARD MWASI MWOVE ..... 3<sup>RD</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOYCE  
MUKYE MWOVE - DECEASED**

**RULING**

**Introduction:**

1. In an Applicant's Notice of Motion dated 22 d July 2025 which was seeking orders that:
  - i. Court be pleased to order the release of the decretal sum of Kshs 1,506,006/= deposited in Consolidated Bank of Kenya to the firm of M/s Shem Kebongo & Company Advocates.
  - ii. court do issue an order for the release of accrued interest on the sums deposited from the date of deposit to the firm of Shem Kebongo & Company Advocates.
  - iii. Court do issue an order directing the Bank Manager and/ or branch manager and all persons of authority concerned at Consolidated Bank of Kenya and Consolidated Bank of Kenya to execute all necessary documents required to enable the release of Kshs 1,506,006/= and accrued interest to the firm of Shem Kebongo & Company Advocates.



- iv. The Costs of this application be provided for.
2. The application is supported by an affidavit and grounds on the face of the application while the respondents have filed a replying affidavit to oppose same.
3. Parties were directed to canvass application via submissions
4. Factual Background:
  1. The Applicant filed a Complaint seeking both General and Special damages for the injuries that he sustained due to a road traffic accident which occurred on 22.10.2019 along Narok-Bomet Road which involved the Plaintiff who contended that the accident was caused due to the negligence of the Respondents herein.
  2. The matter was heard and a judgement was delivered on 24.04.2023 in the sum of Kshs. 1,506,006/= as general damages plus costs.
  3. Being aggrieved by the Judgement of the lower court, the Respondent's herein appealed to the decision of the court and a conditional stay was issued whereby this Honourable court directed that the decretal amount of Kshs. 1506,006/= be deposited as stay condition, as security.
  4. The matter was scheduled for mention thereafter and the appeal was disposed off by way of written submissions and judgement was delivered on 20.12.2024 whereby the appeal was dismissed with costs to the Respondents. Thus, precipitating instant application.
5. Applicant's Submissions:
  1. The applicant submits the following issues for determination: Whether the entire decretal sum and accrued interest should be released to the Respondent's Advocate and costs.
  2. Conditional stay of execution pending Appeal is set out in Order 42 Rule 6(2) of the Civil Procedure Rules. which provides that the conditions for stay of execution pending appeal to be: granted to be: (a) that substantial loss may result to the applicant unless the order is made, (b) the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
  3. The purpose of the security was also aptly explained in Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd [2019] e KLR, the Appellant/Respondent filed an application dated 05.06.2023 under Certificate of Urgency seeking conditional stay pending appeal for the judgement that was delivered in NAROK CMCC E016 OF 2020. Since they were willing to deposit security, the court granted them the orders that they sought on condition that they pay Kshs. 1,506,066 /= within 45 days.
  4. Pursuant to the court order issued on 06.06.2023, the Advocates opened a joint interest earning account with Consolidated Bank in their respective names and security amount deposited as ordered.
  5. The matter proceeded to mention of directions on how the appeal will proceed and parties agreed to file submissions and a judgement date was issued.
  6. The judgement was delivered on 22.12.2024 where the court dismissed the appeal with no orders as to costs and a 30-day stay of execution was issued.



7. It is submitted that the stay lapsed more than 7 months ago and therefore the money held in the joint interest earning account is payable to the firm of Shem Kebongo & Company Advocate, the Applicant's Advocates herein further, the Applicant is in dire need of medical finances and to also settle the pending medical bills and therefore withholding the decretal sum and the accrued interest in the joint account is detrimental to him.
  8. the Respondent in their Replying Affidavit dated 11<sup>th</sup> August 2025 stated under paragraph 4 and 5 that they have just realized that the motor vehicle was being utilized contrary to policy terms and conditions. It is submitted that the issue between the Appellant and his insured would have arisen in the trial stage and therefore this is a delay tactic to deny the Applicant the chance to enjoy the fruits of his judgement.
  9. That they have also had more than 7 months to lodge an appeal at the Court of Appeal but they have slept on their rights until the Applicant moved this honourable court seeking for the release of the decretal sum that had been deposited in a joint interest earning account as security.
  10. It is clear that from the above facts and the evidence that has been produced before this court that it is just and fair that this Honourable court issues an order directing the Appellant/Applicant to release the funds held in the joint interest earning account. We rely on *ATAKA, Kimori & Okoth Advocates V Surestep Systems And Solutions Ltd* {20201KEHC 1153 (KLR)} where the court directed that the money held in the joint interest earning account should be released to the Respondents.
6. Appellants'/respondents' Submissions:
1. The Respondent/Applicant filed an application seeking for the release of the decretal sum deposited in a joint interest earning account as security of the Appeal by the Appellant's herein.
  2. The Application is opposed via the Replying Affidavit sworn by Peter Ngola, the legal officer of the Appellants/Respondents insurer.
  3. The Appellants/Respondents insurer opposes to the release of the decretal sum on the grounds that they now wish to repudiate their Insured's Claim and as such, if the same was to succeed then the insured Appellants/Respondents would not be in a position to refund the decretal sum.
7. Application are - Whether the Funds Deposited as security ought to be released as prayed. It is not in dispute that Britam General insurance Ltd, being the insurer of the Appellants/Respondent, deposited the decretal sum as security of the Appeal by the Appellants, in a joint interest earning Account.
  8. It is not in dispute that the Respondent's insurer, being M/S Britam General Insurance Ltd, took up the claim on behalf of its insured and subsequently the Appeal, also on behalf of its insured. It is also my lord not in dispute, that the decretal sum deposited in the joint interest earning account was deposited by the insurer before they realized that its insured had actually breached the terms of the Policy., entitlement of the release of funds is bound to happen after the question of liability has fully been dispensed of, the discovery of breach of policy on the part of the insured therefore, entitles the insurer to repudiate a claim and as such the question that would beg the Honorable Court is "Would justice be served to the insurer if the funds are released yet they intend to repudiate the Claim?"
  9. From the Replying Affidavit sworn by Peter Ngola, it is asserted that the insured Respondent cannot refund the security amount to the insurer in the event the declaratory suit succeeds. As such, it is



submitted that the Respondent's insurer having repudiated the Claim by its insured, the Applicant ought to pursue payment of the decretal sum directly from the Respondent.

10. The insurers' liability is only limited to the terms of the policy between themselves and their insured. It would negate the rules of justice to have the insurer satisfy a decree and pay decretal sum on behalf of an insured who breached the policy and the terms thereof and as such, my lord, we beseech the Honorable Court to find that it will (indeed be prejudicial to the insurer who deposited the security, if funds were to be released yet there is an impending repudiation claim against its insured.
11. Thus, court urged to dismiss the instant Application with costs to safeguard the interest of the insurer. No prejudice will be occasioned upon the Applicant as the Applicant can still pursue the insured directly by way of execution to satisfy the decretal amount

### **Issues, Analysis And Determinations**

12. Britam General Insurance Company Ltd had insured the Appellants motor vehicle registration number KCL 867J. It is deponed those investigations disclosed that the motor vehicle was being utilized contrary to policy terms and conditions. It is further averred that the Appellant having breached material terms and conditions of the policy Britam General Insurance General Ltd is not liable to settle the decretal sum. THAT the sum deposited in the joint account had been deposited by Britam General Insurance Company Ltd and not by the Appellants themselves.
13. However, the policy documents which contained terms allegedly violated by the insured was annexed nor investigation report containing un-disclosed nature and form of user of the motor vehicle insured which amounted to alleged violation of the material terms and conditions. There is also no evidence of communication of the Respondent's insurer having repudiated the Claim by its insured. The due diligence entails the respondent having investigated the circumstances of the accident, the nature and form of the user of the motor vehicle which was employed at the material time of the accident and same be matched with terms and conditions applicable to warrant the repudiation.
14. The Respondent took charge of the defiance of their insured in litigation and even lodged appeal and consented to depositing of the decretal sum in a joint account as a guarantee as to ability to settle decretal amount in event of the appeal failing to succeed.
15. Upon failing the appeal to succeed, the appellant has come up with untested theory without facts and/or evidence of having been and investigation not indicated when and by who the motor vehicle insured was being used contrary to terms and conditions of the policy thus repudiation allegedly done. He who avers must prove and in this case on balance of probability this being civil matter. This court finds no justification for allowing the respondent to obstruct the applicant from accessing and user of proceeds of his judgment's respondent can also recover any money paid due to its imprudence from their insured. Thus, the court orders that:
  - i. The orders do issue for the release of the decretal sum of Kshs 1,506,006/= deposited in Consolidated Bank of Kenya to the firm of M/s Shem Kebongo & Company Advocates.
  - ii. The order is hereby issued for the release of accrued interest on the sums deposited from the date of deposit to the firm of Shem Kebongo & Company Advocates.
  - iii. The court hereby issues an order directing the Bank Manager and/ or branch manager and all persons of authority concerned at Consolidated Bank of Kenya and Consolidated Bank of Kenya to execute all necessary documents required to enable the release of Kshs 1,506,006/= and accrued interest to the firm of Shem Kebongo & Company Advocates.



iv. That the Costs of this application are awarded to the applicant against the respondent

**DATED AND DELIVERED IN NAROK VIA MICROSOFT TEAMS THIS 24.10.2025.**

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**CHARLES KARIUKI**

**JUDGE**

