

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT CIVIL MISCELLENOUS APPLICATION

NO. E101 OF 2024

MARK OCHIENG

OGWAH.....APPELLANT/RESPONDENT

VERSUS

GRACE AUMA ODHIAMBO (SUING AS THE LEGAL
REPRESENTATIVE IN THE ESTATE OF SUNDAY
KENNEDY ODONGO).....1st

RESPONDENT/APPLICANT

HENRY BUNDI NDEGE.....

2ND RESPONDENT

MICHAEL KINYANJUI GATHIKA.....3RD

RESPONDENT

RULING

1. By a notice of motion application dated 9th June, 2025 the applicant is seeking for the following orders: _

a) Spent

b) Spent

c) Spent.

d) That this Honourable court be pleased to find that the applicant has complied with the directions/order issued on 3rd April, 2025 out of time requiring him to deposit the entire decretal sum in an interest earning account in the joint names of counsel.

e) That the costs of this application be in the cause.

2. The application is based on the grounds that, the primary suit, Nairobi CMCC No. 720 of 2018; Grace Auma Odhiambo (Legal Representative) vs Mark Ochieng and 2 others proceeded for hearing and

judgment delivered on 6th May, 2024. That being aggrieved with the judgment of the trial court, the applicant filed an application herein seeking leave to appeal out of time.

3. That the application was compromised by parties that leave to appeal out of time be granted to the applicant herein on condition that the total decretal sum be deposited in an interest earning account in the joint names of counsel.
4. However, the applicant did not comply with the stay conditions on time and filed an application dated; 19th May, 2025 seeking to extend time to deposit the entire decretal sum in an interest earning account in the joint names of counsel.
5. That the court directed that the application be heard inter-partes on 3rd July, 2025, but the respondent proceeded to execute the judgment delivered on 6th

May, 2024 and instructed Betabase Auctioneers to attach and advertise for sale by auction the applicant's property including his tools of trade, in realization of the judgment much to the detriment of the applicant.

6. That Betabase Auctioneers herein proclaimed the applicant's properties on 15th May, 2025 and may at any given moment attach the properties in execution of judgment of the court as there are no interim orders staying execution of the judgement herein, thus warranting the issuance of conservatory orders.
7. The applicant averred that he has since complied and deposited the entire decretal sum in an interest earning account in the joint names of counsels and in the circumstance it will be prudent and in the interest of justice that execution of the judgment herein be

stayed pending the hearing and determination of the instant application.

8. That the respondent doesn't stand to suffer any harm of prejudice if stay of execution of the judgment/decreed herein is granted and in the premise, it is only fair and just that the Honourable court grants stay of execution of the judgment/decreed of 6th May, 2024 pending inter-parties hearing and determination of the application.
9. However, the respondent opposed the application vide a replying affidavit dated 18th June 2025, where she avers that the applicant had not complied with the orders of the court dated 3rd April 2025. That the applicant only deposited Kshs. 2,226,557 of the decretal sum instead of Kshs. 2,388,662, and had failed to file the record of appeal within the timelines given.

10. Furthermore, the instant application is seeking similar orders to the applicant's earlier application dated 19th May 2025, which application is still pending hearing and determination. That the application should be dismissed with costs to allow execution to proceed and the matter, which has been in court for seven (7) years, be concluded.

11. In the meantime, the respondent by an application dated 15th July, 2025 sought for orders:

a) That the decretal sum Ksh2,267,557 together with any accrued interest held in the joint interest-earning account at NCBA Bank Nanyuki branch in the names of the counsels on record be released to the applicant/deedee holder counsel's firm, that is Messrs Callistus & co. Advocates.

b) That the costs of this application be borne by the Appellant/Respondent.

12. The application is based on the grounds that on 13th June, 2025, this Honourable court presiding in the matter; HCCA E034 of 2024 Mark Ocheing Ogwah vs Grace Auma, ordered the respondent herein to file a complete record of appeal within seven (7) days failure of which the appeal would stand dismissed.
13. That the appellant/respondent blatantly failed and/or neglected to file the complete record of appeal within the stipulated time and instead filed a supplementary record of appeal out of time without leave of the court.
14. That on 8th July, 2025, when the matter came up for directions on the hearing of the application to dismiss the appeal, the Honourable court ordered that the

supplementary record of appeal filed out of time without leave of court be expunged from the record.

15. The applicant argues that without the supplementary record of appeal, the appeal is incomplete, unmeritorious and inadmissible given that the supplementary record of appeal contains typed proceedings and a copy of the judgment.

16. That the continued holding of the funds is unjustifiably prejudicial to the applicant and serves no lawful purpose given the respondent's disregard of court directions and his incomplete appeal, which will render the whole trial an academic exercise. As such, it is in the interest of justice that the prayers sought be granted.

17. The applicant opposed the application vide a replying affidavit sworn on 24th July 2025 by Peter Ngola Makau, a legal officer at Britam General Insurance

Company Limited. He averred that the application is premature, as there is a pending application seeking the court to find that the appellant complied with the court's order issued on 3rd April 2025 out of time, and which application is scheduled for directions on 22nd September 2025.

18. That as decretal amount was deposited into an interest earning account without leave of court, there is no decretal amount deposited in court available to be released to the applicant.

19. Further, that the applicant has always been keen to prosecute the appeal and requested for the certified copy of proceedings vide a letter dated 14th April 2025. That the appellant's advocates on record filed an incomplete record of appeal on 12th June 2025, due to want of proceedings.

20. That when the matter came up in court on 13th June 2025, the court granted the appellant a further seven (7) days within which to file a complete record of appeal. That, the typed proceedings have been availed and a complete record of appeal filed.

21. That the appellant has filed an application seeking to file the supplementary record of appeal out of time and is scheduled for direction on 31st July 2025. That it is in the interest of justice and fairness that the application be dismissed with costs. That the applicant will not suffer any prejudice if the application is dismissed.

22. The applications herein are considered in the light of the material before the court, and it is noted that, on 30th April, 2025, the court ordered the appellant to deposit the decretal sum within 30 days of the date of the order. However, the deposit was made on 5th

June, 2025 after the 30 days and without leave of the court.

23. On 4th June, 2025, the court noted that the deposit was made out of time and without leave of the court and declared it as null and void. Consequently, the order for stay of execution stood vacated.

24. Thereafter, court gave timelines for filing of the record of appeal, initially within 30 days from 23rd April, 2025 and an additional fourteen (14) days with effect from 30th May, 2025. On 13th June, 2025, a further seven (7) days were given for filing of the supplementary record of appeal.

25. However, the supplementary record of appeal was filed out of time and declared invalid, and ordered to be expunged from record. On 24th July 2025, the parties appeared before the Hon. Deputy Registrar to confirm if the record of appeal was complete. The

learned counsel Mr Nyengenyé confirmed that the record of appeal was complete.

26. In the meantime, the learned counsel Mr Kairu informed the Honourable Deputy Registrar that he had filed an application for admission of the supplementary record of appeal.

27. The decree holder has moved to execute the decree but, it is notable that the deposit has been made in joint name of the parties' counsels and secures the interest of both parties. Ironically, the decree holder, alleges that the deposit was made out of time but at the same time, seeks that the said sum be released to them. How can a deposit declared by the court to be null and void be available for release?

28. Consequently, the application for release of the subject sum is not tenable. The purpose of the order

for deposit of a decretal sum is to secure a stay. In the absence of the same, there is no stay order.

29. However, it is in the interest of the parties to ratify the deposit, which is already done by the deposit in joint names and process the appeal. The execution is not available in the given circumstances.

30. It is so ordered with no orders as to costs.

Dated, delivered and signed on this 12th day of November 2025.

GRACE L. NZIOKA

JUDGE

In the presence of: -

N/A for the appellant

Mr. Nyegenye for the respondent

Ms. Hannah: court assistant