



**Nyabera v Kinyanjui & another (Civil Appeal E847 of 2024)
[2025] KEHC 3858 (KLR) (Civ) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 3858 (KLR)

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

**CIVIL
CIVIL APPEAL E847 OF 2024**

**SN MUTUKU, J
FEBRUARY 27, 2025**

BETWEEN

FRED NYABERA APPLICANT

AND

PAUL MACHARIA KINYANJUI 1ST RESPONDENT

NAIROBI BAPTIST CHURCH 2ND RESPONDENT

RULING

1. By a Motion dated 10th December 2024 brought under sections 1A, 1B, 3 and 3A of the [Civil Procedure Act](#), Order 40 Rule 1,2 and 4, Order 42 Rule 6 of the Civil Procedure Rules and all enabling provisions of the Law, the Applicant seeks the following orders:
 - i. Spent
 - ii. That the Honourable Court be pleased to order an immediate refund of Kshs 649,743 together with any accrued interest thereon, deposited in Court by the Applicant in compliance with the Court's order dated 26th October 2023.
 - iii. That the Honourable Court be pleased to stay any further execution against the Applicant pending the hearing and determination of this application.
 - iv. That the Honourable Justice J.N Njagi reviews and corrects the findings contained in the Ruling dated 28th November 2024 to reflect the accurate record of the proceedings and orders issued on 26th October 2023.
 - v. That this Honourable Court be pleased to make any other order as it may deem fit in the interests of justice.



2. The grounds in support of this motion are stated on the face of it and in the Supporting Affidavit sworn by the Applicant on 10th December 2024.
3. In summary, the Applicant has advanced the grounds that the Court (Hon. Justice J. N. Njagi) directed the Applicant, by an order issued on 26/12/2023, to deposit the balance of the decretal sum within 45 days; that the Applicant's advocates wrote to Court on 2/11/2023 seeking an invoice from the Court for depositing the balance of the decretal sum as ordered; that the Judiciary generated an invoice ref. number E2MWVGLF for Kshs 649,473 and that the Applicant deposited that amount in court and was issued with receipt number DCA-0007229.
4. The Applicant has stated, further, that the Court (Hon. Justice J. N. Njagi) held on 28/11/2024 that no such order had been issued to deposit the decretal sum in court and termed the Applicant's deposit as the "Applicant's own ingenuity" and an "attempt to obtain orders through the backdoor". The Applicant has interpreted the Judge's interpretation as being wholly inconsistent with the record and chronology of events which led to the auctioneer to execute the decree as a result of which the Applicant was compelled to pay the Respondent Kshs 747,992 in line with the amount demanded in the warrants dated 6/12/2024.
5. The Applicant has attached to his Supporting Affidavit the Court Order (FN-1); copy of letter to the letter dated 2/11/2023 addressed to the Deputy Registrar of this Court⁶ (FN-2); Invoice from the Judiciary (FN-3) and Receipt for Kshs 649,743 (FN-4) to support his case.
6. The 1st Respondent filed a Replying Affidavit sworn on the 23/1/2025 in opposition to the Application. He has deposed that the order of the court⁶ issued on 26/10/2023 was to deposit the decretal sum in an interest earning joint account held by the two advocates. He has deposed that the orders of the court issued on 28/11/2024 should not be reviewed because it reflects the correct position. His case is that his costs in terms of several court attendances should be considered before the amount deposited by the Applicant is released to him.
7. Parties were directed to file submissions in respect of the Motion under determination. I have considered the Applicant's submissions dated 6/2/2025 and those by the Respondent dated 14/2/2025 with an attached Party and Party Bill of costs which the Respondent seeks to be settled before the deposited money can be released to the Applicant.
8. I have appreciated the submissions of each party which support the positions each party has taken in respect of this matter. I have perused the court file and acquainted myself with the record of the Court.
9. In my considered view, the orders of the court, both on 25/10/2022 and the orders of the Court issued on 18/10/2023, needs to be put into context. The record is clear that Hon. Justice Njagi granted, on 25/10/2022, stay of execution in respect of the Notice of Motion dated 21/10/2022 on condition that the Applicant deposits, within 30 days from that date, the decretal sum in an interest earning account to be opened between the advocates for the parties.
10. On the 18/10/2023, counsel for the Applicant (Mr. Koba representing Mr. Sore) informed the Court that the Applicant had only managed to deposit half of the amount. The Counsel sought 45 days to deposit the balance. The amounts are not mentioned.
11. The Court allowed the Applicant to deposit the balance of the decretal sum within the next 45 days. The order did not state where this amount was to be deposited, either the Court or joint account. Put into context, I would chance to state that the balance was to be paid into the same account as earlier ordered and in line with the information by Mr. Koba that the Applicant had only managed to deposit half of the decretal amount as ordered by the Court.



12. The Deputy Registrar extracted the order of the Court on 26/10/2023. That order does not state that the deposit of the decretal sum was to be made in a joint interest earning account. Neither did it state that the deposit was to be done in Court. In the letter addressed to the Registrar dated 2/11/2025, GSLAW LLP, representing the Applicant told the DR that the Court had directed them to deposit the balance of the decretal amount in Court. They sought assessment of the balance of the decretal sum to be paid by the Applicant and requested for the invoice.
13. The wording of that letter and the order as extracted by the DR changed the wording of the Court Order. At no time did the Hon. Judge change the Order to state that the deposit of the decretal sum was to be in Court. This is my interpretation and understanding of the orders of the Judge.
14. I have considered this application. I am persuaded that indeed the Applicant deposited in Court Kshs 649,473 on 10/12/2024 as evidenced by Judiciary Official Receipt No. E2MWVGLF. The Respondent does not refute that payment of that amount was made to Court. His claim is that the amount should not be released before their costs are paid.
15. I have considered that issue. It is not in dispute that the amount was paid in compliance with court order although into a wrong account instead of a joint interest earning account in both names of counsel. The purpose of that payment was for decretal amount to secure stay of execution. If any costs have resulted following court attendances and other incidentals, then the Respondent ought to seek Party and Party costs through a taxable bill of costs.
16. I am persuaded to allow, which I hereby do, prayers 2 and 3 of t6he Notice of Motion dated 10/12/2024. Prayer 4 of that application is declined. In respect to prayer 5, I direct that each party bears own costs of this application. Further, any other incidental costs resulting from this matter should be taxed in the normal way.
17. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 27/2/2025.

S. N. MUTUKU

JUDGE

