



**CMC Motors Group Ltd v Orange; Nyang'acha & 3 others (Interested Parties) (Miscellaneous Civil Application 70 of 2001) [2024] KEHC 2797 (KLR) (Civ) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2797 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
MISCELLANEOUS CIVIL APPLICATION 70 OF 2001**

**SN RIECHI, J**

**MARCH 20, 2024**

**IN THE MATTER OF ESTATE ON APPLICATION BY CMC MOTORS GROUP LIMITED.**

**BETWEEN**

**CMC MOTORS GROUP LTD ..... APPLICANT**

**AND**

**MORANGA ORENGE ..... RESPONDENT**

**AND**

**ZIPPORAH NYANG'ACHA ..... INTERESTED PARTY**

**DUKE MONARI NYANG'ACHA ..... INTERESTED PARTY**

**MARIA GASARE NYANG'ACHA ..... INTERESTED PARTY**

**TABITHA GEICHEMBE NYANG'ACHA ..... INTERESTED PARTY**

**RULING**

1. CMC Holdings filed this Originating Summons in this Court as 18.10.2001 seeking the Court to determine the following questions;
  1. That this Honorable Court be pleased to appoint a Guardian ad litem to be joined in this suit to represent the interests of Zipporah Nyang'acha, Duke Monari Nyang'acha Maria Cesare Nyang'acha And Tabetha Gechembe Nyang'acha who are all minors.
  2. That the sum of Kshs.2,665,200/- held by the Applicant be apportioned to the beneficiaries of Salim Nyang'acha Omenyi, (deceased) in such manner as this Honourable Court may deem appropriate.



2. After 22 years in this Court, this court delivered Ruling dated 5<sup>th</sup> June 2023 issuing the following orders:
  1. I have considered The application by the appellant CMC Motors and the response and submissions by the respondent. I find and direct the appellant CMC Motors do pay the sum of Ksh.2,665,200/- to the applicants who are the dependants of Salim Nyang'acha Omenya (Deceased).
  2. That the said sum to be paid with interest at court rates from the date of filing of this application 1.11.2001 at court rates until payment in full.
  3. I note that the applicants filed this matter to seek directions on who to pay the sum accrued and it was to their beneficiaries who were minors. Consequently, I direct each party to bear their own costs.
3. Mr. Ngatia for CMC Motors filed two applications, the first one dated 13.6. 2023 Seeking the following orders:
  - a. That due to the urgency, this Motion be certified urgent for hearing *ex parte* at the first instance.
  - b. That an interim order be issued, *ex parte* at the first instance to stay any execution and/or attachment of the Applicant's assets consequent to the decision made on 5<sup>th</sup> June 2023, pending the hearing *inter partes* of this Motion.
  - c. That an Order of stay of execution and/or attachment of the Applicant's assets be issued pending the hearing and determination of this Motion.
  - d. That the ruling and orders made on 5<sup>th</sup> June 2023 be set aside in entirety and the Applicant's Interpleader Motion be heard *de novo*.
  - e. That in the alternative to the foregoing prayer (d), the sum of Kshs.2,665,200 together with all accrued interest on that deposit be released to the Interested Parties in full and final payment.
  - f. That costs of and incidental to this application be provided for.
4. The main grounds for the application are:
  1. It is manifestly clear that the court erroneously made its decision without taking into account the Applicant's submissions though duly filed on 5<sup>th</sup> May 2023 and served upon the Respondent on 6<sup>th</sup> June 2023. This violates Article 25 (c) and 50(1) of [the Constitution](#).
  2. In addition, there is an error apparent on the face of the record since the court made a determination on interest on Kshs.2,665,200 as contemplated in Section 26 of the [Civil Procedure Act](#) whereas this was not a money decree. The sum is not an asset of the deceased's Estate but a benevolent sum.
  3. The Applicant's assets are at risk of being attached if the orders are executed. The Interested Parties issued the Applicant with a notice of intention to execute dated 7<sup>th</sup> June 2023.
  4. The parties herein did voluntarily agree that sum of Kshs.2,665,200/ = be deposited in an interest earning account as per the court orders issued on 24<sup>th</sup> January, 2022. Hence grant of stay of execution will not prejudice the interested parties in any way.
5. Mr. Ngatia for CMC filed another application dated 3.7.2023 seeking the following orders:



- a. The Motion be certified urgent due to the urgency pleaded herein and be heard *ex-parte* at the first instance.
  - b. The execution and/ or implementation of the "Decree" dated 9<sup>th</sup> June 2023 issued purportedly in respect to the ruling that was delivered on 5<sup>th</sup> June 2023 by Mr. Justice Riechi be stayed *ex-parte* at the first instance pending the hearing and determination of this application.
  - c. The execution and/or implementation of the Warrants of Attachment issued on 26<sup>th</sup> June 2023 to Mbeki Auctioneers including the Proclamation of the Applicant's movable assets carried out by Mbeki Auctioneers on 27<sup>th</sup> June 2023 be stayed *ex-parte* at the first instance pending the hearing and determination of this Application.
  - d. That the "Decree" dated 9<sup>th</sup> June 2023 issued purportedly in effect to the ruling delivered on 5<sup>th</sup> June 2023 and the consequent Warrants of Attachment issued on 26<sup>th</sup> June 2023 be set aside and be expunged from the Court record for being irregularly and (or unlawfully obtained by the Interested Parties and for being in breach of the Civil Procedure Act Rules.
6. The application is premised on the grounds that:
- i. That in a ruling delivered by Mr. Justice Riechi on 5<sup>th</sup> June 2023 this Honourable Court allowed interest on a benevolent sum of KShs.2,665,208 which the Applicant made available to the Applicant's employee Mr. Salim Nyang'acha's minor children upon the demise of the employee.
  - ii. That the funds could not immediately be remitted to the children upon demise of Mr. Salim Nyang'acha as the children were minors. In addition, the Respondent herein Moranga Orange surreptitiously applied and obtained a Grant of Letters of Administration to the estate of Salim Nyang'acha on the ground that he was the deceased's brother and guardian of the minor children.
  - iii. The Applicant made inquiries and established that the claims made by the Respondent were incorrect and were made purposely to obtain the benevolent funds.
  - iv. Upon the children being of age, no immediate effort was made to revoke the Letters of Administration that had been issued as afore-averred. It took the Applicant's counsel's prompting for the Interested Parties to initiate the crucial step. The revocation was made on 17<sup>th</sup> April 2023.
  - v. As an act of good will the Applicant made effort to seek the Interested Parties to jointly invest the KSh.2,665,208 in an interest earning account at Paramount Bank Ltd. The funds continue to accrue interest as from 27<sup>th</sup> January 2022 to date. Counsel for the Interested Parties freely consented to the deposit.
  - vi. That the award of Interest was made on an error apparent on the face of the record namely that the Judge erroneously considered that the Applicant had not filed submissions in opposition to the claim for interest whereas the submissions had indeed been filed; are on the e-filing portal and were served upon all the other parties. As the ruling is based on an error apparent on the record, the Applicant immediately after the ruling made an application seeking to review the ruling and to set it aside *ex debito justitiae*. The application was filed on 13<sup>th</sup> June 2023 and served upon all the parties.
7. By Consent both applications were heard together. Both Counsels filed their respective submissions. On 13.7.2023 Mr. Ngatia for applicant and Bosongo for Respondents highlighted their respective



submissions. Mr. Ngatia for the Applicant submitted that the application dated 13.6.2023 was seeking review of the ruling dated 5.6.2023. He submitted that the issue which was for determination was that of interest on the sum and they had filed submissions but which the court did not consider. He submitted that this was an error on face of the record. On the application dated 3.7.2023 he seeks the decree extracted from the ruling to be set aside as the same was not sent to them for approval as required under Order 21 Rule 8, secondly he submits that the decree is signed by a Deputy Registrar and not the Judge contrary to the provisions of Order 21 Rule 8;

8. He submits that the allegations that there are other files in respect of the matter is not true and that the confusion with a Civil file in the Civil division was as a result of mapping during e-filing.
9. Mr. Bogongo for the Respondent submitted that a similar application for review was filed before Onger J in Civil Division and that the Applicant should not be allowed to prosecute 2 similar applications in two separate courts. He submits that the decree complained of was obtained legally and not through back door. He submits that the prayer for orders of stay has been overtaken by events as the applications had paid Ksh.6.92 million interest and that is therefore nothing to stay.
10. In reply Mr. Ngatia submitted that 0.45 provides the procedure for applications for review. On the issue that the applicant has already paid the sum, he submitted that the same was done under duties by auctioneers. Upon considering the applications, affidavits and submissions, the issues for determination on the applications are:
  1. Whether the Court should review its ruling dated 5<sup>th</sup> June, 2023 and
  2. Whether the decree issued should be set aside.
11. Section 80 of the *Civil Procedure Act* Provides:

Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 Rule 1 provides:

- “(1) Any person considering himself aggrieved:
- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
  - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”



12. The main ground for the application for review is that the Court did not consider the submissions by the applicant on the issue of whether interest was payable in respect of the sum of Ksh.2,665,200/- due to the respondent.
13. It is not contested that this issue was raised by the parties in their pleadings and responded to by affidavits reflecting the position of the applicant and the respondents. The parties in addition were directed to file respective written submissions. The respondent filed but the applicant's submissions were not in the file as Mr. Ngatia submits it had been filed in a file in Civil Division before Ongeru J. Be that as it may where parties have been directed to file submissions and they comply, the court will consider them. The submissions are to highlight that respective pleadings and annex authorities if any in support of their position. Submissions do not replace pleadings. Where submissions are not filed by parties the court will make the ruling or Judgment based on the materials before it. Whereas in this case the submissions by applicant were not filed in this file, this court considered the applicant's pleadings and material on record in its ruling. I therefore do not find that the applicant has established any of the grounds in order 45 for review of the ruling dated 5.6.2023. The application for review is therefore dismissed.
14. In view of the finding above, I find the application dated 13<sup>th</sup> June 2024 for stay and setting aside the decree without merit and same is hereby dismissed with costs. The applicant to pay the costs of this application.

**DATED AT NAIROBI THIS 20<sup>TH</sup> DAY OF MARCH 2024**

**S. N. RIECHI**

**JUDGE**

