



Momanyi v Onsongo (Legal and Personal Representative of the Estate of Enoch Agai Kopyo) (Civil Appeal E087 of 2023) [2024] KEHC 17033 (KLR) (30 April 2024) (Ruling)

Neutral citation: [2024] KEHC 17033 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E087 OF 2023**

**KW KIARIE, J
APRIL 30, 2024**

BETWEEN

DICKSON MORIASI MOMANYI APPELLANT

AND

EVERLYNE MWANZI ONSONGO RESPONDENT

**LEGAL AND PERSONAL REPRESENTATIVE OF THE ESTATE OF ENOCH
AGAI KOPIYO**

RULING

1. The appellant/applicant herein moved the court through a Notice of Motion dated the 16th day of November 2023. It was brought under sections 1A, 1B, 3A & 95 of the *Civil Procedure Act*, Order 50 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*. The applicant is seeking the following orders:
 - a. That this application be certified as urgent, service be dispensed with thereof, and the same be heard ex parte in the first instance.
 - b. That pending the hearing and determination of this application inter partes, there be a stay of the ruling and or order of the Honorable Justice w. Kiarie, issued herein on 23rd October 2023, requires the applicant to deposit the decretal amount in a joint interest account.
 - c. That pending the hearing and determination of this application inter partes, there be a stay of the execution of the judgment delivered on 13th September 2023 in Oyugis Civil Suit No.83 of 2020 – *Everlyne Mwanzi Onsongo (Legal & personal representatives to the estate of Enoch Agai Kopyo) v Dickson Moriasi Momanyi*. Failure to grant this stay could result in irreparable harm to the applicant.
 - d. That the ruling dated 23rd October 2023 be varied, enlarged and/or extended and the applicant be ordered to provide a Bank Guarantee over the entire decretal amount of Ksh.306,000/- or



be ordered to deposit kshs.306,000/- in a joint account within thirty (30) days to enable the applicants eventually prosecute and finalize the appeal.

- e. That this honourable court do make any such further orders and issue any other relief it may deem just to grant in the interest of justice.
 - f. That the costs of this application be in the cause.
2. The application was premised on the following grounds:
- a. That in Oyugis Civil Suit No.83 of 2020 – *Everlyne Mwanzi Onsongo (Legal & Personal representatives to the estate of Enoch Agai Kopyio) v Dickson Moriasi Momanyi*, judgment was entered for kshs.306,000/- on 13th September 2023.
 - b. That by a ruling dated 23rd October 2023, the application was allowed on condition that the applicant does deposit a sum of deposit Kenya shillings Three Hundred and Six Thousand (ksh.306,000/-) in a joint interest-earning account within thirty (30) days.
 - c. the applicants wrote to the respondent’s advocate requesting him to sign the joint account opening forms and also requesting them to forward other documents.
 - d. That respondent has failed and/or refused and/or declined to sign the consent forms attached to the joint interest account forms stating that there reequipments of the bank are too many vide a letter dated 3/11/2023.
 - e. Due to the aforementioned reason, we could not open a joint interest account and comply with the ruling on 23rd October 2023.
 - f. That failure to comply with the conditions of stay within the required time has not been the fault of the applicant or their advocates, and the applicants are willing to comply if ordered to provide a bank guarantee or deposit Kenya Shillings Three Hundred and Six Thousand (Ksh.306,000/-) in court.
 - g. In view of the foregoing, it is clear that the inability to comply with stay conditions herein is not at all the applicant’s fault.
 - h. That, unless the orders sought in this Application are granted, the order of stay of execution granted on 23rd October 2023 will be vacated and the respondent will be at liberty to execute the judgment in Oyugis Civil Suit No.83 of 2020 – *Everlyne Mwanzi Onsongo (Legal & Personal reps. to the Estate of Enoch Agai Kopyio) v Dickson Moriasi Momanyi* and the appeal will be rendered nugatory.
 - i. That this application has been made without unreasonable/inordinate delay.
 - j. That in any event this application has been filed timely.
 - k. This application should be granted in the interests of equity and justice.
3. The respondent opposed the application on the following grounds:
- a. That there are no good reasons for a review of the order issued on the 23rd of October, 2023.
 - b. The respondent has not refused to sign the documents to open a joint account.
4. Order 45 rule 1 provides as follows:
- (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.
- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant or when, being respondent, he can present to the appellate court the case on which he applies for the review.
5. For any party to be granted a review of previously issued orders, there must be a demonstration that either there is an error apparent on the record or 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. In the instant application, the applicant has not placed himself under the purview of Order 45 of the [Civil Procedure rules](#).
6. The applicant did not attach a document to show that he did his part but was frustrated by the respondent.
7. I find that the application lacks merits. It is, therefore, dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 30TH DAY OF APRIL 2024

KIARIE WAWERU KIARIE

JUDGE.

