



**Ayungo v Oyak & another (Suing as the Legal Representatives of the Estate of Christine Akoth Omondi - Deceased) (Civil Appeal E084 of 2023) [2024] KEHC 6575 (KLR) (31 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6575 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E084 OF 2023  
MS SHARIFF, J  
MAY 31, 2024**

**BETWEEN**

**STEPHEN KARENKO AYUNGO ..... APPELLANT**

**AND**

**GEORGE OWINO OYAK ..... 1<sup>ST</sup> RESPONDENT**

**MAURICE OMONDI ONDIEK ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF CHRISTINE AKOTH OMONDI - DECEASED**

**RULING**

1. *Vide* a Notice of Motion dated 13.10.2023 supported by the affidavit of Joan Turgutt sworn on even date and made pursuant to the provisions of Sections 1A, 1B, 3A and 95 of the [Civil Procedure Act](#) and Order 45 Rule 1, Order 42 Rule 6 and 21, Order 50 Rule 6 and Order 51 Rule 1 of the [Civil Procedure Rules 2010](#), the Applicant moved this court seeking the following orders:-
  1. Spent.
  2. Spent.
  3. That this appeal being Kisumu High Court Civil Appeal no E084 of 2023 be reinstated for hearing and determination in the normal way.
  4. That this honourable court do make any such further order(s) and issue any other relief it may deem just to grant in the interest of justice.
  5. That the costs of the application be in the cause.



2. The gist of the Applicant's application is that he had already complied with the conditions made for grant of stay of execution orders by paying one half of the decretal sum amounting to ksh 745,887.50 to the Respondent's advocates and depositing the other half of ksh 745,887.50 in a joint interest account of parties and that his failure to file the record of appeal was due to unavailability of typed proceedings from the lower court. Further that when the appeal was dismissed on 11.10.2023 one Mr. Okoth had gone to obtain proof of compliance with stay orders wherefore the Appellant ought to be indulged and have his appeal reinstated. The Applicant has annexed documents marked as JT-1a and b to proof such compliance.
3. The Respondent has resisted this application through a replying affidavit sworn by Geoffrey O. Okoth on 7.2.24 wherein he deposes that whereas there was compliance with the conditions for stay orders, such compliance was effected out of time and given that parties had consented to the terms of stay and directions on appeal, the said terms amount to a contract and can only be varied on grounds that would allow a court to vitiate a contract; upon proof of *inter alia* fraud, collusion, illegality, mistake, affront to the policy of the court, ignorance of material facts and/or absence of sufficient material facts to form the basis of the consent/judgment and/or agreement. (See [Saul Mbugua Ikumbu v Barclays Bank of Kenya Ltd](#) (2015) eKLR.
4. The Respondent thus maintains that the appeal ought not be reinstated.

#### **Analysis and Determination:**

5. Parties filed their submissions to this application and I have duly considered the same.
6. It is common place that when this court dismissed this appeal on 11.10.2023 the Applicant had failed to adduce proof of compliance with the consent order made on 29.6.2023. I have perused the Applicant's annexures marked as JT-1a and JT-1b and I am persuaded that the Applicant did comply with the conditions for grant of stay orders albeit out of time. As for his failure to file a record of appeal in the timeline directed by this court, I will in the interest of justice indulge him given that he is now in possession of the proceedings, judgment and decree of the lower court as evidenced by his annexure JT-3. Given that the Respondent has already received one half of the judgment sum, and the other half is already secured in a joint interest earning account of parties, he will thus suffer no prejudice by a reinstatement of this appeal.
7. On the balance I do hereby find that the application herein is well merited and I thus allow it and I make the following orders:-
  - a. The appeal herein is hereby reinstated with costs to the Respondent assessed at ksh 8,000.
  - b. The Appellant is directed to file his record of appeal simultaneously with his submissions within 21 days from the date hereof.
  - c. The Respondent is directed to file his submissions within 42 days from the date hereof.
  - d. Mention on 23.7.2024 to confirm compliance.

**DATED, SIGNED AND DELIVERED THIS 31<sup>ST</sup> DAY OF MAY, 2024.**

**M. S. SHARIFF**

**JUDGE**

