



**Chengwi v Charles ( Suing as the Legal Representative and Administrator  
as Father of the Estate of Raymond Musyoka Masila) (Civil Appeal  
E105 of 2023) [2024] KEHC 8116 (KLR) (26 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8116 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E105 OF 2023  
REA OUGO, J  
JUNE 26, 2024**

**BETWEEN**

**BENSON KWEYU CHENGWI ..... APPELLANT**

**AND**

**JOSHUA MASILA CHARLES ( SUING AS THE LEGAL REPRESENTATIVE  
AND ADMINISTRATOR AS FATHER OF THE ESTATE OF RAYMOND  
MUSYOKA MASILA) ..... RESPONDENT**

**RULING**

1. Benson Kweyu Chengwi filed a Notice of Motion dated the 11<sup>th</sup> of April 2024. The application cites the following Orders and Rules; Order 42 Rule 6, Order 22 Rule 22, Order 51 of the Civil Procedure Rule, Section 1A, 1B, 3, 3A 63 (e), and Section 79G of the Civil Procedure Act and Article 159 (2) of the Constitution of Kenya 2020 and all enabling provisions of the Law. The applicant seeks the following orders;
  - a. Spent
  - b. That this Court be pleased to extend the orders of stay granted on 20<sup>th</sup> December 2023 by Justice Rose Ougo together with all consequential orders pending the , hearing and determination of Appeal E105 of 2023.
  - c. That this Honorable Court be pleased to vacate and/or set aside the conditions for stay ordered on 20<sup>th</sup> December 2023 by Justice Rose Ougo on grounds that the Respondent herein filed an appeal in Bungoma HCCA NO. E098 of 2023 seeking that the judgment of the trial court in Bungoma CMCC No. 295 of 2021 be set aside.
  - d. That costs of the application be provided.



2. The application is supported by grounds (a) to (s) on the face of the application and a supposing affidavit of Beatrice Murithi a legal claims officer at Jubilee Allianz General Insurance (K) Ltd formerly Allianz Insurance Company of Kenya Ltd ( hereinafter referred to Allianz Insurance). In brief, this is what she avers; Allainz Insurance is the insurer of the appellant/ applicant ( the applicant filed Civil Appeal No. E105 of 2023 and on 20.12.2023 this court ordered that the Appeal will proceed on condition that the applicant pays the respondent's advocate Kshs. 1,500,000/- and deposit Kshs. 2,534,079/- in a joint interest-earning account. Thereafter the respondent's counsel forwarded his banking details on 26.1.2024 and on 31.1.24 they through their advocates forwarded the account opening forms to the respondent's advocates via Fargo courier for filling and return. The said documents were returned on 20.3.2024. In the process, it was noted that the respondent's advocate name on the national identity card had an error and he had to swear an affidavit dated 25.3.2024 and which caused the delay in opening the account.
3. On 27.2.2024 whilst attending a court session their advocate noted from the cause list that there was another appeal No. E098 of 2023 with the same parties as the subject of the appeal herein. The court thereafter ordered that they be served with a Record of Appeal in HCCA NO. E98 of 2023 and this was done on 21.3.2024. In a letter dated 21.3.2024, their advocate wrote a letter to the court raising the issue of the stay since the respondent had filed an appeal before the subject appeal. they filed the current application after the court directed them to do so. She deposes that it is unjust for the appellant to be condemned to pay the amount ordered as a condition for stay when the respondent filed an appeal in Civil Case No. E098 of 2023. In the said appeal the respondent having been dissatisfied with the judgment seeks have it to set aside. The respondent's advocate acted in bad faith by not serving them with the appeal and it can be concluded that the respondent's sole intention was to benefit from the conditions of stay in the current. Had they been served with HCCA NO. E098 of 2023 they would have filed a cross-appeal and the conditions of stay would not applied. As a result of sending the account opening forms late, the applicant did not comply with the court orders of 20.12.2023 in time. That the applicant is faced with imminent threat of the respondent executing the trial court judgment which the applicant has appealed against and the subject appeal will be rendered nugatory. The application was brought without delay, it's made in good faith and will not occasion any prejudice to the respondent as he is also the appellant in HCCA NO. E098 of 2023 and that its in the interest of justice if the orders are granted.
4. The application was opposed. Mr. Anwar Ahmed the respondent's counsel in the conduct of this matter averred as in his replying affidavit dated 23.4.2024; that the application is frivolous and vexatious and an abuse of the court process. The respondent being aggrieved by the judgment of the lower court after the court apportioned liability at 90:10 filed Appeal No. E098 of 2023. The applicant then filed the instant appeal challenging the lower court's judgment on quantum. To halt execution the applicant filed an application to halt execution and the court on 20.12.23 ordered the applicant to pay Kshs.1,500,000/- together with assessed costs and to deposit the remainder in a joint interest-earning account in the names of the counsels for the parties within 45 days. Thereafter the applicant went mum on the compliance aspect with the conditional stay and he was forced to call Miss June advocate on 26.1.2024 he found the account details for the deposit of the 1.5 million plus costs, see correspondence acknowledged on 26.1.2024. on 16.2.2024 the respondent served the applicant with a mention notice in HCCA NO. E098 of 2023 and on the same day the applicant requested for the sending of account forms delivered to them vide courier and on 17.2.2024 there was correspondence on Appeal No. E098 of 2023 which correspondence was received by the applicant on 19.3.24. From the said correspondence it is foolhardy for the applicant to allege that they did not disclose the existence of Appeal No. E098 of 2023 prior to 23.2 2024 when she saw it in the cause list as the service effected is instructive that the applicant was well aware of Appeal No. E098 of 2023 as from 16.2.2024.



5. It is further deponed that the instant application is an afterthought as upon notifying the applicant of the existence of Appeal No. E098 of 2023 on the 16<sup>th</sup> and 17<sup>th</sup> February 2024 he still sought their account details vide the email sent on 23.2.2024 in Appeal No. E098 of 2023.
6. Pursuant to Order 42 rule 6 (1) of the Civil Procedure Rules no appeal or second appeal shall operate as a stay. There are no stay orders in Appeal No. E098 of 2023 filed by the respondent and the appeal filed by the respondent in Appeal No. E098 of 2023 was on a negative order, an order that denied the respondent 10% of the liability and it being a negative order, no stay can lie on such an order. That they have had constant communication on the opening of the joint account and complying with the stay orders as issued and his client and himself have been gracious to extend the time for compliance as seen in the several correspondences of the applicant's advocate. There is no ground set out to review the court order and or set aside the said order as the applicant wants this court to sit on appeal on its own order which is absurd in law. The applicant is an afterthought and without merit and should be dismissed.
7. Parties canvassed the application by way of oral submissions. I have considered the said submissions. I have also perused the pleadings and proceedings in Appeal No. E098 of 2023, the correspondence attached to the affidavit between the parties as annexed by the parties, and the pleadings and proceedings in E105 of 2023.

### **Analysis And Determination**

8. I have considered the rival affidavits and the oral submissions and I find as follows; the applicant's main complaint is that the respondent filed Appeal No. E098 of 2023 and that they were not aware of said appeal. From the submissions, there is a blame game between the 2 advocates, which I do not want to analyze in this ruling. The main issue for determination is whether the court should vacate the stay orders issued in this matter because the respondent filed E098 of 2023. The latter appeal was filed earlier before the current suit. The appeal in HCCA NO. E098 of 2023 is on liability. The appeal in HCCA NO. E105 of 2023 is on quantum. The applicant moved to this court because he was apprehensive that the respondents could move to execute the judgment award. The court upon considering the application granted a conditional stay upon considering what was averred in the affidavit of the applicant. The said order was granted to protect the applicant against execution. The applicant's appeal is still pending it has not been withdrawn. No good reason has been advanced to grant the orders sought. What the parties need to do is to consolidate the 2 appeals in the earlier suit. The stay order which was extended by this court in E105 of 2023 is set aside. The applicant has to comply with the conditional stay. I find no merit in the application and dismiss it. Costs shall be in the caused.

**DATED, SIGNED, AND DELIVERED AT BUNGOMA ON THIS 26<sup>TH</sup> DAY OF JUNE 2024.**

**R.E.OUGO**

**JUDGE**

In the presence of:

Miss Wanga h/b Miss Njoki For-- the Appellant/ Applicant

Mr. Anwar - For the Respondent

Wilkister/ Diana - C/A

