



**Muysoki & another v Muindi (Civil Appeal E096 of 2024)
[2025] KEHC 11601 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11601 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E096 OF 2024
EN MAINA, J
JULY 31, 2025**

BETWEEN

ALPHONCE MBINDA MUYSOKI 1ST APPELLANT

PHYLIS MUTHEU MBINDA 2ND APPELLANT

AND

ELVIS ZAKAYO MUINDI RESPONDENT

RULING

1. By an application dated 29th April, 2024 the Appellants/Applicants sought and obtained an order for stay of execution of the decree of the court below pending hearing and determination of this appeal.
2. The stay was conditional upon the Applicant depositing half the decretal sum in a joint interest earning account of the Advocates for both sides within 90 days and pay the other half to the account of the Respondent's advocate.
3. The Appellant/Applicants have in their application dated 13th May 2025, contended that despite complying fully with the conditions above, albeit out of the timelines set by the court, the Respondent has gone ahead and obtained warrants of execution of the decree.
4. The Appellants/Applicants depose that they obtained the stay on 7th December 2024 and they complied on 17th May 2025 and the warrants of attachment were obtained on 9th May 2025 and that the Appellant's/ Applicants properties were attached on 12th May 2025. They urge this court to stay execution of the decree as the subject matter of the appeal has been effectively preserved and the appeal will be rendered nugatory if the application is not allowed. The Appellants/Applicants depone that the delay in fulfilling the conditions was neither intentional nor in disregard of the orders of the court but was due to bureaucracy (internal and procedural requirements of the insurer).



5. The Respondent has vehemently opposed the application through a preliminary objection dated 14th May 2025 and a replying affidavit sworn on even date. In the preliminary objection it is contended that the present application is res judicata as the same application was heard and determined by Muigai J. In the replying affidavit it is deposed that the Applicants had 90 days to comply with the condition for stay but neglected to do so despite reminders by Counsel for the Respondent. That the court was clear that if the conditions were not fulfilled within 90 days then the application for stay of execution stood dismissed; that only part of the conditions were fulfilled and even then one month after the time limited by the court; that the Applicants are asking this court to sit as an appellate court to ad judicata an application that was determined and the orders ignored.
6. I have carefully considered the application, the preliminary objection, the rival submissions, the cases cited and the law. The Appellants/Applicants were granted a conditional order for stay of execution of the decree, appealed from, pending appeal. The order and conditions were granted and imposed on 17th December 2024, by my predecessor, Muigai J. However, come May 2025, the Applicant filed this application, dated 13th May 2025, seeking the same orders as in the earlier application. Learned Counsel for the Respondent is vehemently opposed to this application and contends that the current application is res judicata as it is an exact replica of the earlier application. Counsel for the Respondent however, contends that they filed the present application because the Respondent went ahead to execute the decree despite the conditions for stay of execution having been fulfilled. Taken in that light then the present application is not res judicata. The only concern would be the manner of drawing the application and this court would then consider whether in view of Sections 1A and 1B of the Civil Procedure Act it would be proper to dismiss this application. Would this court have done justice to the parties?
7. Learned Counsel for the Applicant submitted that the conditions imposed by Muigai, J were not fulfilled within the timelines set by the court. On the other hand learned Counsel for the Respondent contends that they fulfilled the conditions, albeit one month after the lapse of the timelines. He has blamed the delay on the bureaucracy in the Insurance Company. In my view that is a plausible explanation and the delay of one month was not in any event inordinate. I shall therefore exercise my discretion in favour of the Appellants/Applicants and affirm the order for stay of execution granted by Muigai, J pending the hearing and determination of this appeal.
8. The auction is hereby stayed.
9. The Appellants/Applicants shall bear the costs of this application, the preliminary objection and the auctioneers charges if any which may be agreed or assessed by the Deputy Registrar.

Orders accordingly.

RULING SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 31ST DAY OF JULY 2025.

E.N. MAINA

JUDGE

In the presence of:

Ms Mudeizi for Appellants/Applicants

Ms Kavita for the Respondent

Geoffrey - Court Assistant

