



REPUBLIC OF KENYA



KENYA LAW
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**Ochieng v Odhiambo (Civil Appeal 6 of 2022)
[2023] KEHC 27497 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 27497 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL 6 OF 2022
RPV WENDOH, J
JANUARY 19, 2023**

BETWEEN

ALLAN ROBERT OCHIENG PLAINTIFF

AND

JEREMIAH ODHIAMBO DEFENDANT

RULING

1. By a Notice of Motion dated 28/4/2022, the appellant sought inter alia, an order of stay of execution of the judgement in Migori CMCC No. 80 of 2020 delivered on 25/1/2022 pending the hearing and determination of the application inter parties.
2. On 5/5/2022, this court gave directions that the applicant do deposit in court a sum of Kshs. 400,000/= being half the decretal amount within 14 days as a condition of stay. The money ought to have been deposited on or before 19/5/2022 but the applicant deposited the decretal sum on 31/5/2022, 12 days after the lapse of time.
3. The foregoing events, precipitated the applicant's application dated 24/6/2022 and he seeks the following orders:-
 - a. Spent.
 - b. Pending the hearing and determination of this application interparties there be stay of the ruling and/or order of the Hon. Lady Justice R. Wendoh issued herein on 5/5/2022, requiring the applicants to deposit half of the decretal amount within 14 days.
 - c. This court be pleased to arrest the ruling set to be delivered on 21/7/2-22 pending the hearing and determination of this application.



- d. That pending the hearing and determination of this application interparties an order of stay of execution of judgement entered on 25/1/2022, in Migori CMCC No. 80 of 2020 Jeremiah Odhiambo vs Allan Robert Ochieng be issued.
 - e. That the period granted for depositing half of the decretal amount be enlarged and/or extended to enable the applicants eventually prosecute and finalize the appeal.
 - f. That the applicant be deemed to have complied with the stay conditions having deposited half of the decretal amount in court on 31/5/2022.
 - g. That this court do make any further orders and issue any other relief it may deem just to grant in the interest of justice.
 - h. Costs of this application be in the cause.
4. The grounds upon which the application is premised, are found in the body of the application and the supporting affidavit of Billy Mumo Ndolo who deposed that he is an Advocate of the High Court of Kenya practicing in the firm of Kimondo Gachoka & Co. Advocates who have the conduct of this matter on behalf of the applicant. In relation to the reasons why the applicant could not comply with the order of depositing the decretal amount as ordered by the court, Counsel deponed that the reason for the delay was because of the prevailing economic situation and in addition, the applicants had also been issued with an invoice that was not going through hence they had to apply for a fresh one. The applicant urged this court to consider that the application has been made without unreasonable delay and if the orders being sought are not granted, the appeal will be rendered a nugatory.
 5. The application was opposed. Ms. Everlyne Akinyi Kuke Counsel for the respondent deposed that since the applicant failed to comply with the orders, the act of depositing the amount on 31/5/2022 was a nullity since the same was done without leave of court. Counsel stated that it is unclear what the reasons of the delay were. Counsel urged the court to dismiss the application and proceed with the ruling bearing in mind that the applicant failed to comply with the interlocutory orders.
 6. This court has carefully read and considered the application, replying affidavit and the rival positions taken by both parties in their respective submissions. The main issue for determination is whether the stay orders should be vacated.
 7. It is not denied that the court directed the applicant vide its orders of 5/5/2022, to deposit half of the decretal sum within 14 days from the date of the order. The orders lapsed on 19/5/2022 but the applicant deposited the said decretal amount on 31/5/2022, 12 days after the lapse of the stipulated timelines. The reasons advanced by the applicant is economic hardship and that they were issued with an incorrect invoice.
 8. I have perused the application, its supporting affidavit and the annexures. “BMN4” is a letter dated 10/5/2022 addressed to the Deputy Registrar asking to be furnished with an invoice to enable them to comply with the orders. The letter was received on 11/5/2022 at the registry. On the face of it, there are some letters “EZFGJFRW” with the amount of Kshs. 400,000/= which I presume should be the invoice number. “BNM3” is the cash deposit slip which shows the decretal amount deposited in the bank. A cursory look at the cash deposit slip, there is a reference number which is “EZFGJFRW” which is the same as the invoice issued by the registry. This court is not inclined to believe that the applicant was issued with an incorrect invoice number. It is the applicant who deliberately delayed in depositing the decretal sum.
 9. The other reason advanced by the applicant on the delay is economic hardship seems to be a plausible explanation. The applicant was sued as the insured person. The insurance company may not have



readily available money at their disposal but it took all reasonable measures to ensure that the decretal amount is deposited albeit late.

10. In his submissions, the respondent relied on the case of *County Government of Narok vs British Pharmaceuticals Limited* (2021) eKLR where the court was faced with a similar issue as this one. Gikonyo J held that the courts must strike a balance on the prejudice to be suffered by the offending party vis a vis the innocent party. It would be an affront to the principles laid down in Section 1A and 1B of the *Civil Procedure Rules* on the overriding objectives of the court and Article 159 (2) of *the Constitution* towards serving substantive justice, if the court would take the direction of employing extreme measures to offending parties which findings are persuasive to this court.
11. The delay was a mere 12 days. The applicant has shown good faith all through from the time of filing the appeal and the speed of filing the instant application to arrest any execution which may prejudice him. The respondent on the other hand, has not explained what prejudice he is likely to suffer if the application is allowed. I therefore find that the applicant is deserving of the orders that the decretal amount be deemed to be duly deposited in compliance with the stay orders pending hearing and determination of the appeal.
12. The lower court file has the record that the proceedings are typed and certified. The applicant should therefore move with speed in view of the delay already occasioned and file a record of appeal.
13. The application dated 24/6/2022 is hereby allowed and the following orders do issue: -
 - a. Stay of execution pending the hearing and determination of this appeal is hereby granted;
 - b. The decretal sum of Kshs. 400,000/= deposited on 31/5/2022 be and is hereby deemed as duly deposited in compliance with the stay conditions of 5/5/2022;
 - c. The applicant to file and serve a record of appeal within fourteen (14) days from the date of this ruling;
 - d. The applicant should also file and serve his submissions together with the record of appeal;
 - e. Upon being served, the respondent is given fourteen (14) days after service to file his submissions;
 - f. The applicant is allowed corresponding leave to file further submissions, if need be, within seven (7) days of service;
 - g. Mention on 14/3/2023 to confirm compliance and to take a judgement date;
 - h. Costs of the application awarded to the respondent.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 19TH DAY OF JANUARY 2023.

R. WENDOHO

JUDGE

Ruling delivered in the presence of;

Mr. Njuguna h/b for Mr. Nyanga or the Applicant.

Mr. Okong'o for the Respondent.

Nyauke - Court Assistant.

