



**Mukasa v Oduory (Civil Appeal E014 of 2022)
[2023] KEHC 22666 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22666 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E014 OF 2022
WM MUSYOKA, J
SEPTEMBER 28, 2023**

BETWEEN

ADOLF KHAIMA MUKASA APPELLANT

AND

JOSEPH WABWIRE ODUORY RESPONDENT

(Being an appeal from the judgment and decree of Hon. PA Olengo, Senior Principal Magistrate, SPM, delivered on 31st March 2022, in Busia CMCCC No. 327 of 2019)

RULING

1. I am determining a Motion, dated 9th December 2022, which principally seeks stay of execution of the decree in Busia CMCCC No. 327 of 2019. The grounds upon which it is premised are on the face of the Motion, and the facts on which it is predicated, are set out in the affidavit sworn in support, by the appellant, on 9th December 2022.
2. The background is that a decree was obtained by the respondent as against the appellant in Busia CMCCC No. 327 of 2019. The appellant was aggrieved, hence the appeal herein. The appellant expresses apprehension that the respondent may move to have the decree executed. It is urged that the court could order stay, with conditions. The documents annexed to the supporting affidavit include the memorandum of appeal lodged herein, as proof that an appeal was filed, and good grounds exist for it. A copy of a letter from Family Bank, addressed to Directline Assurance Company Limited, dated 18th February 2022 is attached, as proof that the said insurer of the accident vehicle has obtained a bank guarantee, to support such conditions for stay as the court may impose.
3. The application is opposed. There is an affidavit in reply, sworn by the Advocate for the respondent, Mr. Fredrick Omondi, on 6th March 2023. It is averred that there are subsisting stay of execution orders made by the trial court, in a ruling delivered on 11th November 2022. It is averred that thereafter he was furnished with a bank form for deposit that the court had ordered, which he duly signed, but



the account was never opened. It is further averred that this court ought not grant similar orders. It is averred that following the failure by the appellant to comply with the orders of 11th November 2022, an auctioneer was instructed to levy execution, and a motor vehicle was proclaimed, and the instant application is, therefore, spent. The Motion for stay, filed at the trial court, in Busia CMCCC No. 327 of 2019, dated 4th May 2022, is attached, and so are copies of a letter from the appellant's Advocates, dated 16th November 2022, forwarding documents to the respondent's Advocates to open a joint bank account in compliance with the said stay orders of the trial court; a letter from the Advocates for the respondent returning the account opening forms, duly executed; warrants of attachment, dated 20th December 2022, warrants of sale, dated 20th December 2022; a proclamation, dated 8th February 2023; and a notification of sale, dated 17th February 2023 are also attached.

4. Directions were given on 17th April 2023, for canvassing of the application, by way of written submissions. Both sides have complied, for they have filed their respective written submissions, and I have read through them, and noted the arguments made.
5. Should I grant the stay orders sought? The appellant was not candid with the High Court, for it was not disclosed that a stay application was successfully mounted before the trial court. Stay of execution of the decree in Busia CMCCC No. 327 of 2019 was granted, pending the appeal herein, that is to say Busia HCCA No. E014 of 2022, subject to certain conditions being satisfied. There was no disclosure of that stay order, nor an account of what has happened with that stay order. I have seen the ruling of 11th November 2022, it granted final stay orders, pending appeal, subject to conditions. I have not seen an order, either of the trial court, or of the High Court, vacating that order. So, what the appellant is doing is seeking the same order here at the High Court, despite the same having been granted by the trial court, and those orders still being in existence.
6. That is abuse of court process. The appellant cannot have it both ways. He cannot proceed as if the stay order granted by the trial court does not exist. I cannot possibly make orders parallel to those made by the trial court. The mere fact that a party feels that the orders made by the trial court are onerous does not justify ignoring those orders, so that the party moves the higher court as if the orders made by the trial court do not exist. The appellant is obliged to work with the subsisting orders. He can move the trial court for review of the orders, or extension of time to comply with them, but he cannot ignore the said orders, and approach the High Court in a manner suggesting that those orders do not exist.
7. In view of what I have stated above, there can be no merit in the Motion, dated 9th December 2022. It is for dismissal, and I hereby dismiss the same, with costs. No interim stay orders were ever given, although I note that on 17th April 2023, 12th June 2023 and 17th July 2023 orders were made purporting to extend non-existent stay orders. The said orders of 17th April 2023, 12th June 2023 and 17th July 2023 are hereby vacated.
8. To move the matter forward, I direct the appellant to file and serve the record of appeal within 30 days. The matter shall be mentioned for directions within 45 days. Orders accordingly.

RULING IS DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 28TH DAY OF SEPTEMBER 2023

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Ms. Turgut, instructed by Kimondo Gachoka & Company, Advocates for the appellant.



Mr. Omondi, instructed by Omondi & Company, Advocates for the respondent.

