



REPUBLIC OF KENYA



KENYA LAW
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**Otieno & another v Mukanda & another (Civil Appeal E013 of 2022)
[2023] KEHC 22667 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22667 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E013 OF 2022
WM MUSYOKA, J
SEPTEMBER 28, 2023**

BETWEEN

HASTINGS OWINO OTIENO 1ST APPELLANT

BEN OMOLLO T/A GREENLINE SERVICES 2ND APPELLANT

AND

NOCENCIA AKUKU MUKANDA 1ST RESPONDENT

DEOGRACIOUS EGESA MUKANDA 2ND RESPONDENT

(Being an appeal from the ruling and order of Hon. PY Kulecho, Senior Resident Magistrate, SRM, delivered on 6th April 2022, in Busia CMCCC No. 107 of 2020)

RULING

1. I am determining a Motion, dated December 9, 2022, which principally seeks stay of execution of an alleged judgment and decree in Busia CMCCC on No. 107 of 2020, and attendant orders. 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 1st appellant, on December 9, 2022.
2. The background is that a decree was purportedly obtained by the respondents as against the appellants, for Kshs. 1,274,233.00, in the said suit. The appellants were aggrieved, hence the appeal herein. An application, at the primary court, seeking similar orders, dated May 4, 2022, was dismissed by that court, on a date that is not disclosed. The appeal is said to be on liability. Fear is expressed that the respondents are persons of straw, who may not be in a position to reimburse the appellants, should the appeal succeed, after the decretal amount has been settled. 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 February 18,



- 2022, 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 2nd respondent, on March 3, 2023. It is averred that the trial court had assessed liability at 50:50, between the deceased and the 1st appellant driver, on grounds that the 1st appellant had conceded that he did not know how the accident happened. It is said that when the primary court dismissed the stay application before it, on December 7, 2022, it was on grounds that the respondents could refund the decretal amount, if paid to them, and the appeal proved successful. A copy of the plaint and of a statement by the 1st appellant are attached.
 4. Directions were given on April 17, 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. I do not think it will be worth my while to consider the application, dated December 9, 2022, on its merits. A court ought only to go into the merits, after establishing that the application is properly conceived, and presented. I have found that the Motion before me is not, and the reasons for that conclusion are in the succeeding paragraph.
 6. The principal order, sought in the Motion, is for stay of execution of a purported judgment in Busia CMCCC No. 107 of 2020. That judgment was not delivered by this court, and, therefore, a copy of it is not before me. The appellants have a duty, to demonstrate to the appellate court that the judgment or decree whose execution is sought to be stayed in fact exists, for a court ought not act in vain. That could be accomplished by attaching a copy of the decree or a certified copy of the judgment. That has not been done here. Indeed, no material was placed before me, by the appellants, to demonstrate that the suit, in Busia CMCCC No. 107 of 2020, in fact exists. The respondents salvaged the situation, somewhat, by filing a copy of the plaint filed in that suit, but the Motion before me is not about the plaint, but the judgment or decree. I cannot act blindly, by granting orders on stay of execution of a judgment or decree that has not been proved to exist. I should not act on basis of guesswork, but on what is real, and exists. The duty was on the appellants to establish existence of the judgment and decree. They did not discharge that duty. There is no basis to begin to consider the application on its merits, in the circumstances.
 7. In view of what I have stated above, there can be no merit in the Motion, dated December 9, 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 June 12, 2023 and July 17, 2023 orders were made purporting to extend non-existent stay orders. The said orders of June 12, 2023 and July 17, 2023 are hereby vacated.
 8. To move the matter forward, I direct the appellants to file and serve the record of appeal within 30 days, and the Deputy Registrar to call for the original trial records right away. 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 appellants.



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

