



REPUBLIC OF KENYA



KENYA LAW
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**Amoke v Osotsi (Civil Appeal E031 of 2021)
[2023] KEHC 26584 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26584 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E031 OF 2021
JR KARANJA, J
NOVEMBER 30, 2023**

BETWEEN

PASCAL OTIENO AMOKE APPELLANT

AND

ABIGAEEL AYUMA OSOTSI RESPONDENT

RULING

1. The Notice of Motion dated 27th March 2023 was filed by the appellant, Pascal Otieno Amoke through Kimondo Gachoka & Co. Advocates not only in this cause but also in Civil Appeals No. E035 and E038 involving the appellant and the respondent Samwel Ngore Danga and Kevin Otieno Ochieng respectively.

Herein, the respondent is Abigale Ayuma Osotsi. Similar prayers are sought in all the three appeals with or without variation with regard to the decretal sums. Therefore, this ruling applies to all the three matters.

2. In essence, the applicants/appellants seek stay of execution of Judgement/decree issued on the 13th April 2022 in Kericho CMCC No. E026 of 2020, Kericho CMCC No. E027 of 2020 and Kericho CMCC No. E023 of 2020 pending the hearing and determination of the three appeals.

The appellants also seek orders to furnish security in the form of Bank Guarantees for the respective decretal amounts.

The application is anchored on the grounds set out in the appropriate Notice of Motion as fortified by the applicants averments contained in their respective supporting affidavits and was opposed by the applicants on the basis of the grounds contained in their respective replying affidavits.

3. The original lower court records from where the appeals sprung were not availed and there is no indication that the appeals have since been admitted to hearing. Nonetheless, the applications for stay pending determination of the appeals were canvassed by way of written submissions and upon due



consideration of the rival submission against the grounds in support of the applications and those in opposition thereto, the mind of this court was drawn to the applicable provisions of the Civil Procedure Rules in relation to stay of execution.

4. Thus under Rule 6(1) of Order 42 of the Rules, no appeal shall operate as a stay of execution under a decree unless the court appealed from may for sufficient cause order stay of execution of such decree. The same position would apply to the court to which the appeal is made. Rule 6(2) of the Order 42 provides the parameters for grant of a stay order to wit: -
 - a. The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay and
 - b. Such security as the court orders for the due performance of such decree or order as my ultimately be binding on him has been given by the applicant.

5. The issues arising for determination herein would therefore be whether the applicant has demonstrated by way of sufficient and credible evidence that he will suffer substantial loss if stay is not granted and on the periphery, whether the present application has been brought without undue delay.

The argueability of the intended appeal would not be an issue for determination at this juncture.

On the issue of security, the applicant has not furnished any so far but is ready and willing to do so but not necessary in the form proposed by him.

6. Basically, the applicant has failed to demonstrate the substantial loss that he will suffer if stay is not granted. He has not proved that the respondents are persons of straw incapable of refunding the decretal amounts if paid to them and appeal succeeds. The mere prayers of the decretal amount would not by itself constitute substantial loss unless the amount was too high or exorbitant which is not the case in the present matters.
7. With regard to delay in making the application, if as stated by the applicant that the impugned judgment was delivered on 22nd September 2021 and a memorandum of appeal was filed on 24th September 2021, then it is obvious that there was no delay in filing the appeal. However, filing the appeal and filing the application for stay pending appeal are two different matters.

It is indicated herein that the decree was effectively issued on 13th April 2022, yet this application was filed on or about the 29th March 2023 thereby translating to a delay of one year from the date of issue of the decree to the date of filing the application. This delay was indeed unreasonable and would militate against exercise of discretion in favour of the applicant.

8. However, the expression of intention to furnish security by the applicant would somehow compensate for the delay in the filing of the application for stay and offer sufficient reason for exercise of discretion in favour of the applicant to the extent that stay pending determination of the appeal is hereby ordered in all the three appeals on condition that the decretal amounts be deposited in a fixed deposit bank account in the joint names of both counsels for the applicant and the respondents within the next twenty one (21) days from this date hereof. In default the stay order lapses forthwith with liberty to the respondents to execute their respective decrees.

Ordered accordingly

DELIVERED, DATED AND SIGNED AT KERICHO THIS 30TH DAY OF NOVEMBER, 2023.

J. R KARANJAH

JUDGE

