



**Bunde & another v Odongo (Miscellaneous Civil Case E025 of 2022)
[2023] KEHC 27035 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27035 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
MISCELLANEOUS CIVIL CASE E025 OF 2022**

KW KIARIE, J

DECEMBER 20, 2023

BETWEEN

STEPHEN BUNDE 1ST APPLICANT

BARRACK OWINO WAGA 2ND APPLICANT

AND

MICHAEL ONDIGO ODONGO RESPONDENT

RULING

1. The applicants moved the court by way of a Notice of Motion dated 10th August 2023. The application is brought under sections 1A, 1B, 3A, and 95 of the [Civil Procedure Act](#), & Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules. The applicants are seeking the following orders:
 - a. That this application be certified urgent, service be dispensed with thereof and the same be heard ex-parte in the first instance.
 - b. That pending the hearing and determination of this application inter-partes there be a stay of the ruling and/or order of the honorable Kiarie, J. issued herein on 8th June 2023 requiring the applicants to secure the decretal sum in Homabay Civil Suit No.3 of 2020 by way of a bank guarantee within thirty (30) days.
 - c. That pending hearing and determination of this application inter-partes an order of stay of execution of the judgment entered on 23rd February 2022 in Homabay Civil Suit No.3 of 2020 be and is hereby issued.
 - d. That pending the hearing and determination of this application inter-partes an order of stay of the proclamations and warrants of attachment dated 1st August 2023.



- e. That the period granted for provoking the bank guarantee be hereby enlarged and/or extended to enable the applicants to eventually prosecute and finalize Homabay Civil Appeal No.19 of 2022.
 - f. That the applicant be deemed to have complied with the stay conditions having provided a bank guarantee on 12th July, 2022.
 - g. That the proclamations and warrants of attachment taken out by M/s Credible Auctioneers be set aside and quashed.
 - h. That this honorable court do make any such further orders and issue any other relief it may deem just to grant in the interest of justice.
 - i. That the costs of this application be in the cause.
2. The application is premised on the following grounds:
- a. That on 23rd February 2022 the honorable Tom Mark Olando delivered judgment in Homabay Civil Suit No. E003 of 2020 in which the plaintiff was awarded kshs.800,000/- as General Damages and kshs.14,560/- as Special damages plus cost and interest at court rates.
 - b. That on 8th June 2023 the court allowed the application dated 4th May, 2022 which was seeking stay of execution of Homabay Civil Suit No. 3 of 2020 pending hearing and determination of the intended appeal and the court further gave directions that the application do provide security by way of a bank guarantee within (30) day hereof.
 - c. That the memorandum of appeal was filed in Homabay civil appeal No.19 of 2022 which is still active and we are awaiting the typing of proceedings in order to file the record of appeal.
 - d. That the said appeal was mentioned on 6th July 2023 for purposes for showing cause why it shouldn't be dismissed and another date was fixed for 21st September 2023.
 - e. That due to the prevailing economic situation and system breakdown within the bank the applicant was able to provide the bank guarantee on 12th July 2023 only three (3) days late.
 - f. That the applicant is now requesting that they be deemed to have complied with the stay conditions issued on 8th June 2023.
 - g. That the respondent has already instructed M/s Credible Auctioneers to take out proclamations and warrants of attachment in execution of Homabay Civil Suit No.3 of 2020 and that unless the orders sought for herein are granted the respondent will proceed with the execution process and that will render the appeal (Homabay Civil Appeal No.19 of 2022) nugatory and in such event the applicant herein will suffer irreparable loss and damage.
 - h. That the decretal amount has been secured and therefore execution is improper and unwarranted and beats the very essence of provisions of security pending appeal.
 - i. That the warrants issued are erroneous due to the fact that the judgment was delivered more than one year ago and the respondent ought to have first served the applicant with a notice to show cause why his movable property ought not to be executed in accordance with the civil procedure rules.
 - j. That this application has been made without unreasonable/inordinate delay.
 - k. That in any event this application has been filed timely.



- l. That this application ought to be granted in the interests of equity and justice.
3. The application was opposed by the respondent on the following grounds:
 - a. That the applicants have been indolent.
 - b. That the application is an abuse of the due process of the court.
 - c. That the applicants have not explained the cause of the delay.
4. On June 8th, 2023, a stay of execution was granted on condition that the applicant file the same within 30 days of the order. On September 19th, 2023, the advocate for the applicants requested 14 days to file submissions. This had not been complied with by October 23rd, 2023. Again, no reasons were advanced for noncompliance. I am reading mischief in this application.
5. The applicants have not proffered any reason as to why they did not comply with the condition issued on June 8th, 2023. Pius Kawinzi Kithoka vs. Jacinta Kavindu Makau [2012] eKLR in a similar application the court said:

The Applicant has given no explanation at all for this delay. In my view, it shows lack of seriousness in pursuing the appeal at worst, and at best a vexing tardiness which disentitles him from the court's discretion. Equity does not aid the indolent.
6. The applicants herein have not demonstrated that they deserve to be granted the orders sought. The application is dismissed with costs.

DELIVERED AND SIGNED AT HOMABAY THIS 20TH DAY OF DECEMBER 2023

KIARIE WAWERU KIARIE

JUDGE

