



REPUBLIC OF KENYA



KENYA LAW
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**Odhiambo & another v Oduory (Civil Appeal E048 of 2022)
[2023] KEHC 26693 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26693 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E048 OF 2022
WM MUSYOKA, J
DECEMBER 20, 2023**

BETWEEN

SOLOMON ADUNDO ODHIAMBO 1ST APPELLANT

NYOLAS ENTERPRISES LIMITED 2ND APPELLANT

AND

JAMES ANGELO ODUORY RESPONDENT

RULING

1. On 11th December 2023, I delivered a ruling, where I directed that the court file in Busia CMCCC No. 131 of 2020 be made available, as claims had been made that the trial court had made orders that the appellants herein are not keen on complying with. That original trial record has been availed, and I am now in a position to determine the application, dated 4th October 2023.
2. The application, dated 4th October 2023, seeks stay of execution of the decree passed in Busia CMCCC No. 131 of 2020, and that the conditional orders of stay of execution imposed by the trial court on 11th September 2023 be vacated or varied. The said orders were to effect that $\frac{1}{2}$ of the decretal amount be deposited in a joint account in the names of the Advocates on record, and the other $\frac{1}{2}$ be released to the respondent, in default of which the order of stay of execution would lapse. The appellants appear to be unhappy with paying $\frac{1}{2}$ of the decretal amount to the respondent, for fear that they may not recover the same from him, should their appeal be successful.
3. In reply, the respondent contends that he had to wait for 9 months before the impugned order was made, on 11th September 2023, and says that the appellants had in fact gotten his Advocates to sign forms for opening a joint account. It is submitted that the application is an afterthought.
4. The application was canvassed by way of written submissions. In their submissions, the appellants argue that the High Court has jurisdiction to entertain a stay application, even after the trial court had granted stay orders. They cite *National Bank of Kenya vs. Alfred Owino Bala* [2015] eKLR (Nagillah,



J) and *Patrick Kalava Kulamba and Tristan K. Limited vs. Philip Kamosu and Roda Ndanu Philip (suing as the Legal Representatives of the Estate of Jackline Ndinda Philip (Deceased))* [2016] eKLR (Meoli, J). The respondent submits that the trial court had granted conditional stay orders, which the appellants have failed to comply with, and that that being the case, the High Court ought not interfere with those orders. He cites *Hitesh Bikhula Khetias vs. Patuma Jama Mohammed* [2018] eKLR (Achode, J) and *Collin Bett vs. Silas Kabisa* [2016] eKLR (Muriithi, J).

5. The matter is fairly straightforward, in my view. The question is, where the trial court has granted, conditional stay orders, and the applicant is unhappy with those orders, would it be open for the High Court to interfere with them? That is what the appellants are inviting me to do.
6. The matter is on appeal, and Order 42 Rule 6(1) of the *Civil Procedure Rules* should apply. That provision allows the High Court to entertain an application for stay of execution, regardless of whether such an application had been granted or refused by the trial court. The appellate court is granted discretion to consider such application, and to make such orders on it as it may seem just to it. It is further provided that a party aggrieved by the order of the trial court, on stay, may ask the appellate court to set aside such order.
7. For avoidance of doubt, Order 42 Rule 6(1) of the *Civil Procedure Rules* says:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty on application being made, to consider such application and to make such order thereon as may seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”
8. That provision gives the trial court power to order stay pending appeal, and the High Court power to entertain a second application for stay, whether or not the trial court will have granted or denied such application. The available case law, extensively cited in *Patrick Kalava Kulamba and Tristan K. Limited vs. Philip Kamosu and Roda Ndanu Philip (suing as the Legal Representatives of the Estate of Jackline Ndinda Philip (Deceased))* [2016] eKLR (Meoli, J), in such cases as *Equity Bank Ltd vs. West Link MBO Ltd* [2013] eKLR (Githinji, JA) and *Gurbux Singh Suiri & another vs. Royal Credit Ltd* Civil Application NAI 281 of 1995 (Kiage, JA)(unreported), states that the appellate court, in entertaining an application for stay, exercises an original, rather than an appellate jurisdiction, and deals with the application as if stay is being sought for the first time, at the appellate court. To that extent, the application, dated 4th October 2023, is properly before me.
9. The order appealed from was made on 6th December 2022. The memorandum of appeal was lodged herein on 23rd December 2022, within the 30 days allowed in law. A record of appeal, dated 31st July 2023, was lodged herein on even date. The original trial court records are also available. The matter is ripe for hearing. The only thing that is yet to be done is admission of the appeal.
10. Stay of execution is granted at the discretion of the court. The appellants fear that when a portion of the decretal amount is paid to the respondent, there is a sense in which the same is taken away from their reach, and, should the appeal be successful, there is no guarantee that the appellants would recover that amount from the respondent. I share that fear. It would always be best for the amount to be secured in a deposit, either in court or in the hands of the Advocates, rather than having a portion of the money paid over to the respondent. Do the appellants have to demonstrate that they have an arguable appeal?



That is not in the language of Order 42 Rule 6(1) of the Civil Procedure Rules. It is found in Rule 5(2) (b) of the Court of Appeal Rules, which does not apply to this appeal. whether or not the appeal raises substantial grounds, or is arguable, or has reasonable chances of success, is neither here nor there.

11. What order should I make? I grant stay of execution of the subject judgment, subject to the judgment sum, excluding costs and interests, being deposited in court, within 30 days. To move the matter forward, I hereby admit the appeal. Directions on its disposal shall be taken on 16th January 2024. It is so ordered.

DATED AND SIGNED IN CHAMBERS, AND DELIVERED BY EMAIL, AT BUSIA THIS 20TH DAY OF DECEMBER 2023

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Ms. Wahome, instructed by Nyairo & Company, Advocates for the appellants.

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

