



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO. E082 OF 2021

KENNETH KERE OYOO

WILLIAM OKORA NYANGOTOAPPELLANTS/APPLICANTS

VERSUS

ELIZABETH AKINYI

SELEMIA ORINDO OUNDA [*Suing as the legal representatives of the estate of*

JAMES OUMA OUNDA-deceased].....RESPONDENTS

RULING

1. The appellants/applicants moved the court by way of Notice of Motion dated 14th September, 2021. It was brought under sections 1A, 1B & 3A of the Civil Procedure Act, Order 22 Rule 22, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules. The applicants are seeking the following orders:

- a) That the application be certified urgent and heard *ex-parte* in the first instance and thereafter be set down for hearing *inter partes*. [Spent].
- b) That there be a stay of execution of the decree emanating from the judgment in Oyugis SPMCC No.116 of 2019 Elizabeth Akinyi & Selemia Orindo Ounda (Suing as the legal representative of the estate of James Ouma Ounda (deceased) versus Kenneth Kere Oyoo and William Okora Nyangoto pending the hearing and determination of this application.
- c) That there be a stay of execution of the decree emanating from the judgment delivered in Oyugis SPMCC No. 116 of 2019 Elizabeth Akinyi and Selemia Orindo Ounda (Suing as legal representative of the estate of James Ouma Ounda – Deceased) versus Kenneth Kere Oyoo and William Okora Nyangoto pending the hearing and determination of the appeal.
- d) That the costs of this application be in the cause.

2. The application was premised on the following grounds:

- a) On 25th August 2021 the Senior Principal magistrate's court delivered judgment in Oyugis a) SPMCC No.116 of 2019 Elizabeth Akinyi & Selemia Orindo Ounda (Suing as legal representatives of the estate of James Ouma Ounda – Deceased) versus Kenneth Kere Oyoo and William Okora Nyangoto wherein the court awarded inordinately high general damages to the respondents.
- b) The applicants face an imminent and real danger of execution by the respondent to satisfy the decree emanating from the above judgment.
- c) The applicants stand to suffer substantial loss if the application herein is not allowed as the respondent will proceed with the process of execution.
- d) The appellants have lodged an appeal in this honourable court as the judgment of the honourable magistrate's court as the same is not supported by evidence that was tendered in court by the parties.
- e) The appellants' appeal has a high probability of success and it will be rendered nugatory if this application is not allowed.
- f) There shall be no prejudice to any party if this application is allowed as prayed

g) It is in the interest of justice to allow the present application.

h) This application is brought in good faith and without any unreasonable delay.

3. The respondent opposed the application on the following grounds:

a) The applicants have not shown how they are going to suffer if the order for stay is not granted.

b) That the applicants have not shown that the respondents will not be able to refund the decretal amount should the appeal succeed.

4. Order 42 Rule 6 of the Civil Procedure Rules is clear that an appeal does not operate as a stay for execution. It provides as follows:

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from 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 to it 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.

5. In the case of **RWW vs. EKW [2019] eKLR**, the court while addressing its mind to the purpose of a stay of execution order pending appeal, stated:

The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

6. In the interest of justice, there will be a stay of execution until the appeal is heard and determined. The stay will be on condition that the applicants do deposit half the decretal amount in an interest earning Bank account in the names of both counsel on record for the parties within 30 days. Failure to comply, then the respondent will be at liberty to commence execution.

DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF FEBRUARY, 2022

KIARIE WAWERU KIARIE

JUDGE.