



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**CIVIL APPEAL NO.E085 OF 2021**

**BETWEEN**

**BENARD OTIENO ODHIAMBO.....APPELLANT/APPLICANT**

**AND**

**SALLY AKINYI OTIENO & ASARIAH OSONGO NINYUMA**

**[SUING AS A LEGAL REPRESENTATIVE OF ROGERS OTIENO OSONGO].....RESPONDENTS**

**RULING**

1. The appellant/applicant moved the court by way of Notice of Motion dated 16<sup>th</sup> December, 2021. The application is brought under sections 1A, 1B & 3A of the Civil Procedure Act, Order 42 Rule 6 (1) & (2) Civil Procedure Rules. The applicant is seeking the following orders:

- a) That this application be certified as urgent and service of the same be dispensed within the first instance.[Spent]
- b) That this Honorable court be pleased to stay the execution of the Trial court's judgment delivered on 29<sup>th</sup> September, 2021, the decree arising therefrom and the subsequent ruling delivered on 2<sup>nd</sup> December, 2021 *ex parte* in the first instance pending hearing and determination of this application. [Spent]
- c) That this honorable court be pleased to stay execution of the trial court's judgment delivered on 29<sup>th</sup> September, 2021, the decree arising therefrom and the subsequent ruling delivered on 2<sup>nd</sup> December, 2021 *ex parte* in the first instance pending hearing and determination of the appellant's/applicant's appeal to this court.
- d) That the costs of this application be provided for.

2. The application is premised on the following grounds:

- a) That the trial court entered judgment on 29<sup>th</sup> September, 2021 in the amount of kshs.4,132,000/- in favour of the respondent.
- b) That the appellant/applicant being aggrieved by the said judgment/Decree, preferred an appeal in Homa Bay Civil Appeal No. 85 of 2021.
- c) That the appellant/applicant applied for orders of stay of execution in the trial court pending hearing and determination of this appeal.[Sic]
- d) That the trial court granted stay vide its ruling on 2<sup>nd</sup> December, 2021, on condition that the appellant/applicant pays half the decretal amount to the respondent and deposits the other half in a joint interest earning account within 30 days from the date of the ruling.
- e) That the conditional stay granted by the sub-ordinate court was prejudicial because release of a sum of kshs.2, 066,000/- to the respondent was not secure by any deposit in the event of this appeal succeeding.
- f) That the terms awarded by the subordinate court were defeatist of stay and amount to partial satisfaction of the judgment and will

render this appeal nugatory if it succeeds.

- g) That the appellant/applicant is apprehensive that if the amount is paid to the respondent he won't be able to recover the amount should the appeal succeed.
- h) That since the parties had agreed on liability before the trial court, the appellant/applicant is willing to pay kshs.828,914/- being the amount he felt should've been awarded by the trial court and furnish a bank guarantee for the remaining amount.
- i) That this honorable court has unfettered discretion to consider an application for stay whether it had been allowed or rejected in the subordinate court.
- j) That if execution of the said judgment/decree and the subsequent ruling is not stayed, the aforesaid appeal will be rendered nugatory and would thereby occasion substantial loss to the appellant/applicant as the respondent may not be in a financial position to pay back any funds paid out to her should the appeal be successful.
- k) That the respondent is at liberty and may proceed to execute the decree subject of the preferred appeal at any time from 2<sup>nd</sup> January 2022.
- l) That in the premises it is only fair and just that there be stay of execution of the judgment/decree and the subsequent ruling dated 2<sup>nd</sup> December, 2021 herein pending the *inter partes* hearing and determination of the instant application and/or the hearing and determination of the preferred appeal, as the case would be.
- m) That the appellant/applicant is amiable to furnishing security by paying to the respondent kshs.828,914 and furnishing a bank guarantee for the remaining decretal amount in fulfillment of the conditions for being granted a stay of execution of the judgment/decree and the subsequent ruling of the magistrate's court.
- n) That the appellant/applicant is ready and willing to adhere to any conditions that the honourable court will set in order to be granted the stay of execution of the judgment/decree of the magistrate's court.
- o) That the appellant/applicant has moved the court timeously without undue delay.
- p) That in the premises, it is only fair and just that the application be allowed as prayed.

3. The application was opposed and the respondent prayed that the court uphold the trial court's ruling which was to the effect that the applicant to pay the respondent half the decretal sum awarded with costs and deposit the remaining half in a joint interest earning account.

4. The applicant did not appeal against the order of the trial court. The order cannot be said to be unfair especially where the parties entered a consent on liability.

5. The appellant/applicant must comply with that order within 14 days failure of which the respondent shall be at liberty to commence execution.

6. Costs be in the cause.

**DELIVERED AND SIGNED AT HOMA BAY THIS 31ST DAY OF MARCH, 2022**

**KIARIE WAWERU KIARIE**

**JUDGE**