



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO. EO97 OF 2021

STEPHEN OTIENO OSUMBE.....APPELLANT/APPLICANT

VERSUS

EUNIA AKELLO OTIENO & SALOME AUMA OTIENO

(Suing as personal representatives & legal administrators of the estate of

Nelson Odhiambo Otieno aka Mandela Deceased.....**RESPONDENTS**

RULING

1. The appellant/applicant moved the court by way of Notice of Motion dated 18th October, 2021. It was brought under sections 1A, 1B, & 3A of the Civil Procedure Act, Order 21 Rule 1B, Order 22 Rule 22, Order 40 Rule 6 & Order 51 Rule 1 of the Civil Procedure Rules, 2010 & Article 159 of the Constitution of Kenya. They are seeking the following orders:

- a. That this application be certified urgent, service thereof be dispensed with and the same be heard ex-parte in the first instance.
- b. That this honorable court be pleased to grant a stay of execution of the judgment and/or Decree issued by Honorable Celesa Okore delivered on 7th October, 2021 pending the hearing and determination of this application.
- c. That this Honorable court be pleased to grant a stay of execution of the judgment and/or Decree issued by Honorable Celesa Okore on 7th October, 2021 pending the full hearing and determination of this appeal.
- d. That this Honorable court allow the applicant to furnish the court with security in the form of a Bank Guarantee from the DTB Bank.
- e. That the application be heard inter-partes on such date and time as this Honorable court may direct.
- f. That the costs of this application abide the outcome of the appeal.
- g. That this Honorable Court be pleased to issue any other order and/or direction it deem fit to grant in the circumstances.

2. The application was premised on the following grounds:

- a. Judgment herein was entered on 7th October, 2021 in favour of the respondent against the appellant in the ratio 60:40. The respondent was awarded Kshs.3, 700,000/- for general damages and Kshs.99, 450/- for special damages less 40% contribution with costs and interest.
- b. The appellant being dissatisfied with the said judgment have preferred an appeal on both liability and quantum and filed Memorandum of Appeal.
- c. That the appellants' appeal has high chances of success.
- d. That the appellants/applicants are reasonably apprehensive that the respondent, as Decree holder, may proceed and levy execution against them should the 30 days stay period granted by the trial court lapse.

e. That the judgment is of substantial amount and the appellants/applicants are apprehensive that if the respondent is paid he may deal with the same in a manner prejudicial to the appellant/.applicant and if the appeal is successful, he might not be able to recover the same from the Plaintiffs/Respondent.

f. That the respondent has not disclosed nor furnished the Court with any documentary evidence to prove his financial standing.

g. Unless stay of execution is granted, and the respondent levy and/or executes the said judgment of 7th October, 2021 the Appellants appeal will be rendered nugatory and the appellant will suffer irreparable loss and damage.

h. The appellant's insurance is ready, willing and able to furnish the Court with a Bank Guarantee as security to the court.

i. This application is made in good faith and will not occasion any prejudice to the plaintiff/respondent.

j. That the respondent will not be prejudiced in any way if the application is allowed.

k. That the application has been brought without unreasonable or undue delay.

l. That unless stay of execution ordered, irreparable loss will result to the applicant.

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

a. That the application is full of deliberate falsehoods meant to hoodwink the court into granting the orders sought.

b. That the application itself does not portray any merit for it to be allowed and heard.

c. That the application is meant to solely just frustrate the respondents from enjoying the fruit of the judgment.

d. That the applicant has not indicted/and or demonstrated any prejudice and/or substantial loss likely to be incurred or suffered in the case that the instant application is not granted.

e. That the application herein is malicious and has no basis except that the applicant only want to deny justice that was out rightly and on merit awarded to me.

f. That the respondents will be greatly prejudiced if the orders sought herein are granted and the same will contravene the provisions of Article 159(2) (6) of the Constitution.

g. That should the appellant/applicant's application be allowed, the applicant should be ordered to pay at least half of the decretal amount to the respondents and deposit the other half either in court or in a joint interest earning account.

4. It is trite law that an appeal does not operate as a stay for execution. Order 42 Rule 6 of the Civil Procedure Rules states 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. The applicant has contended that should the appeal succeed, the respondents have not shown how they will refund the decretal amount if the stay of execution is not allowed. 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. From the foregoing, I make the following order:

The applicant to deposit half the decretal amount together with the agreed cost in an interest earning bank account in the names of both counsel on record for the parties within 30 days. In addition, the appellant should file and serve record of appeal within 30 days of this order unless extension has been sought and granted. Failure to comply, then the respondent will be at liberty to commence execution.

DELIVERED AND SIGNED AT HOMA BAY THIS 29TH DAY OF MARCH, 2022

KIARIE WAWERU KIARIE

JUDGE