



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO. EO3 OF 2020

GEORGE ODHIAMBO ADIENGE.....APPELLANT/APPLICANT

VERSUS

PAMELA ADHIAMBO DU YA.....RESPONDENT

RULING

1. The appellant/applicant moved the court by way of Notice of Motion dated 4th February, 2021. It was brought under Order 42 Rule 6, Order 51 Rule 1 & 2 of the Civil Procedure Rules, 2010 & sections 1A & 3A of the Civil Procedure Act. The applicant is seeking the following orders:

- a. That the honorable court be pleased to certify this application as urgent in the first instance and grant interim orders thereto exparte.
- b. That the honorable court be pleased to order temporary stay of execution of decree pertaining the ruling delivered on 7th October, 2020
- c. That upon hearing of this application inter parte, the court be pleased to grant an order of stay of execution of decree of the ruling delivered on the 7th of October, 2020 until the instant appeal is heard and determined.
- d. That the costs of this application be provided for.
- e. Such further and/or other orders be made as the court may deem fit and expedient.

2. The application was premised on the following grounds:

- a) The applicant is dissatisfied with the ruling of the learned senior principal magistrate T. A. Obutu in Succession Cause No.126 of 2019 delivered on the 7th October, 2020 and has filed appeal on the same in this court.
- b) That the applicant sought for orders of stay in the subordinate court that issued the decree but the application was dismissed necessitating this application.
- c) That execution of decree in the subordinate court will immensely deprive the applicant of his legal right to ownership of land parcel number GEM/KANYANJWA/1040.
- d) That no prejudice will be done to any party if this application is allowed.
- e) That it is in the interest of justice that this application be allowed.

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

- a) That the applicant will not suffer any loss.
- b) No substantial loss which may result was demonstrated.

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. 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. Failure to comply, then the respondent will be at liberty to commence execution.

DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF JULY, 2021

KIARIE WAWERU KIARIE

JUDGE.