



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO. EO54 OF 2021

BARRACK OWINO OWAGA.....1ST APPEELANT

STEPHEN BUNDE.....2ND APPELLANT

VERSUS

GEDION OMONDI ODONGO.....RESPONDENT

RULING

1. The applicant came to court by way of Notice of Motion dated 30th June, 2021. It was brought under sections 3 & 3A of the Civil Procedure Act, CAP. 21 Laws of Kenya and under Orders 42 Rule 6, 50 Rule 5, 51 Rules 1 & 3, 22 Rule 22 of the Civil Procedure Rules, 2010. The applicant is seeking the following orders:

- a) That this application be certified urgent, service be dispensed with thereof 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/decree in this matter delivered on 3rd June 2021, pending the hearing and determination of this application and appeal.
- c) That this honorable court be pleased to grant a stay of execution of the judgment/decree in this matter delivered on 3rd June 2021 pending the hearing and full determination of the appeal.
- d) That upon grant of prayer No.3 above, this honourable court be pleased to order that the applicant do provide sufficient security in the form of a suitable Bank Guarantee from a reputable financial institution to secure the Judgement herein of Kshs.320, 000.
- e) That costs of this application be in the cause.

2. The application was premised on the following grounds:

a. That Judgment herein was delivered on 3rd June, 2021 in the following terms;

- i. Liability at 100%
- ii. General damages **320,000/-**
- iii. Special Damages **Nil**

Total amount 320,000/-

iv. Costs and interest of the suit.

b. That the applicant is aggrieved by the said judgment on the issue of liability and quantum.

c. That the applicant has lodged an appeal against the afore-stated judgment which appeal has high chances of success.

d. That the applicant has lodged an appeal for failure of the court to consider the provisions of Section 10(3A) of The Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013 CAP 405.

e. That there is no order of stay of execution in force.

f. That the decree is for a substantial sum of **Kshs.320, 000/-** which if paid to the respondent and the appeal is successful, the applicant will not be able to recover the same from the respondent and the appeal will therefore be rendered nugatory.

g. That the applicant will suffer substantial loss and damage if orders sought herein are not granted and further that the appeal will be rendered nugatory.

h. That this application has been filed timeously.

i. That the respondent will not be prejudiced in any way if the orders sought herein are granted.

j. That it is in the interest of Justice that the execution of Judgement and/or decree herein be stayed pending the hearing and determination of the appeal.

k. That the respondent is a person of straw and will not be able to refund the decretal sum if they are allowed to execute and the appeal thereafter succeeds.

l. That the applicant is ready, willing and able to furnish such reasonable security as this Honourable Court may deem fit and in particular, the applicant is willing and able to furnish security by providing a bank guarantee as security for the whole decretal sum.

m. This application has been done without any unreasonable delay.

3. The respondent opposed the application and proposed that in the event the application was allowed, the applicant be ordered to release to the respondents half the decretal sum together with costs.

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 respondent argued that the applicant has not demonstrated that he will suffer irreparable loss while the appellant on the flip side argued that the respondent has not shown how he will refund the decretal sum if the appeal succeeds. 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 27TH DAY OF JULY, 2021

KIARIE WAWERU KIARIE

JUDGE.