



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO. EO28 OF 2021

GEORGE OUMA ONYANGO.....1ST APPELLANT/APPLICANT

VINCENT ACHOLAH OPIYO.....2ND APPELLANT/APPLICANT

VERSUS

WISON ACHIENG ATHO & LORNAH ADHIAMBO ODONGO

(Suing as the administrators of the estate of Wilkista Aluoch-Deceased).....**RESPONDENTS**

RULING

1. The appellants/applicants moved the court by way of Notice of Motion dated 6th April, 2021. It was brought under Order 12 Rule 2 (a), 5 & 7 Order 42 Rule 6, Order 22 Rule 22, Order 50 Rule 4 and Order 51 Rule 1of the Civil Procedure Rules, 2010 & sections 1B, 1(a), 3A and 100 of the Civil Procedure Act & Article 159 of the Constitution of Kenya. They are seeking the following orders:

- a) That this matter be certified urgent and heard ex parte in the first instance and service thereof be dispensed with.
- b) That this Honourable court be pleased to order a stay of execution of the *ex-parte* judgment delivered on 25th November, 2020 by Hon. TOM MAKR OLANDO, in HOMABAY SPMCC NO.39 OF 2020 pending the hearing and determination of this application *inter-partes*.
- c) That this Honourable Court be pleased to order a stay of execution of the *ex-parte* judgment delivered on 25th November, 2020 by Hon. TOM MARK OLANDO, in HOMBAY SPMCC NO.39 OF 2020 pending the hearing and determination of the appeal.
- d) That the costs of this application be provided for.

2. The application was premised on the following grounds:

- a) That judgment in Homa Bay SPMC NO.39 OF 2020, Wilson Achieng' Atho And Lornah Adhiambo Odongo (suing as the administrators of the estate of Wilkister Aluoch-Deceased) vs. George Ouma Onyango And Vincent Acholah Opiyo was entered on 25th November, 2020 in favour of the respondent as against the appellants/applicants to the tune of kshs.6,481,500/-.
- b) That the afore-stated judgment was entered ex-parte as the applicants did not defend themselves in the said matter.
- c) That the applicants' filed an application dated 8th February, 2021 in Homa Bay SPMCC NO.39 of 2020 seeking to set aside the ex-parte judgment entered on 25th November, 2020 which application was dismissed on 31st May 2021.
- d) That there are no orders of stay of execution in force and the applicants are apprehensive that the respondents will proceed to proclaim the applicant's goods and properties and if an order for stay of execution is not granted.
- e) In such event, the appellants/applicants herein stand to suffer irreparable loss and damage if the orders sought in the application herein is not granted.
- f) The appellants/applicants being dissatisfied with the ruling dated 31st March, 2021 filed the appeal herein.

g) That the applicants' are ready and willing to offer security in form of a bank guarantee for the decretal sum to a statutory limit of Kshs.3,000,000/- pending the hearing and determination of this Appeal and Homa Bay SPMCC NO.39 of 2020.

h) The appellants/applicants implore this Honorable Court to adhere to natural justice, doctrines of equity and the constitution in this matter as the appellants/applicants will be condemned unheard if the applicants are not granted an opportunity to defend the suit.

i) The appellants/applicants have to come to court within a reasonable period of time and without undue delay.

j) The application will not occasion any prejudice to the respondents.

k) That this application is made in good faith, timeously and it will be in the interest of justice that the same be allowed.

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

a) No substantial loss which may result was demonstrated.

b) That no adequate security has been offered.

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. 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.