



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

MISCELLANEOUS CIVIL APPLICATION NO. E028 OF 2021

CHINESE CITY CONSTRUCTION COMPANY LTD.....APPLICANT

VERSUS

MINICA NYAORE NYAORI & ANOTHER

(suing as legal representatives of the estate of

SILAS OKECH NYAORI-DECEASED).....RESPONDENT

RULING

1. The applicant came to court by way of Notice of Motion dated 21st June, 2021. It was brought under sections 3A, 75, 78 & 79G of the Civil Procedure Act, CAP. 21 Laws of Kenya and under Order 50 Rule 6 of the Civil Procedure Rules, 2010. The applicant is seeking the following orders:

- a. That this application be certified as urgent, service thereof dispensed with and heard forthwith and *ex-parte* in the first instance. [Spent]
- b. That this honorable court be pleased to grant an interim order of stay of execution of judgment and resultant decree issued in Oyugis PMCC NO. 49 of 2020 – Monica Nyaore Nyaori & Treazer Hellen Adhiambo (Suing as legal representative of the estate of Silas Okech Nyaori (Deceased) vs. Chinese City Constructions Company Ltd Pending the hearing and determination of this application inter-parties. [Spent]
- c. That this honorable court be pleased to grant leave to the applicant/judgement-debtor to appeal out of time against the judgment of the Hon. B. Omwansa (PM) delivered on the 28th April 2021 in Oyugis PMCC No.49 OF 2020.
- d. That the said leave does operate as a stay of all execution proceedings in Oyugis PMCC NO.49 of 2020 pending the determination and outcome of the intended appeal.
- e. That the costs of this application be provided for.

2. The application was premised on the following grounds:

- a. That judgment in Oyugis PMCC No.49 of 2020 was delivered on 28th April 2021 by the hon. B. Omwansa (PM).
- b. That upon delivery of the said judgment, the applicant, being the defendant/judgement-debtor in the primary suit, sought for and successfully obtained 30 days stay of execution.
- c. That the applicant being aggrieved and dissatisfied by the said judgment, thereby through their insurers, instructed their advocates to file an appeal.
- d. That meanwhile, the time for instituting the appeal had run out.
- e. That it is in the interests of justice that the applicant be allowed to appeal against the decision of the trial court, albeit out of time.
- f. That the respondent will not be prejudiced if the said leave is granted.
- g. That the said intended appeal has high chances of success and unless leave to file out of time together with stay of execution

pending the appeal is granted, the applicant shall suffer substantial loss as the substratum of the appeal will be lost.

h. That there currently being no orders preventing the respondent, being the decree-holder in Oyugis PMCC NO.49 OF 2020 from realizing the fruits of his judgment, the applicant is at risk of imminent execution.

i. That unless both leave to file the appeal out of time and stay of execution pending appeal is granted, the intended appeal shall be rendered nugatory as execution process shall be commenced to realize the fruits of the judgment.

j. that unless both leave to file the appeal out of time and stay of execution pending appeal is granted, the defendant stands to suffer substantial loss in the nature and to the extent of the judgment cum plus the necessary costs of this suit as already assessed as the plaintiff shall not be able to refund the same in the event the intended appeal succeeds.

k. That the defendant is ready and willing as the court shall order or desires to provide security for the due satisfaction of this decree in the unlikely event the intended appeal fails.

l. That it would be just and equitable to so order in the interest of justice so as to preserve the substratum of the intended appeal as the plaintiff's means are unknown.

m. That the court has powers and discretion to so order as prayed and for the status quo to be maintained so as to preserve the substratum of the intended appeal.

n. That this application has been made without undue delay and in the interest of justice.

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 the agreed 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 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 22nd day of July, 2021

KIARIE WAWERU KIARIE

JUDGE.