



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL CASE NO. 3 OF 2020

ERNEST OMONDI OWINO.....1ST PLAINTIFF

MBINGO ENTERPRISES LTD.....2ND PLAINTIFF

VERSUS

FELIX OLICK1ST DEFENDANT

THE STAR NEWSPAPER.....2ND DEFENDANT

RADIO AFRICA GROUP LTD.....3RD DEFENDANT

RULING

1. The defendants herein moved the court by way of Notice of Motion dated 24th August, 2021. It was brought under sections 1A, 1B, 3 & 3A of the Civil Procedure Act and under Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 &. The applicant is seeking the following orders:

- a) This application be certified as urgent, service be dispensed with thereof and the same be heard ex-parte in the first instance. [Spent]
- b) That pending the inter parte hearing of this application, an Order be and is hereby issued staying the execution of the Judgment and Decree issued herein on 28th July 2021 and 6th August 2021 respectively.[Spent]
- c) That pending the hearing and determination of this application, an Order be and is hereby issued staying the execution of the Judgment and Decree issued herein on 28th July 2021 and 6th August 2021 respectively.[Spent]
- d) That pending the hearing and determination of the appeal, an order be and is hereby issued staying the execution of the judgment and decree issued herein on 28th July 2021 and 6th August 2021 respectively.
- e) The costs of this application be provided for.

2. The application was premised on the following grounds:

- a) Judgement in this case was delivered on 28th July, 2021 in favour of the Plaintiffs herein in the sum of Kshs.20, 000,000/- as general damages, kshs.2, 000,000/- as exemplary damages along with the costs of the suit.
- b) The defendants being aggrieved by this decision have lodged an Appeal at the Court of Appeal.
- c) There is imminent threat of execution by the plaintiffs against the defendants as stay of execution of the said judgment and decree on 28th August 2021.
- d) The judgment is of a colossal amount, which if execution were to be rendered by the plaintiffs, it would render the defendants destitute, crippled their operations and in turn stifle their right to challenge the judgment in the higher court in light of the current tough financial times due to COVID-19.
- e) The plaintiffs herein are not of known financial means to be in a position to refund the decretal sum in the event the Appel

succeeds.

- f) Consequently, unless the Orders sought herein are granted, the defendants stand to suffer substantial loss that would in turn render this application and the appeal nugatory.
- g) The instant application has been made promptly and without unreasonable delay.
- h) The defendants are ready and willing to provide security for the due performance of the Decree in the form of a bank guarantee.
- i) It is just and proper that an order of stay of execution be granted to prevent the ends of justice being defeated.
- j) The plaintiffs stand to suffer no prejudice should this application be allowed as prayed.

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

- a) That the respondents are people of substance; and
- b) That bank guarantee is not adequate security.

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 16TH DAY OF DECEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE.