



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CIVIL APPEAL NO.15 OF 2018**

**BETWEEN**

**HENRY WAFULA.....1<sup>ST</sup> APPELLANT/APPLICANT**

**VINCENT OKOTH..... 2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**WILLIMINA AGUNDA [*Suing as a legal representative of the estate of*]**

**NOEL RUTH WASIKE.....RESPONDENT**

***(Being an Appeal from the Ruling in Busia Chief Magistrate's Court***

***Civil Case No. 23 of 2016 by Hon. Maureen A. Odhiambo- Resident Magistrate).***

**RULING**

1. The applicants herein moved the court by way of Notice of Motion dated 11<sup>th</sup> March 2019 under sections 1A, 1B, 3 & 3A of the Civil Procedure Act, order 10 Rule 11 & Order 50 Rule 6 of the Civil Procedure Rules. They are seeking the following orders:

- a) That there be a stay of execution of the judgment of the lower court which was delivered on 14<sup>th</sup> March 2017 and any other consequential orders pending the hearing of this application.[spent]
- b) That there be a stay of execution of the judgment of the lower court which was delivered on 14<sup>th</sup> March 2017 and any other consequential orders pending the hearing of this appeal.
- c) That costs of this application be provided for.

2. The application is premised on the following grounds:

- a) That the appellants have preferred an appeal against a ruling that dismissed their application dated 17<sup>th</sup> May 2018.
- b) That they have a prima facie arguable appeal with high chances of success.
- c) That the respondent will not suffer any prejudice.
- d) That this application was made without undue delay.

3. The application was opposed on the following grounds:

- a) The application lacks merit.
- b) That the application has been compromised by the appellants/applicants payment part of the decretal sum of Kshs. 12,000/=.

4. The impugned ruling of the lower court was delivered on 21<sup>st</sup> September 2018. The present application was filed in court on 13<sup>th</sup> March 2019. This was a period of over 5 months. The applicants cannot be heard to say they acted with due diligence. Upon my perusal of the court file, I notice that there is no record of appeal.

5. In the interest of justice I will allow the application for stay of execution of the judgment and decree of the lower court pending the hearing of this appeal subject to the following conditions:

i) The applicants to deposit the balance of the decretal sum in a joint interest earning account in the names of both advocates on record within 30 days of this ruling.

ii) That the applicants file and serve the records of appeal within 30 days of this ruling.

Failure to comply with the above mentioned conditions, then the order for stay of execution will lapse and the respondent be at liberty to execute.

6. Since there has been inordinate delay, the applicants will bear the costs of this application.

**DELIVERED and SIGNED at BUSIA this 29<sup>th</sup> day of January, 2020**

**KIARIE WAWERU KIARIE**

**JUDGE**