



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL SUIT NO. 91 OF 2004

**GERSON OGWANG KOLA (suing as the personal
and legal representative**

of JEREMIAH OWAKA OGWANG – Deceased) ... PLAINTIFF/RESPONDENT

VERSUS

JOSEPH OYAYA 1ST DEFENDANT/1ST APPLICANT

NICHOLAS ODAGO ODALO 2ND DEFENDANT/2ND APPLICANT

PETER OYAYA 3RD DEFENDANT/3RD APPLICANT

RULING

1. The application before the court is the Notice of Motion dated 5th March 2014 where the applicant is seeking ORDERS:-
 1. *That the application herein be certified urgent and same be heard Ex-parte in the first instant.*
 2. *That pending the hearing and determination of the instant application, the Honourable Court be pleased to grant an interim order of stay of execution of the judgment and decree together with all consequential orders of this Honourable Court issued on the 18th May 2011.*
 3. *That the Honourable court be pleased to grant an order of stay of execution of the judgment and decree of this Honourable Court, dated and delivered on the 18th day of May 2011 together with all consequential orders, pending the hearing and determination of the Appeal to the Honourable Court of Appeal, against the entire judgment and/or decision of this court made on 18th day of May 2011.*
 4. *That the costs of this application do abide the outcome of the intended Appeal.*
 5. *That such other and/or further orders be granted as this honourable court may deem fit and expedient.*
2. The application is premised on the grounds set out in the application and is also supported by the affidavit of Joseph Oyaya sworn on the 5th day of May 2014. The application is brought under **Order 42 Rule 6** of the **Civil Procedure Rules 2010**, **Rule 75** of the **Court of Appeal Rules** and **Section 1A, 1B, 3 and 3A** of the **Civil Procedure Act, Cap 21 Laws of Kenya** and all other enabling provisions of the law.
3. The applicant states that he has filed an appeal in the Court of Appeal being **Kisumu Court of**

- Appeal Civil Appeal No.11 of 2014**, having been aggrieved by the judgment and decree delivered and issued by this court on 18th May 2011. He adds that there is a warrant for his arrest in execution of the decree issued at Kisii on the 20th November 2013 a copy of which he has annexed and marked “**JO1**”. He further states that he has filed and served the Record of Appeal same having been filed on the 27th February 2014 and served on the 3rd day of March 2014. He states that he is in danger of being arrested, warrants of arrest having been issued on 14th February 2014. The applicant also contends that the appeal as filed has high chances of success.
4. He opines that he is bound to suffer substantial loss and prejudice unless the orders sought are granted and that he is ready and willing to offer such security as this court may deem reasonable and expedient. He states further that the delay to have the appeal filed was due to delay in typing of proceedings. There is a certificate of delay marked “**JO5**” to that effect.
 5. The application is opposed. There is a replying affidavit sworn by Omonde Kisera an advocate of this Honourable court who is conducting the matter herein on behalf of the decree holder/respondent. Mr. Kisera depones that the application herein is a pure desperate attempt to block execution of the decree.
 6. He adds that judgment herein was delivered over 3 years ago namely on 18th May 2011 and all along there has been no attempt at all to seek stay of execution of the said decree. That this honourable court has and is capable of granting stay of execution of a decree appealed against on proof of a duly filed Notice of Appeal alone. That the Notice of Appeal having been lodged against the decree herein on the 26th of May 2011, on that basis alone, the defendant/respondent had a basis of seeking for stay of execution before this Honourable Court much earlier than 5th March 2014 and that the applicants’ contention that they had to file the record of appeal to the Court of Appeal before they could seek stay of execution pending appeal is not well founded. He further states that the applicant is guilty of unreasonable delay which is a bar for stay of execution and that the delay in preparation of Record of Appeal is not an issue to be considered in granting a stay before this honourable court, rather it is an issue for the Court of Appeal regarding competence of the appeal before that court.
 7. He further states that this being a money decree, no stay of execution should be given as the applicant has not shown that the Respondent will be incapable of refunding the decretal sum should the appeal succeed. He adds that the applicant does not deserve the said orders as he has not demonstrated that he sought for the same within reasonable time.
 8. He further states that each court must jealously guard its decree and/or orders and execution is the surest way to stamp that authority. Further that the application lacks merit as the applicant has not demonstrated how he is likely to suffer substantial loss and the application as a whole falls short of the conditions set out in **Order 42 Rule 6** of the **Civil Procedure Rules** and that **Rule 75** of the **Court of Appeal Rules** is not a rule of this Honourable Court.
 9. Finally that considering the inordinate delay on the part of the applicants and their general conduct since the date of the decree herein and while balancing the interest of the deceased’s family and that of the applicant, the application herein should be dismissed but if the court is inclined to grant same then it should be on condition of payment of ½ of the decretal sum as at the date of the ruling to the respondent and deposit of the remaining sum into a joint interest earning account in the names of the respective counsel.
 10. The application came up for hearing on the 13th March 2014 and Mr. Bunde made submissions on behalf of the applicant. Mr. Omonde Kisera who is on record for the respondent did not appear although the court was satisfied that he had been duly served.
 11. Mr. Bunde submitted that the application dated 5th March 2014 was merited. He relied on the grounds on the face of the application and on the supporting affidavit sworn by Joseph Oyaya on 5th March 2014. He submitted further that the applicant is in danger of being arrested since warrants of arrest have been issued against him. He submits that the applicant has filed Civil Appeal No.11 of 2014 before the Court of Appeal which appeal he says have overwhelming chances of success. He also contended that the replying affidavit does not raise any grounds as would make this court not to grant the orders as prayed.

12. Upon reading the application together with the replying affidavit and the annexures thereto, and having considered the arguments by counsel I must point out that the conditions for grant of stay pending appeal which are enumerated in **Order 42 Rule 6 (2) (a) and (b)** of the **Civil Procedure Rules** are as follows:-

“42 6 (2) No order for stay of execution shall be made unde Sub rule (1) unless

- a. **the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**
- b. **such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”**

13. The applicant has brought this application three (3) years after judgment and decree was issued. He has tried to demonstrate that the delay to have the appeal filed was occasioned by proceedings not having been typed in time. He has obtained a certificate of delay to that effect. I note that the applicant filed the Notice of Appeal on 20th May 2011 and applied for copies of proceedings and judgment as well as exhibits and certified copies of the decree in this case vide the letter dated 30th May 2011 and filed in court on 19th July 2011 and served upon plaintiff’s advocates on 21st July 2013. I also note that the Certificate of Delay shows proceedings were ready on the 16th December 2013. The delay in typing of proceedings was not caused by the applicants herein. Be that as it may, did the applicant have to wait for the proceedings to be typed and a Record of Appeal compiled and filed before making an application for stay of execution? And two, has the applicant fulfilled the conditions set out in **Rule 6 (2) of Order 42?**

14. In an application such as this, the appellant/applicant is required to demonstrate that he or she will suffer substantial loss if stay is not granted. There is a warrant of arrest issued in execution of the decree. The question to be answered by the court is whether the threat of an arrest is a demonstrable substantial loss to the applicant if the stay order is not granted by this honourable court.

15. It is my considered view first that the applicant was under no obligation to wait for typed proceedings before he could file an application for stay of execution. The Notice of Appeal was sufficient for the applicant to base his application for stay notwithstanding that the Record of Appeal had not been compiled. This position is strengthened by the provisions of **Order 42 Rule 6 (5)** to the effect that **“an application for stay of execution may be made informally immediately following the delivery of the judgment or ruling.”** In effect the excuse of the proceedings not having been typed in time is hollow and not well grounded. The applicant is therefore guilty of inordinate delay in bringing this application.

16. The court also finds and holds that the applicant has not demonstrated to this court what loss he will suffer if he is not granted the orders sought. Merely stating that one shall be prejudiced is not the same as demonstrating how one shall be prejudiced.

17. Thirdly, the applicant has not shown how he intends to comply with the third limb of **Order 42 Rule 6 (2)** as to furnishing of security. In any event, even if the court were to accept that there was a delay in getting the proceedings typed up to 16th December 2013, there is clear evidence that the applicant did not act diligently thereafter. He took the step of filing this application almost three (3) months after 16th December 2013. The court finds that he was indolent and therefore undeserving of the order sought.

18. Finally, it is to be noted that **Rule 6 (2) of Order 42** clearly requires an applicant to comply with all the three conditions stated thereunder before an order for stay of execution can be granted, namely:-

- i. *demonstration of imminent substantial loss to be suffered by the applicant; and*
- ii. *timely filing of the application; and*
- iii. *Furnishing of security.*

19. In the instant case, the applicant has failed to comply with all the three conditions above stated and consequently, the entire application is dismissed but with no order as to costs.
20. Orders accordingly.

Dated and delivered at Kisii this 18th day of March, 2014

R.N. SITATI

JUDGE

In the presence of:-

Miss Okwoyo (present) for the Applicants

Mr. Okemwa h/b for Omonde Kisera (present) for the Respondent

Mr. Bibu - Court Clerk