



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**OF KISII**

**Civil Appeal 175 of 2004**

**EAST AFRICAN SEA FOOD LIMITED.....APPELLANT**

**-VERSUS-**

**JOEL MUGA OPIJA.....RESPONDENT**

**RULING**

Joel Muga Opija ( suing as Administrator of the Estate of Evans Odhiambo Muga (Deceased) (the respondent) sued East African Sea Foods Ltd (the applicant) in Homa Bay SRMCC no. 15 of 2003 and was awarded Kshs. 350,120/= plus costs and interest. Costs were assessed at Kshs. 43,165/=. When interest was calculated, the decretal sum became Kshs. 412,637/60. The applicant was served with warrants of attachment. An appeal was filed and with it an application for stay of execution. An order of stay was granted on condition that Kshs. 250,000/= of the decretal sum be released to the respondent. The decretal sum had been deposited into court. It was ordered that the balance be deposited into a joint interest earning account in the names of the two firms of the advocates of the parties. This was to await the determination of the appeal.

Kshs. 250,000/= was released to the respondent. The balance was deposited as ordered. On 20/11/2007 the appeal was allowed and each party ordered to bear his own costs. This meant that the amount deposited in joint account be released to the applicant. Several letters were written to S. Okoth & Company Advocates for the respondent to release the money. They did not release. They instead wrote to say they had lodged a notice of appeal in the Court of Appeal against the High Court judgment and could not authorize the release of the money until the intended appeal had been heard and determined. The respondent filed application by way of motion to have the advocates ordered to release the money. The application was on 13/5/2009.

On 22/9/2009 the respondent filed motion under *Order 41 rule 4(1) and (4) of the Civil Procedure Rules* seeking “stay of the execution of the decree of this appeal made on the 20<sup>th</sup> of November, 2007” pending the hearing and determination of the intended appeal to the Court of Appeal. It was sought that the money continues being held until the intended appeal is determined.

The decision of the High Court was on 20/11/2007 and the application for stay is being brought on 22/9/2009. It is being brought about one year and 10 months later. There is no explanation for this inordinate delay.

The appeal is against the dismissal of the respondent’s suit. There is therefore no decree resulting from the judgment that can be stayed.

The respondent’s advocates have held onto this money for nearly two years without any order or reasonable explanation. This should not be countenanced.

In all, I allow the applicant’s application with costs and dismiss the respondents application with costs.

Dated, signed and delivered at Kisii this 20<sup>th</sup> day of January, 2010.

**A.O.MUCHELULE**

**JUDGE**

**20/1/2010**

Before A.O.Muchelule-J

Court clerk-Bibu

Mrs. Opanga for Respondent

**COURT:** Ruling in open Court.

**A.O.MUCHELULE**

**JUDGE**