



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 830 OF 2015

FRANCIS ODHIAMBO OTURU

(Suing as the administrator of the estate of the late

SAMWEL OTURU ODUOGO.....PLAINTIFF/RESPONDENT

VERSUS

JACTON OKULA ADUOGO.....DEFENDANT/APPLICANT

RULING

The applicant Jackton Okula Aduogo prays that pending the hearing and determination of the appeal to the Court of Appeal at Kisumu, being Kisumu Court of Appeal, Civil Appeal No..... of 2021, Jackton Okula Aduogo vs Francis Odhiambo Oturu, a stay of execution of the ruling/decreed/order dated 18th March 2021 be issued. That costs of the application to abide by the outcome of the appeal. The application is based on grounds that:

- 1. The appeal raises plausible and arguable grounds of appeal.**
- 2. The Applicant is an old man who may end serving the sentence handed down on him before the appeal has been heard and determined.**
- 3. The execution of the decree/order/Judgment herein shall render the appeal nugatory and or an academic exercise.**
- 4. The Applicant who is an old man was never accorded a chance to be heard in mitigation before he was sentenced.**
- 5. The Respondent does not stand to suffer any substantial damage/loss during the period of stay of execution ending the hearing and determination of the pending appeal.**
- 6. This application has been made without undue delay.**
- 7. The grant of the orders prayed for shall meet the ends of justice.**

The applicant states that he has drawn a draft memo of Appeal. He has filed a notice of Appeal. That he is an old man who may end serving the sentence handed down on him before the appeal has been heard and determined. That the execution of the decree/order/Judgment herein shall render his appeal to the Court of Appeal nugatory and or an academic exercise.

That the Respondent does not stand to suffer any substantial damage/loss during the period of stay of execution pending the hearing and determination of the pending appeal. This application has been made without undue delay and the grant of the orders prayed for shall meet the ends of justice.

The respondent Francis Odhiambo Oturu filed grounds of opposition stating that the application is totally defective and that no security has been availed.

Mr. Onsongo, learned counsel for the applicant submits that they seek a stay of execution pending the hearing and determination of the appeal that has been filed. The reason is that the appeal may be rendered nugatory if the applicant serves sentence of two months' imprisonment. That he is unable to pay the fine. He has deponed to that effect. He is a peasant farmer living from hand to mouths. The only option is to serve sentence. If he serves sentence it can't be reversed. He has filed a draft memo of Appeal. He raises serious issues to be argued in the Court of Appeal. One of the grounds is that the sentence was handed before mitigation. He would raise other issues. Either way

the respondent does not stand to gain anything. The respondent does not stand to lose if the stay is granted. If the appellant goes to prison, he cannot exhume the body of the grandchild. He can't exhume the body while in prison. These are relatives. An uncle and a nephew.

Mr. Odeny learned counsel for the respondent submits that the applicant is playing to the gallery. He is not denying being in contempt. He claims to be old. He is not remorseful. Age is just a number. There was no leave granted to file the appeal. The applicant has not deponed that he is a poor man. Applicant has had counsel all through the proceedings. He should pay the fine if he is not to go to jail. Orders of court are supposed to be respected.

Under Order 42 Rule 6 Sub-rule 2(a) of the Civil Procedure Rules 2010, the court is empowered to grant stay of execution pending appeal on being satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay.

In the case **Esther Wanjiru –vs- Jackline Arege [2014] eKLR**, it was held that an order of stay of execution will be granted where the court is satisfied that substantial loss may result to the applicant.

In the case of **Mukuma –vs- Abuoga** substantial loss was considered as being the cornerstone of the discretion by the High Court in the granting stay of execution under order 42 of the CPR, when it stated that;

“... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

Under order 42 Rule 6 Sub-rule 2(b) of the Civil Procedure Rules 2010, it is provided that the applicant is obligated to furnish such security as the court may order for the due performance of such decree or order as may ultimately be binding on him.

The applicant states that, he is ready and willing to furnish such reasonable security to be deposited in court as guided by this honourable court.

In the case of **Kenya Commercial Bank Ltd –vs- Sun City Properties Ltd & 5 Others [2012] eKLR** it was held:

“In an application for stay, there are always two competing interest that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced.

In a bid to balance the two competing interests, the courts usually makes an order for suitable security for the due performance of the decree as the parties wait for the outcome of the appeal.

This position has been ascertained in **Tabro Transporters Ltd –vs- Absalom Dova Lumbasi [2012] eKLR** where the requirement to furnish security was considered as the just thing to do when balancing the two competing interests.

The application herein has been brought without any unreasonable delay and the same will not occasion any prejudice to the respondent.

The essence of an application for stay pending appeal is to preserve the subject matter of litigation to avoid a situation where a successful appellant only gets a paper judgment. It is therefore in the interest of justice that the application be granted.

I have considered the application, supporting affidavit and the grounds of opposition and do find that the application is filed timely as required by law.

Moreover, the applicant is likely to suffer substantive loss if the appeal succeeds as he would have served the jail term and no award of compensation can be satisfactory. The applicant is willing to abide to any term of security to be granted by the court.

I do grant stay of execution and suspend the orders herein pending hearing and determination of the Appeal. The applicant to deposit Ksh 50,000 or security of the value of Kshs. 50,000/= in court.

DATED AT KISUMU THIS 30th DAY OF APRIL, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE