



REPUBLIC OF KENYA



KENYA LAW
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Ogutu ((Suing as Legal Representative of the Estate of Jackson Ogutu Osende)) v Okumu & another (Civil Appeal E023 of 2022) [2024] KEHC 1181 (KLR) (14 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1181 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E023 OF 2022
WM MUSYOKA, J
FEBRUARY 14, 2024**

BETWEEN

**SYLVESTER ODHIAMBO OGUTU APPELLANT
(SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF JACKSON OGUTU
OSENDE)**

AND

**VICTOR ODUORI OKUMU 1ST RESPONDENT
FRANCIS OKUMU WERE 2ND RESPONDENT**

RULING

1. The application, dated 25th September 2023, seeks stay of execution of an order made in Busia CMCCC No. 350 of 2009, on 23rd June 2022, pending hearing and determination of the application and the appeal. The appeal is against orders that were made by the trial court on 23rd June 2022, allowing an application, for stay of execution proceedings against the 1st respondent, the raising of an attachment levied against the 1st respondent, and ordering the appellant to pay compensation to the 1st respondent in the event the attached cattle had been since disposed of.
2. The reply to the application was by the 1st respondent, taking the form of grounds of opposition, dated 16th October 2023. The grounds are that the appellant had filed an application for review, against the ruling of 23rd June 2022, which was dismissed; the application offends the provisions of section 80 of the *Civil Procedure Act*, Cap 21, Laws of Kenya, which bars an appeal where a review application has been preferred; the appellant has not paid the sum of Kshs 245,900.00, ordered by the trial court; among others.
3. The application was placed before me, on 25th September 2023, under certificate of urgency. I gave directions on its service, and granted temporary relief, by way of stay of execution of the decree.



4. Directions were given on 16th October 2023, for canvassing of the application, by way of written submissions. The written submissions that I see on record were filed by the appellant, on 30th October 2023, of even date. In the said submissions, the appellant cites Order 42 Rule 6(1)(2) of the *Civil Procedure Rules*, and *Johnson Mwiruti Mburu v Samuel Machari Ngure* [2004] eKLR, *National Industrial Credit Bank Limited v Aquinas Francis Wasike & another* [2006] eKLR, *Swapan Sadhan Bose v Ketan Surenda Samaia & others* [2006] eKLR, *Esther Wanjiru v Jackline Arge* [2014] eKLR and *Mukuma v Abuoga*, on the principles relating to substantial loss, submitting that he faced imminent arrest over payment of the amount that he was ordered to pay by the trial court. He submits that his appeal has high chances of success, and that he has brought the application without unreasonable delay, for the ruling was delivered on 23rd June 2022, and he filed appeal on 6th July 2022. He asserts that he never filed an application for review of that decision. He cites Article 50(1) of the *Constitution*, to assert his right to a fair hearing; and Article 48 of the *Constitution*, to argue that he is entitled to access justice.
5. The question is whether stay of execution pending appeal ought to be granted.
6. Order 42 Rule 6(1) of the *Civil Procedure Rules* applies. That provision grants the High Court, as an appellate court, discretion to consider an application for stay of execution of a decree pending appeal, and to make such orders on it as it may seem just to it.
7. For avoidance of doubt, Order 42 Rule 6(1) of the *Civil Procedure Rules* says:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court 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 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.”
8. The order appealed from was made on 23rd June 2022. The memorandum of appeal was lodged herein on 6th July 2022, within the 30 days allowed in law. However, the application for stay was lodged on 25th September 2023, some 15 months after the making of the impugned orders on 23rd June 2022. He has not explained why it took him 15 months to apply for stay of execution of the impugned orders. That delay was considerable and unreasonable. See *Philip Kiprotich Tuitoek v Edna Jebiwott Kiplagat & 2 others* [2020] eKLR (Odeny, J), *Joseph Odide Walome v David Mbadi Akello* [2022] eKLR (Aburili, J) and *Phineas Waguma Machiro v George Anyika K'Ouma t/a Wotatech Services* [2022] eKLR (Wendoh, J). The appellant has cited Article 50 of the *Constitution*, on fair hearing. However, he has not demonstrated that anyone has sought to impede, or has actually impeded, his right to a fair hearing. He is the one who has not taken advantage of what the law allows him, in terms of moving the court to grant him stay of the impugned orders, within the 15 months between when those orders were made and when he moved for stay. He has also cited Article 48, on access to justice. He has not demonstrated that an attempt has been made by the other parties, or by the court, to impede his access to justice. He is the one who filed an appeal, and just went to sleep, instead of applying timeously to have the orders he challenges stayed, and to have the appeal disposed of.
9. An issue was raised about a review application, which the appellant mounted at the trial court, and which was allegedly dismissed. The appellant has denied that. The 1st respondent did not file an affidavit, where he could have annexed a copy of that application, and the ruling or orders dismissing it. The original trial court records have not been availed, and so I cannot verify, from the trial record, the



veracity of the claim by the 1st respondent about the review. I shall, in the circumstances, not address my mind to the matter of the alleged review.

10. What order or orders should I make? Grant of stay of execution is discretionary, and it is granted, where, on among other considerations, the stay order is sought timeously. That discretion cannot be available where the delay is for 15 months, and where such delay is completely unexplained. There can be no merit in the application, dated 25th September 2023, and I hereby dismiss it with costs. The temporary orders made on 25th September 2023 are hereby discharged. I note that a record of appeal has been filed, but the appeal has not been admitted. I hereby admit the appeal. Let the Deputy Registrar call for the original trial records. The matter shall be mentioned on 22nd April 2024, for compliance, and directions on disposal. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL AT BUSIA THIS 14TH DAY OF FEBRUARY 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Sylvester Odhiambo Ogutu, the appellant, in person.

Advocates

Mr. Ouma, instructed by BM Ouma & Company, Advocates for the 1st respondent.

