



**Oguna & another v Odongo (Civil Appeal E110 of 2023)  
[2024] KEHC 1124 (KLR) (12 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1124 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CIVIL APPEAL E110 OF 2023  
KW KIARIE, J  
FEBRUARY 12, 2024**

**BETWEEN**

**WILLIAM ODONGO OGUNA ..... 1<sup>ST</sup> APPELLANT**

**ERICK OCHIENG ODONGO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DONALD ISAYA ODONGO ..... RESPONDENT**

**RULING**

1. The appellants/applicants filed an application through a Notice of Motion dated 14 December 2022 and which was received in court on 14 December 2023. It was brought pursuant to sections 1A & 3A of the *Civil Procedure Act*, Order 42 Rule 6 (2) (a) & (3) and Order 51 Rule 1 of the *Civil Procedure Rules* and Rules. They are seeking the following orders:
  - a. The honourable court be pleased to stay the judgment entered on the 13<sup>th</sup> of December 2023, allowing the respondents to bury and intern the remains of their late sister-in-law at Migori in place of Nyatambe village Gwasssi, Suba sub-county, pending the hearing and determination of this application and appeal lodged herein.
  - b. Alternatively, the honourable court be pleased to stay the entire judgment of the counterclaim and the subsequent orders awaiting the hearing of the said appeal against the said judgment.
  - c. And in the alternative, do reverse the said judgment pending hearing and determination of the said appeal inter partes and stop the respondents from executing the orders of the judgment dated the 13<sup>th</sup> day of December 2023.
  - d. The costs of this application be in the cause.
2. The application was premised on the following grounds:



- a. The stay of execution of the said judgment was made, and the same was denied by the honourable court despite the stakes being raised by the appellants, who were all dismissed without any good tangible reason for which there is an overwhelming chance of success from the said appeal.
  - b. The judgment is unjust, shrouded in judicial injustice in the circumstances and will greatly cause trauma, loss, scorn and abuse to the appellants if the orders sought are denied.
  - c. That the said application ought to be heard and determined on merit before the respondent takes the body of their sister-in-law from Rosewood mortuary for interment elsewhere.
  - d. That in the interest of justice, the following application be heard at the first instance.
3. The respondent opposed the application on the following grounds:
- a. That the appellants are seeking a stay of an order that does not exist.
  - b. That the application is an abuse of the court process.
4. In their submissions, the applicants proceeded as if they were arguing the appeal. They did not submit why this court should grant them the orders they seek in this application. Secondly, since the filing of this appeal, the appellants have not filed the record of appeal. This being a burial dispute, they ought to have moved with speed to mitigate further expenses on the preservation of the body of the deceased.
5. When the intended appeal is against a negative order, the appellate court will not ordinarily grant a stay of execution. In *David Kipruto Chingi & another v Director of Public Prosecutions & 2 others* [2016] eKLR, the Court of Appeal said:

This Court has often times stated that stay of execution cannot be granted when the intended appeal is against a negative order. In *Devani & 4 Others v Joseph Ngindari & 3 others*, Civil Application No. 136 of 2004, it was stated:

By dismissing the judicial review application, the superior court did not thereby grant any positive order in favour of the respondents, which was capable of execution. If the order is granted, it will have an indirect effect of reviving the dismissed application. This the court cannot undo at this stage what the superior court has done. It can only do so after hearing the appeal.

In this matter, the trial court did not grant any positive order in favour of the respondents.

6. I have not been persuaded to grant any of the orders sought. The application is dismissed with costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 12TH DAY OF FEBRUARY 2024**

**KIARIE WAWERU KIARIE**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

