



REPUBLIC OF KENYA



KENYA LAW
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**Okumu v Opiyo & another (Civil Appeal E017 of 2023)
[2024] KEHC 793 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 793 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E017 OF 2023
WM MUSYOKA, J
FEBRUARY 2, 2024**

BETWEEN

HAGGAI WONDER OKUMU APPELLANT

AND

BELINDA KADOGO OPIYO 1ST RESPONDENT

VINCENT MUGABE JUMA 2ND RESPONDENT

RULING

1. The application, dated 8th November 2023, seeks stay of execution of the decree passed in Busia CMCCC No. 11 of 2022, pending hearing and determination of the application and the appeal. The appeal is against orders that were made by the trial court on 26th October 2023, dismissing an application, for the setting aside of the judgement and decree, on the finding that the mistake alleged on behalf of the appellant was not excusable.
2. In reply, the respondents contend that the appellant had been properly served, as admitted, and the judgement was, therefore, regular. They plead with the court, in the event that there is inclination to allow the application, to consider having the decretal amount deposited in a joint account in the names of the Advocates for both sides. They further plead that the appellant ought to pay the auctioneer's charges, as the auctioneer had already proclaimed.
3. The application was placed before me, on 9th November 2023, under certificate of urgency. I gave directions on its service, and granted temporary relief, by way of stay of execution of the decree, pending hearing and determination of the application.
4. Directions were given on 16th November 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 8th December 2023, dated 7th December 2023. In the said submissions, the appellant cites Order 42 Rule 6(1)(2) of the *Civil Procedure Rules* and *Elena Doudoladova Korir vs. Kenyatta University* [2014] eKLR



(wa Makau, J), on the principles that govern determination of applications for stay of execution pending appeal. On whether substantial loss would befall the appellant unless orders of stay of execution are granted, the appellant cites *National Industrial Credit Bank Limited vs. Aquinas Francis Wasike* [2006] eKLR (Omolo, O’Kubasu & Githinji, JJA), to submit that the respondents had not demonstrated capability to refund any sum found by the court to be refundable, should the appeal be successful, and inability to refund such moneys could expose the appellant to substantial loss. Section 79G of the *Civil Procedure Act*, Cap 21, Laws of Kenya, is cited to demonstrate that the application for stay was filed without undue delay. It is also submitted that the appellant was willing to tender security for due performance. *Hassan Guyo Wakalo vs. Straman East Africa Ltd* [2013] eKLR (Nambuye, Karanja & Kiage, JJA) is not cited in the written submissions, but a copy of the decision is annexed.

5. The matter is straightforward. The question is whether stay of execution pending appeal ought to be granted.
6. Order 42 Rule 6(1) of the *Civil Procedure Rules* should apply. 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 26th October 2023. The memorandum of appeal was lodged herein on 9th November 2023, within the 30 days allowed in law. The application for stay was lodged simultaneously with the memorandum of appeal. A record of appeal is yet to be lodged herein, but it is still early days. The original trial court records have been availed.
9. Stay of execution is granted at the discretion of the court. The appellant fears that when a portion of the decretal amount is paid over to the respondents, there is a sense in which the same is taken away from its reach, and, should the appeal be successful, there is no guarantee that the appellant would recover that amount from the respondents. The respondents have not demonstrated capacity to refund the decretal amount, should the same be paid to them, and the appeal proves successful. I share that fear. It would always be best for the amount to be secured in a deposit, either in court or in the hands of the Advocates, rather than having a portion of the money paid over to the respondent.
10. What order or orders should I make? I grant stay of execution of the subject judgment, subject to the judgment sum, excluding costs and interests, being deposited in an interest earning bank account, in the joint names of the Advocates for the parties hereto, within 30 days. The appellant shall meet the auctioneer’s charges so far incurred. To move the matter forward, let the appellant file and serve a record of appeal, within 30 days. The matter shall be mentioned on 26th February 2024, for compliance, and further directions. It is so ordered.

DATED AND SIGNED IN CHAMBERS, AND DELIVERED BY EMAIL, AT BUSIA THIS 2ND DAY OF FEBRUARY 2024



W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Osino, instructed by Eboso & Company, Advocates for the appellant.

Mr. Mukisu, instructed by Mukisu & Company, Advocates for the respondent.

