



**Owaga & another v Odongo (Civil Appeal E054 of 2021)
[2024] KEHC 4877 (KLR) (7 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4877 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E054 OF 2021**

KW KIARIE, J

MAY 7, 2024

BETWEEN

BARRACK OWINO OWAGA 1ST APPLICANT

STEPHEN BUNDE 2ND APPLICANT

AND

GEDION OMONDI ODONGO RESPONDENT

RULING

1. The applicants moved the court through a Notice of Motion dated the 14th day of February 2024 under sections 1A, 1B, 3A and 95 of the *Civil Procedure Act*, Order 45 Rule 1, Order 50 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*. She is seeking the following orders:
 - a. That this application be and is hereby certified urgent and heard ex-parte on a priority basis in view of its urgent nature and service of the same be dispensed with in the first instance.
 - b. That pending the hearing and determination of this application inter-partes, a stay of execution of the judgment and/or decree issued on 3rd June 2021 in Homabay CMCC 26 of 2020 and all consequential orders and proceedings thereto be and is hereby issued and/or granted.
 - c. That pending the hearing and determination of this appeal inter-partes, a stay of execution of the judgment and/or decree issued on 3rd June 2021 in Homabay CMCC 26 of 2020, and all consequential orders and proceedings thereto be and is hereby issued and/or granted.
 - d. That the honourable court reinstate and readmit the application dated 1/8/2023 for hearing and determination.
 - e. That this honourable court does make any such further and/or other orders and issue any other relief it may deem just to grant in the interest of justice.



- f. That the cost of this application abides by the appeal outcome.
2. The application was premised on the following grounds:
 - a. That the appellants' appeal is against the judgment and/or decree issued on 3rd June 2021 in Homabay CMCC 26 of 2020.
 - b. That on 23/11/2022, the honourable judge had ordered the applicants to move court once they had filed their record of appeal.
 - c. That before the applicants had moved the court, the respondents filed an application seeking to dismiss the appeal.
 - d. That the appeal was dismissed on 17/7/2023, and the applicants applied to reinstate the appeal dated 1/8/2023, which was dismissed for want of prosecution on 19/12/2023.
 - e. That the application had reason to believe that the said submissions were filed and had also served the respondent herein with the said submissions.
 - f. In view of the foregoing, the appellants are now under an imminent threat of execution from the respondent, thereby exposing them to substantial loss and damage.
 - g. The application dated 1/8/2023 be reinstated and readmitted for equity and justice.
 - h. The appeal raises triable issues that need to be heard and determined by this honourable court.
 - i. That this application has been made without undue and/or unreasonable delay.
 3. The respondent opposed the applications and stated:
 - a. The application lacks merit.
 - b. That it is aimed at delaying the respondent's realization of the fruits of his judgment.
 4. On February 6th 2024, I delivered the following ruling:

When the parties appeared before me on the 16th day of November 2023, they agreed to canvass the application dated the 1st day of August 2023 by writing submissions. When the matter came up for mention on 19th December 2023 to confirm compliance, Mr Njuguna, for the applicant, indicated that they had filed their submissions. M/s Obwanda, holding a brief for M/s Amondi, told the court they had not been served.

When we checked the e-filing platform, we confirmed that the applicant had not filed any submissions.

At the time of writing this ruling, nothing had been filed.

The application is, therefore, dismissed for want of prosecution.
 5. This ruling has given rise to the present application.
 6. It would appear from the applicants' point of view that Article 159 (2) (d) of the *Constitution* is to be waved as a magical wand whenever a party finds himself with no reason to advance his course. The Article states:

In exercising judicial authority, the courts and tribunals shall be guided by the following principles—



(d) justice shall be administered without undue regard to procedural technicalities; and

7. The instant application contains blatant untruths and misinformation, as well as inaction on the part of the applicants. These cannot be said to be technicalities.
8. No reasons were advanced why, after parties agreed to canvass the application through written submissions, the applicants did not deem it fit to file theirs. Before me, there is nothing for consideration to grant the prayers sought.
9. the application lacks merit, and I dismiss it with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 7TH DAY OF MAY 2024

KIARIE WAWERU KIARIE

JUDGE

