



**Odhiambo v Kongo & 2 others (Miscellaneous Civil Application  
E051 of 2024) [2024] KEHC 12649 (KLR) (22 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12649 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
MISCELLANEOUS CIVIL APPLICATION E051 OF 2024**

**KW KIARIE, J  
OCTOBER 22, 2024**

**BETWEEN**

**JOSEPH ODHIAMBO ..... APPLICANT**

**AND**

**VICTOR OCHIENG KONGO ..... 1<sup>ST</sup> RESPONDENT**

**STEPHEN OTIENO KONGO ..... 2<sup>ND</sup> RESPONDENT**

**LOISE MURUGI NJOROGE ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Joseph Odhiambo, the applicant, moved the court through a Notice of Motion dated the 31<sup>st</sup> day of May 2024. The application is brought under sections 1A, 1B, 3A & 79G of the *Civil Procedure Act*, Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules. He is seeking the following orders:
  - a. That this application be certified urgent and the same be heard ex-parte on the first instance.
  - b. That pending the hearing and determination of this application, this honourable court be pleased to order a stay of execution against the applicant regarding the judgment and the decree of the trial court and all the consequential orders.
  - c. Leave be granted to the applicant/appellant to appeal out of time and the draft memorandum of appeal herewith be deemed duly filed.
  - d. The costs of the application be in the cause.
  - e. Any other relief the honourable court deems fit and appropriate to grant.
2. The application is premised on the following grounds:



- a. The first and second respondents seek to have the applicant committed to civil jail. The notice to show cause application is scheduled for a hearing before the trial court on June 5, 2024.
  - b. In May 2024 or thereabouts, the applicant was served with a notice to show cause application explaining why he should not be committed to civil jail.
  - c. The application prompted the applicant's advocate to peruse the file and, upon perusal, learnt that a ruling was delivered on 9<sup>th</sup> October 2023.
  - d. The date for the ruling was not served upon the applicant or his advocate.
  - e. The applicant and his advocate were equally not served with the ruling after it was delivered.
  - f. The applicant/appellant intends to appeal out of time against the ruling delivered on 9<sup>th</sup> October 2023 by the learned magistrate, honourable C.O. Omwansa.
  - g. The delay in filing the appeal within the time limit was not deliberate, as the ruling was delivered in the absence of the applicant and his advocate.
  - h. The appellant/applicant intends to appeal the ruling, but he is time-barred.
  - i. The delay in filing the appeal within time was occasioned by an oversight from the applicant's advocate.
  - j. The respondent is at the verge of executing the decree emanating from the said ruling, and the application is scheduled for hearing on 5<sup>th</sup> June 2024.
  - k. The delay is not inordinate.
  - l. Prejudice shall be occasioned against the respondent should the application be allowed as prayed.
  - m. The intended appeal raises serious, triable, and weighty issues and has a high chance of success.
3. The respondent opposed the application on the following grounds:
- a. That the applicant has partially satisfied the decretal sum.
  - b. That applicant now seeks leave to appeal out of time against the self-explanatory ruling on said application, which ruling was delivered on schedule on 9<sup>th</sup> October 2023 and duly posted on the CTS system, making it available online for diligent parties and their representatives.
  - c. On that account alone, this application is premature and an abuse of due process to the extent that it seeks a stay of execution and a stay of the decree in the trial court, which I urge this court not to grant.
  - d. That the application does not meet the required threshold for favourable discretion, and in any event, the conditions for a stay pending appeal have not been answered, preferably by deposit of full outstanding decretal sum plus costs in court within timelines set by the court; and in default, execution.
4. The applicant cannot purport to address the application pending in the trial court by an application in this court. In the trial court, he has to convince the presiding officer why he should not be committed to civil jail.



5. The applicant seeks to be granted a stay of execution in the decree in Oyugis Senior Principal Magistrate Court number 99 of 2019. It is trite law that an appeal does not operate as a stay of execution. Order 42 Rule 6 of the Civil Procedure Rules states as follows:

No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from 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 to it 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.

6. The purpose of issuing an order for a stay of execution was explained in the case of RWW vs EKW [2019] eKLR, as follows:

The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

7. In order for the court to make orders for a stay of execution, the applicant must demonstrate why he took too long to file the application for leave to appeal. The trial court rendered the impugned ruling on the 9<sup>th</sup> day of October 2023. He applied six months after the period allowed to lodge the appeal. He never gave any reasons for the delay. This was an inordinate delay.
8. The respondent has contended that the decree is partially settled. This has not been refuted.
9. From the foregoing, the applicant is dismissed for want of merits.
10. The applicant made another application dated the 1<sup>st</sup> day of August 2024. The application, by way of Notice of Motion, is brought under sections 1A, 1B, 3A & 79G of the *Civil Procedure Act*, Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules, Section 10 of the High Court (Organization & Administration) Act, Rules 15, 16, & 17 of the High Court (Organization & Administration) (General) Rules. He is seeking a stay of execution of the decree in Oyugis Senior Principal Magistrate Court number 99 of 2019 pending the hearing of the application dated the 31<sup>st</sup> day of May 2024.
11. The application dated the 31<sup>st</sup> day of May 2024 having been dismissed; this application has, therefore, been overtaken by events. The same is dismissed with costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 22<sup>ND</sup> DAY OF OCTOBER 2024**

**KIARIE WAWERU KIARIE**

**JUDGE**

