



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**CIVIL APPEAL NO. EO24 OF 2021**

**ERICK MUNENE MURIUKI.....APPELLANT/APPLICANT**

**VERSUS**

**JOSHUA OUKO PIEMO.....RESPONDENT**

**RULING**

1. The appellant/applicant moved the court by way of Notice of Motion dated 22<sup>nd</sup> March, 2021. It was brought under Order 41 Rule 4, Order 51 Rule 1 of the Civil Procedure Rules & section 3A of the Civil Procedure Act. He is seeking the following orders:

2. The application was premised on the following grounds:

- a. That this application be certified as urgent and be heard exparte in the first instance owing to the urgency involved.
- b. That the honourable court be pleased to grant stay of execution of the decree and all consequential orders of the Magistrate's Court given on 5<sup>th</sup> November, 2020 pending hearing and determination of this application.
- c. That the sale of the plaintiff's/applicant's goods be temporarily stay of execution proceedings [*sic*] pending the final determination of the instant appeal.
- d. That this honorable court be pleased to make any other suitable orders.
- e. The costs of and incidental thereto be provided.
- f. Any other orders that meets the ends of justice.

3. The application was premised on the following grounds:

- a. That warrants of arrest intending to commit the applicant to prison are out.
- b. That the applicant has an arguable appeal with overwhelming chance of success.
- c. That it was never served with summons to enter appearance and plead, hence was condemned unheard.
- d. That there has been no delay in bringing this application.
- e. That service seems to have been effected to the insurer who has now failed to satisfy the Judgment and/or decree of the lower court.
- f. That the applicant is willing to abide by any conditions and terms as the court may deem fit to impose.
- g. That applicant stand to suffer irreparable loss in the event he is arrested and committed to civil jail and his appeal succeeds ultimately.

4. The respondent opposed the application on the following grounds:

a. That the appeal does not raise triable issues.

b. That the applicant was not vigilant to protect his rights in the lower court.

5. The grounds of opposition can only be adequately addressed at the hearing of the appeal and not at this stage.

6. It is trite law that an appeal does not operate as a stay for execution. Order 42 Rule 6 of the Civil Procedure Rules states as follows:

**(1) 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.**

7. The court has a duty to balance between the interests of both parties so that ends of justice can be realized. In the case of **RWW vs. EKW [2019] eKLR**, the court while addressing its mind to the purpose of a stay of execution order pending appeal, stated:

**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.**

8. From the foregoing, I make the following order:

The applicant to deposit half the decretal amount together with the agreed cost in an interest earning Bank account in the names of both Counsel on record for the parties within 30 days. Failure to comply, then the respondent will be at liberty to commence execution.

**DELIVERED AND SIGNED AT HOMA BAY THIS 12<sup>TH</sup> DAY OF OCTOBER, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE.**