



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO. 102 OF 2019

CHARLES ODONGO NG'ON.....APPELLANT/APPLICANT

VERSUS

PAUL ODHIAMBO ADIEMA [Suing as the legal representative of the estate

of PHABIAN OCHIENG ODHIAMBO- deceased].....RESPONDENT

RULING

1. The appellant/applicant moved the court by way of chamber summons dated 1st September, 2020. It was brought under sections 1A, 3A & 95 of the Civil Procedure Act, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and Article 159 of the Constitution of Kenya. The applicant is seeking the following orders:

- a. This application be certified urgent, service thereof be dispensed with and the same heard forthwith and ex-parte in the first instance and be fixed for inter-partes hearing thereafter.[Spent]
- b. Pending the inter-partes hearing and determination of this application or further orders of the court, this honourable court be pleased to issue an order of stay of execution of the Decree and all consequential orders issued bide Oyugis PMCC No.123 of 2018. [spent]
- c. The honourable court be pleased to set aside the exparte orders issued on 13/10/20120 dismissing the applicant's application for non-attendance.
- d. Upon prayer three above being granted, the honourable court be pleased to reinstate the applicants' application dated 31st august 2020 for hearing on merit.
- e. The costs of this application be in the cause.

2. The application was premised on the following grounds:

- a. Vide a notice of motion application dated 1st September, 2020 the defendant/applicant herein sought for orders for release of motor vehicle on running attachment, stay of execution in PMCC no. 123 of 2018 and all other consequential orders thereto and for extension of time within which to pay and comply with orders of the court.
- b. This honourable court issued interim orders pending the hearing and determination of the said application which was then slated for inter-partes hearing on 13th October, 2020.
- c. On the said date, counsel for the defendant arrived in court after the matter had been called out as the public service vehicle she was traveling in developed mechanical problems.
- d. Nonattendance by counsel when the matter was called out was inadvertent and not deliberate on the part of the counsel.
- e. Despite efforts to get a counsel to hold brief and place aside the file, the efforts were not successful.
- f. That the mistake of an advocate should not be visited on an innocent litigant.

g. That the Honourable court is vested with powers and discretion to grant the orders sought.

h. This application has been made without undue delay and in the interests of justice.

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

a. That the application is misconceived, mischievous and wanting in merit.

b. That the failure by the applicant or his agent to attend court on 13th October, 2020 for the hearing of their own application dated 31st August, 2020 was a clear failure on their part to exercise due diligence and the fault of neither the court nor the respondents counsel.

c. That the applicant's right to be heard stood duly accorded and spent once the applicant and/or his counsel failed to attend court and prosecute own application which the court considered and dismissed within the law.

d. That there is no basis whatsoever for favorable exercise of discretion in the applicant's favour.

e. That the application is incompetent, frivolous and vexatious.

4. 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.

5. 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.

6. In the instant case the applicant is incoherent. Whereas he was seeking to have the exparte orders issued on 13/10/20120 dismissing the applicant's application for non-attendance set aside, his supporting affidavit appears to compromise this position. He blames the delay in settling the claim to Covid-19 and then goes on to state:

viii. That however, the applicant's insurer is willing to have the claim liquidated in full granted a period of 30 days.

7. I therefore do not need to belabor. I make an order that the applicant to deposit the decretal amount 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 8TH DAY OF DECEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE