



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

HIGH COURT CIVIL APPEAL NO 20 OF 2016

PAUL ADIKA ODHIAMBO.....1ST APPELLANT

EVERLINE ADHIAMBO ADIKA.....2ND APPELLANT

VERSUS

SCHOLSTICA ADHIAMBO OGOLA.....1ST RESPONDENT

ADELINE ATIENO.....2ND RESPONDENT

RULING

1. This matter is a series of other related files being HCCA Nos. **21 of 2016, 22 of 2016, 23 of 2016, 24 of 2016** all relating to the same parties and arising from the same cause of action so the orders in this file will apply to all the aforementioned files *mutatis mutandis*.
2. By a notice of motion dated 28th October 2016, the court is urged to grant orders of stay of execution of the judgment and decree pending the hearing of the appeal filed herein.
3. The grounds for seeking the orders is that the applicants are aggrieved by the decision where *ex parte* judgment has been entered in favour of the respondents on 14/09/2016 against the appellants in the sum of Ksh 3,514,294/-. The applicant's unsuccessfully applied to have the judgment set aside so they have appealed against the order
4. They lament that they have been condemned unheard in violation to their constitutional right to a hearing and feel particularly aggrieved because the respondents are strangers to them and the applicants are apprehensive that if the decretal sum is paid out to the respondents the same may not be recovered in the event that the appeal succeeds as their financial status is unknown.
5. The applicants have expressed a willingness to settle the decree once the appeal is determined in the event that they do not succeed. They urge the court not to place depositing of security as a condition to grant of stay orders maintaining that they have been condemned unheard.
6. In opposing the application the respondents depose that the trial court duly heard the evidence presented before it and considered the written submissions by their counsel before entering a favourable judgment. After the appellant failed to settle the decree within the prescribed period, the respondent instructed auctioneers to execute and they obtained warrants of execution. The applicants sought stay orders but the lower court declined to grant the same on 13/07/2016. Thereafter the applicants obtained a conditional stay order requiring them to deposit the decretal sum in a joint interest earning account in the names of both counsel within 45 days pending the hearing and determination hearing of the appeal yet

even this condition was not met.

7. This appeal was canvassed by way of written submissions and the appellant's counsel argues that Order 42 Rule 6 (1) is not applicable in this instance because the applicant not challenging the judgment for which the appeal is being pursued but the order dismissing the application to set aside the judgment. I fail to comprehend this argument as it is the applicant who infact cited those provisions in the instant application. A reading of the wording in the application is a prayer for stay of the execution of the judgment NOT setting aside thereof . The High Court's discretion in dealing with an application for stay of execution of any orders-whether obtained *ex parte* or *inter-partes* is governed by the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules 2010 and I concur with the respondent's counsel on this limb that the arguments raised by the applicant's counsel is self defeating.

8. The applicant's counsel also argues that the application has been brought without undue delay as the application was filed in less than 45 days after the contested ruling citing the decision in **MATHU vs GATIMU (2004)eKLR** where favourable orders were granted despite the application being brought after 5 months from the date of the judgment. He further submits that no prejudice will be occasioned as there is an appeal already filed

9. The respondent's counsel submits that there has been unreasonable delay as the application was made 43 days after the contested orders had been issued and the applicant's are simply buying time and running away from fulfilling the borders the trial court made.

10. Order 42 Rule 6 (1) provides as follows:

“No appeal or second appeal shall operate as a stay of a decree or order appealed from except in so far as the court appealed from may order but, the court appeal from may for sufficient cause order stay of execution of such decree, 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 have such orders set aside.”

My own view is that the application was filed in less than two months from the date of the contested orders and that cannot be termed an inordinate delay

11. Counsel also argues that the applicant is likely to suffer substantial loss because the matter was heard *ex parte* and the respondents would not be able to refund the sum in the event that the appeal succeeds-this would then render the appeal nugatory. In response it is submitted that at no point did the respondents ask to be paid the money before the appeal is heard and all they sought was that the sum be held in a joint interest earning account in the names of both counsel where the sum can earn interest. Counsel referred to the decision in **DIPLACK (K) LTD Vs WILLIAM MUTHAMA AND ANOR MISC HCCA No 142 OF 2013** where the court pointed out:

“the essence of an application of stay of execution of decree pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful appellant only gets a paper judgment while at the same time balancing the rights of the parties”

12. I think the criteria applied in considering whether the applicant will suffer substantial loss if the decretal amount is paid out is whether the respondent would be able to refund the money. Were the appeal to succeed-this was the test applied in the case of **BEJAMIN KARUGA AND ANOR VS KENYA SHELL LTD**. However the respondent is not even asking to be paid the sum all they ask is that to secure their interest and so that they too do not get access the money, it be deposited in an interest earning account in the joint names of their counsel. I do not think that is an unreasonable request.

13. What I understand the applicant to be saying is that the sum total to be deposited would run into

millions of shillings as there are 5 related matters with awards ranging between Kshs 1,667,480, Ksh 1,451,803, Ksh 254,072, Ksh 6,239,025 in the other matters. That is a reasonable concern so to balance the interest of both parties. The applicant's in their application had expressed a willingness to deposit security for due performance and the arguments that the court should grant an order of unconditional stay fails to cater for the respondent's interest. I therefore order that the stay of execution be allowed on condition that the applicant deposits a half the amount due in each matter except for **HCCA No 22 of 2016** whose figure is so colossal and for which he shall deposit $\frac{1}{4}$ of the total decretal sum.

14. The sums shall be deposited within 30 days (Thirty days) hereof, in default to which the order will lapse and the respondents shall be at liberty to proceed with the execution

Delivered and dated this 28th day of February 2017 at Homa Bay

H. A. OMONDI

JUDGE