



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO. 67 OF 2015**

**SOUTH NYANZA SUGAR CO. LTD.....APPELLANT**

**VERSUS**

**MARGARET ADOYO OPIYO.....RESPONDENT**

**ROSELINE O. OCHIENG.....APPLICANT**

**RULING**

1. On 14<sup>th</sup> September 2015, the applicant herein, ROSELINE O. OCHIENG filed an application under **Order 42 Rule 1B, Rule 4 and Rule 8 (2) of the Civil Procedure Rules** seeking inter alia, that the appeal herein be struck out, that the order for stay of execution dated 8<sup>th</sup> July 2015 be vacated, that the plaintiffs be allowed to proceed with the execution of the decree and that the sum of Kshs. 1,069,958/= deposited at Kenya Commercial Bank Migori be released to the plaintiff.

2. The application is supported by the applicant's affidavit dated 14<sup>th</sup> September 2015 in which she deposes that judgment was delivered in her favour in Kisii CMCC NO. 801 of 2005 on 6<sup>th</sup> May 2015 after which the appellant herein obtained a conditional stay of execution of the decree on 8<sup>th</sup> August 2015 despite the fact that there was no appeal filed against her since the memorandum of appeal was in respect of another respondent one **Margaret Adoyo Opiyo**. She avers that the order of stay is prejudicial to her in view of the fact that there is no appeal pending against her decree. She contends that since there is no appeal pending against her, the court had no basis for issuing stay of execution orders against her decree.

3. The Respondent/Appellant did not oppose the application despite having been duly served with it even though the respondent's lawyer, Mr. Odero, appeared in court on 15<sup>th</sup> August 2016 and undertook to file a response and written submissions to the application.

4. I have considered the instant application and the written submissions filed by the applicant's counsel on 25<sup>th</sup> April 2016 together with the authorities cited. I note that the appeal filed herein is stated to be against the decree of one Margaret Adoyo Opiyo and not the applicant herein yet the said Margaret Adoyo Opiyo was not the plaintiff in Kisii CMCC 801 of 2005.

5. The order of stay of execution pending appeal on the other hand, was obtained against the applicant herein, Roseline O. Ochieng. Clearly therefore, the stay of execution orders were obtained against the decree of applicant herein yet she is not named as the respondent in the appeal. There appears to be a mix-up in the names of the respondent in the appeal which mix-up the appellant has not bothered to correct or explain and I am therefore in total agreement with the applicant's submissions that the orders of stay of execution are prejudicial to her as there is no appeal pending against her. Consequently, I find that the instant application is merited, it is unopposed and I therefore allow it as prayed with costs to the applicant.

**Dated, signed and delivered in open court this 10<sup>th</sup> day of April, 2017**

**HON. W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Nyachae for the Applicant

N/A for the Respondent

Omwoyo court clerk