



**Odongo v Okeno & another (Environment and Land Appeal
E012 of 2022) [2023] KEELC 16150 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16150 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E012 OF 2022
AY KOROSS, J
MARCH 16, 2023**

BETWEEN

**JAKINDA OJUOK ODONGO ALSO KNOWN AS JACK JAKINDA
OJUOK APPELLANT**

AND

**ALFONZO OMOLLO OKENO ALSO KNOWN AS DICKSON ODONGO
OKENO 1ST RESPONDENT**

THE DISTRICT LAND REGISTRAR, BONDO 2ND RESPONDENT

RULING

Introduction

1. The notice of motion filed under certificate of urgency dated December 9, 2022 was expressed to have been moved pursuant to the provisions of Articles 40, 48, 64 and 159 of the [Constitution of Kenya](#), Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and order 40 rules 1, 2 and 3, order 42 rule 6(1) & (2) and order 51 rule 3 all of the *Civil Procedure Rules*. The 1st respondent sought the following reliefs from this court:
 - a. Spent;
 - b. Spent;
 - c. A temporary injunction do issue restraining the appellant either by himself, his servants, agents, proxies or any one of them from evicting the 1st respondent, taking possession of, alienating, selling, disposing of, transferring or in any way interfering with the 1st respondent's access into, peaceful possession, user and enjoyment of the disputed portion of land parcel No North Sakwa/Nyawita/796 pending hearing and determination of the appeal from the decree and judgment of this court;



- d. There be a stay execution of the decree and judgment dated 8/12/2022 pending the hearing and final determination of the appeal; and
 - e. Costs of the motion do abide the outcome of the appeal.
2. The motion is based on the grounds set out on its face and two affidavits which were respectively deposed by the 1st respondent on 9/12/2022 and December 13, 2022. The 1st respondent deposed *inter alia*, he was aggrieved by the decision of this court and had lodged a notice and memorandum of appeal; the appeal had high chances of success; appellant had interfered with his occupancy and the appellant intended to evict him and, he would be prejudiced.
 3. The appellant filed grounds of opposition and a replying affidavit both dated 16/01/2023. In brief, he asserted *inter alia*, the motion failed to meet the threshold of Order 40 Rules 1, 2 and 4 of the *Civil Procedure Rules*; the intended appeal was not arguable; security had not been furnished; the motion was frivolous and vexatious; he had not interfered with the 1st respondent's occupancy; the appeal did not have chances of success and the motion be dismissed with costs.
 4. The 2nd respondent did not participate in these proceedings.

Parties' written submissions

5. Despite directions issued by this court on December 14, 2022, the 1st respondent did not file written submissions.
6. Mr. Manwari, counsel for the appellant, filed his written submissions dated January 16, 2023. Counsel submitted this court had discretion to grant orders of injunction pending appeal. However, the exercise of such discretion had to be exercised judiciously and to buttress his case on the guiding principles on issuance of injunctions pending appeal, counsel relied on the decision of *Patricia Njeri & 3 Others v National Museum of Kenya* [2004] eKLR where Visram, J cited with approval the Court of Appeal decision of *Venture Capital & Credit Limited v Consolidated Bank of Kenya Ltd* Civil Application No Nairobi 349 of 2003 (174 of 2003 UR) and proceeded to express himself as follows on the guiding principles:-
 - (a) The discretion will be exercised against an Applicant whose appeal is frivolous (See *Madhupaper International Limited vs Kerr* (1985) KLR 840 (cited in *Venture Capital*). The Applicant must state that a reasonable argument can be put forward in support of his appeal (*J. K. Industries vs KCB* (1982 – 88) KLR 1088 (also cited in *Venture Capital*)
 - (b) The discretion should be refused where it would inflict greater hardship than it would avoid (See *Madhupaper supra*).
 - (c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See *Butt vs Rent Restriction Tribunal* (1982) KLR 417 (cited also in *Venture Capital*).
 - (d) The Court should also be guided by the principles in *Giella vs Cassman Brown & Company Ltd* (1973) EA 358 as set out in the case of *Shitukha Mwamodo & Others* (1986) KLR 445 (also cited in *Venture Capital*).

Counsel argued the 1st respondent had not met the threshold outlined by these legal principles.

7. Counsel submitted the guiding principles for stay pending appeal were provided for by Order 42 Rule 6 of the *Civil Procedure Rules*. Rule 2 thereof states as follows:
 - (2) No order for stay of execution shall be made under subrule (1) unless—



- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.’
8. Counsel also placed reliance on the Court of Appeal decision of *Omar Mwakweli & 3 others v Vipingo Development Limited & 2 others* (Civil Application E060 of 2021) [2022] KECA 1378 (KLR) (16 December 2022) (Ruling) where the court in paragraph 18 of its ruling stated: -
- ‘The principles that guide consideration of an application of this nature are old hat. For an applicant to succeed he must, firstly demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that the same is not frivolous. The applicant must in addition show that the appeal would be rendered nugatory absent stay.’
9. In applying these principles to the averments made in the motion, counsel contended the 1st respondent had not demonstrated the appeal was arguable and the mere filing of an appeal did not presuppose the 1st respondent could automatically be granted orders for stay of execution. He had failed to demonstrate he would suffer substantial loss and had failed to offer security.

Analysis and determination

10. Having carefully considered parties’ pleadings, appellant’s written submissions together with judicial precedents cited and provisions of law, this court is of the considered view that the issues falling for determination are:
- a. Whether in the absence of a positive order, this court can grant an order for stay of execution.
 - b. Whether this court has jurisdiction to grant an order of injunction pending appeal against its own decision.
 - c. Who should bear costs.

a. Whether in the absence of a positive order, this court should grant an order for stay of execution pending appeal

11. The provisions of law and precedents cited by the appellant’s counsel capture the principles for stay of execution. These provisions of law were similarly cited in the motion that is the subject of this ruling.
12. This court pronounced itself on 8/12/2022. Its exercise of jurisdiction for stay pending appeal is encapsulated in Order 42 Rule 6(2) of the *Civil Procedure Rules*. Its discretion is fettered by three conditions namely; establishment of sufficient cause, satisfaction of substantial loss and provision of security. However, the Court of Appeal to which the 1st respondent has preferred an appeal against the decision of this court has unfettered discretion to grant stay pending an appeal. The Court of Appeal additionally considers such factors as the appeal being rendered nugatory or it raises arguable grounds. See *Vishram Ravji Halal v Thornton & Turpin* Civil application No Nai. 15 of 1990 [1990] KLR 365 and *Omar Mwakweli & 3 others v Vipingo Development Limited & 2 others* (supra).
13. In its judgement, this court allowed the appeal from the decision of the lower court, set aside the entire judgment and dismissed the 1st respondent’s suit before the lower court. A clear reading of this decision does not demonstrate this court issued any positive order that is capable of execution. If at all there is an order capable of execution, it would only be on costs. The significance of the judgement of this court is that parties were to remain in the same position they were in prior to the suit being filed in



the lower court. This prayer is non-suited. I am persuaded by the decision of *Sekento v Muntet & 11 others* (Environment & Land Case 83 of 2017) [2022] KEELC 3327 (KLR) (16 June 2022) (Ruling) where Mbogo C.G. J stated thus:

‘However, as it stands, the judgment only dismissed the plaintiff’s suit and thus a stay of the same would also be inconsequential as the judgment only took back the parties to the position they were in before the suit was filed.’

b. Whether this court should grant an order of injunction pending appeal

14. The 1st respondent has purportedly moved the motion by among others the provisions of Order 40 Rules 1, 2 and 3 of the *Civil Procedure Rules* which deal with temporary injunctions pending the hearing and disposal of the suit or until further orders of court.

15. A glance at these provisions of law demonstrates they are not applicable to the circumstances obtaining in this case. Whether it was an oversight, typographical error or otherwise, the appropriate provision of law is Order 42 Rules 6(6) of the *Civil Procedure Rules*. Although this provision of law insinuates it applies to the High Court, it similarly applies to the Environment and Land Court which pursuant to Article 162 (2) of the *Constitution of Kenya*, is a court of equal status to the High Court. This provision reads: -

‘Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.’ Emphasis added.

16. Whereas no positive order was granted by this court that would justify the grant of an order for stay, this did not bar the 1st respondent from seeking an order of injunction pending appeal. In light of this Order 42 Rules 6(6), does this court have jurisdiction to issue injunctive orders against its own decision? My answer is in the negative.

17. My understanding of Order 42 Rules 6(6) is that this court can only grant an injunction from an appeal emanating from the subordinate court when it is exercising its appellate jurisdiction. In other words, it is debarred from issuing an injunction pending appeal from a decision emanating from its own court.

18. In my honest opinion, such a provision was for good order because it would be irrational for a court which pronounced itself on the merits or otherwise of an appeal or a suit before it to once again ascertain whether the outcome of its decision should be subjected to the principles of injunction pending appeal such as reasonable argument with probability of success, balance of convenience or irreparable harm. See *Patricia Njeri & 3 Others v National Museum of Kenya* (supra). In seeking such an order, the 1st respondent should have moved the Court of Appeal which has jurisdiction within the provisions of Rule 5(2)(b) of the *Court of Appeal Rules* which reads: -

‘in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.’

19. This position of law has been upheld in a line of court decisions including *Sekento v Muntet & 11 others* (supra), *Chembe Katana Changi v Ministry for Lands & Settlement & 4 Others* (2014) eKLR



and *Bartholomew Mwanyungu & 3 others v Florence Dean Karimi* [2019] eKLR. In the latter decision, the court held thus: -

‘It should be noted from the above provision of the law, and in particular Order 42 Rule 6(6) that this Court has the power to grant injunction only when exercising its appellate jurisdiction. In the instant case, the Court has already rendered its decision and the applicant has stated that she intends to appeal to the Court of Appeal against the decision of this Court given on 18th April 2018. On that basis alone, I find that the court does not have the jurisdiction to entertain the present application and grant the order of injunction sought by the applicant. This Court is no longer exercising its appellate jurisdiction.’

20. For the reasons stated above, it is my ultimate finding the motion was not merited. I hereby dismiss it with costs to the appellant.

DELIVERED AND DATED AT SIAYA THIS 16TH DAY OF MARCH 2023.

HON. A. Y. KOROSS

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Mogi for Mr. Manwari for the appellant

N/A for the respondent

