



REPUBLIC OF KENYA



KENYA LAW
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**Akhenda v Pamba & another (Environment & Land Case
84 of 2013) [2023] KEELC 17921 (KLR) (18 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17921 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 84 OF 2013**

BN OLAO, J

APRIL 18, 2023

BETWEEN

CHRISTOPHER SIGANA AKHENDA PLAINTIFF

AND

MICHAEL BARASA PAMBA 1ST DEFENDANT

NICHOLAS OPIYO 2ND DEFENDANT

RULING

1. Christopher Sigana Akhenda (the respondent for purposes of this application and later substituted with Florence Kimuli Akhenda) filed an Originating Summons against Michael Barasa Pamba and Nicholas Opiyo (the 2nd applicant for purposes of this application) seeking the main remedy that he had acquired by way of adverse possession the parcel of land known as Samia/Luchululo/Bukhulungu/1868 (hereinafter the suit land).
2. After hearing the parties, Omollo J delivered a judgment on January 26, 2023 in favour of the Respondent and ordered the applicants to execute all the necessary documents to enable the Land Registrar Busia to register the suit land in the name of the Respondent. She also enjoined the applicants, their agents, servants and their workers from interfering with the suit land.
3. The 2nd applicant was aggrieved by that judgment and promptly lodged a Notice of Appeal at this court's registry on January 30, 2023.
4. The 2nd applicant has now approached this court vide his Notice of Motion dated February 13, 2023 in which he seek the following orders:
 1. Spent
 2. Spent



3. An order of stay of execution of the judgment/decreed of the Honourable Justice A. Omollo delivered at Nairobi on January 26, 2023 be and is hereby granted pending the hearing and determination of the appeal pending before the Court of Appeal.
4. Costs of this application be provided for.
5. The application which is predicated under the provisions of Order 42 Rule 6 of the Civil Procedure Rules is based on the grounds set out therein and supported by the affidavit of Nicholas Opiyo the 2nd applicant herein.
6. The gist of the application is that the 2nd applicant is the current registered proprietor of the suit land which the court decreed by its judgment to be registered in the name of the respondent. That the respondent has extracted a decree and is likely to lodge the same at the Land's office at any time yet the 2nd applicant has already filed a Notice of Appeal and applied for proceedings, judgment and decree for purposes of preparing the record of appeal. The 2nd applicant avers further that he will suffer substantial loss if the suit land is alienated and transferred to third parties. That he undertakes not to sub-divide the suit land nor alienate it until the appeal is heard and determined. Further, that the 2nd applicant is willing to abide with any conditions which this honourable court may deem just and reasonable for purposes of stay of execution of the judgment herein.
7. Annexed to the application are the Notice of Appeal dated January 27, 2023 and lodged on January 30, 2023 as well as a letter by counsel for the 2nd applicant.
8. When the application was placed before me on February 15, 2023, I directed that it be canvassed by way of written submissions to be filed on or before March 9, 2023. However, when the matter was mentioned on that day to confirm compliance, only Mr Otanga Counsel for the 2nd applicant had filed his submissions which were supported by MR Okeyo Counsel for the 1st applicant. Mr Ashioya Counsel for the respondent had not filed any response or submissions on behalf of the Respondent and a request to extend the period was declined by the court as no good reasons were advanced for the failure to comply with the timelines set by the court.
9. The application is essentially that of the 2nd applicant although Michael Barasa Pamba also filed a Notice of Appeal dated January 31, 2023 and lodged on February 2, 2023 but nothing else.
10. I have considered the application, the annexures thereto and the submissions by counsel. As the Respondent did not file any response or other pleading in opposition to the same, it is unopposed. Nonetheless, I must interrogate it to confirm that it meets the threshold set out in Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules which provide that:

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- (1) "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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."
- (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.”
Emphasis added.

It is clear from the above that the 2nd applicant was required to satisfy the following conditions to justify the grant of the orders sought:

1. Show sufficient cause.
 2. Demonstrate that he will suffer substantial loss if the order sought is not granted.
 3. Approach this court without unreasonable delay.
 4. Offer security.
11. The jurisdiction of this court in determining such applications was circumscribed by the Court of Appeal as follows in the case of *Visbram Ravji Halai & another v Thornton & Turpin (1963) LTD* 1990 KLR 365:

“Thus the Superior Court’s discretion to order a stay of execution of it’s order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

12. The 2nd applicant filed a Notice of Appeal on January 30, 2023. That is sufficient cause. He also moved to this Court on February 13, 2023 just about 20 days following the delivery of the judgment sought to be appealed. I do not consider such a delay to be unreasonable. In paragraph 10 of his supporting affidavit, the 2nd applicant has deposed thus:

10: “That I am willing to abide with any conditions that this honourable court may deem just and reasonable for purposes of ordering stay of execution pending appeal.”

I consider that averment to be a sufficient offer of security. As was stated in *Wycliffe Sikuku Walusaka v Philip Kaita Wekesa* 2020 eKLR:

“The offer for security must of course come from the Applicant himself as a sign of good faith to demonstrate that the application for stay of execution pending appeal is being pursued in the interest of justice and not merely as a decoy to obstruct and delay the Respondent’s right to enjoy the fruits of his judgment.”

I also note that in paragraph 9 of the same affidavit, the 2nd applicant goes further to undertake not to sub-divide the suit land or alienate it until the appeal is heard and determined. That is clearly the conduct of a party motivated by good faith.

13. On the issue of substantial loss, and which is the “cornerstone” of such an application, (see Platt Ag. J.A in *Kenya Shell LTD v Benjamin Kibiru* 1986 KLR 410), the 2nd applicant has deposed in paragraph 8 of the same affidavit as follows:



8: “That I will suffer substantial loss if the land is alienated from me and transferred in the name of third parties.”

In the absence of a rebuttal to that averment, this court must believe the 2nd applicant when he states that the suit land could be alienated to third parties before the appeal is heard and finally determined. No doubt that will be substantial loss as it will put the said land beyond his reach yet a major consideration in any application such as this is to ensure that the subject matter of the dispute is no dissipated thus rendering any appeal nugatory. And since the respondent did not file any response, the court is entitled to conclude that he will not be prejudiced by any orders of stay of execution pending appeal. It must also be remembered that the remedy of stay of execution pending appeal is a discretionary one. This court must therefore balance the interests of both parties and in the circumstances of this case, I am persuaded that the 2nd applicant is deserving of the orders sought in his Notice of Motion dated February 13, 2023.

14. The application is accordingly allowed in the following terms:

1. A stay of execution is issued in respect of the judgment delivered on January 26, 2023 pending the hearing and determination of the intended appeal at the Court of Appeal.
2. As a condition for the order of stay, the 2nd applicant shall within 15 days of this ruling deposit with the Deputy Registrar of this Court the Original title deed for the land parcel No. Samia/Luchululo-Bukhulungu/1868 and shall not sub-divide or alienate it until the appeal is heard and determined or until further orders of this court.
3. In default of (2) above, the order of stay shall lapse and the respondent shall be at liberty to execute the judgment.
4. No orders as to costs.

RULING DATED, SIGNED AND DELIVERED AT BUSIA ELC ON THIS 18TH DAY OF APRIL 2023 BY WAY OF ELECTRONIC MAIL AS WAS ADVISED TO THE PARTIES ON 9TH MARCH 2023.

This ruling was scheduled for delivery on 12th April 2023 but the Court did not sit on that day having travelled to Nairobi for a symposium. The delay is regretted.

BOAZ N. OLAO

JUDGE

