



**Wesonga v Odera (Environment and Land Appeal E023 of 2023)
[2023] KEELC 17757 (KLR) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17757 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E023 OF 2023**

DO OHUNGO, J

MAY 30, 2023

BETWEEN

ALEX OMONDI WESONGA APPELLANT

AND

ALFAYO JOHN MAJONI ODERA RESPONDENT

*(Being an appeal from the ruling and order of the Principal
Magistrate's Court at Butali (Hon. R S Kipngeno, Principal Magistrate)
delivered on 2nd May 2023 in Butali MCELC No. E024 of 2021)*

RULING

1. This ruling is in respect of the appellant's Notice of Motion dated May 10, 2023, an application through which the appellant seeks stay of further proceedings in Butali MCELC No E024 of 2021 and stay of execution of the orders made in the said case on May 2, 2023 and November 24, 2022 pending hearing and determination of this appeal. The application is supported by an affidavit sworn by the appellant and is opposed through a replying affidavit sworn by the respondent.
2. Based on the material on record, the background of the dispute is that the respondent, who is the appellant's uncle, filed the suit in the Subordinate Court through plaint dated June 2, 2021, against the appellant. He averred in the plaint that he transferred the parcel of land known as S/Kabras/Shamberere/4307 (the suit property) to the appellant in the year 2020 as a gift for the purpose of safeguarding graves of family members as well as the respondent's late parents' house. He further averred that upon becoming the registered proprietor of the suit property, the appellant started destroying the graves and allowed members of a church to construct a church on the graves. He sought judgment against the appellant for a permanent injunction to restrain him from selling or interfering with the suit property and an order that the suit property be deregistered from the appellant's name so that it reverts to the respondent.



3. Alongside the plaint, the respondent filed an application dated June 2, 2021 seeking an injunction to restrain the appellant “from illegal use and cultivation” of the suit property pending inter parte hearing. The application was placed before Hon Z J Nyakundi SPM who issued the injunction on June 2, 2021 and scheduled the application for inter parte hearing on June 10, 2021. Subsequently, the respondent filed an application dated July 18, 2022, seeking punishment of the appellant by imprisonment for a period not exceeding six months, on claims that he disobeyed the injunction order of June 2, 2021. The application was heard and determined by Hon Z J Nyakundi (SPM) through a ruling delivered on November 24, 2022. The learned magistrate stated in the ruling as follows:

“The application was duly served and on 25/8/2022, Advocate Aligula counsel for the defendant confirmed being in receipt of the application and suggested that the same be canvassed by way of written submissions. Suffice to note that none of the parties filed their submissions and neither did the defendant file a replying affidavit to the application.

Looking at the case at hand the issue for determination is whether the Respondent acted in breach of the court dated 2/6/ 2021 and issued by this court.

The court has looked at the court record and notes that indeed the court did issue an order restraining the respondent, agents, servants, personal representative from illegal use and cultivation of parcel No S/Kabras/Shambere/4307, (attached and marked FMP), it is the plaintiff’s contention that the respondent has disobeyed the order and is tilling the land as exhibited in annexure FMP3.

It was confirmed by counsel for the defendant that the application was served upon them, the order was as served upon the defendant with a penal notice and a return of service filed, the defendant did not file any response to the application, the plaintiff’s application dated 18/7/2021 is therefore unopposed.

Conclusion.

In light of the aforesaid I do hold that the respondent be and is hereby cited for contempt of a valid court order dated 2/6/2021.”

4. Dissatisfied with that outcome, the appellant filed Notice of Motion dated December 15, 2022, seeking stay of execution of the orders of November 24, 2022 as well as review, variation or setting aside of orders of June 2, 2021 and those of November 24, 2022. The application dated December 15, 2022 was heard and determined by Hon R S Kipngeno (PM) through a ruling delivered on May 2, 2023. The learned magistrate found no merit in the application and therefore dismissed it with costs. He stated as follows in the ruling:

“7. The parties had been given time to try resolving the matter through mediation and other ADR channels, but they could not agree. It is a fact that the land was gifted to the Applicant on terms that restricted him on what he can and cannot do in the land despite being registered the absolute proprietor. The Applicant is not among the beneficiaries of the estate of the Odera family. There was no monetary consideration informing the land acquisition from the estate, but of importance was how the Applicant would safeguard the grave yards of the deceased Odera family patriarchs and their children. A simple act of exchanging the suit land with another of equal value would have permanently freed the Applicant from the burden of the conditions placed on his absolute proprietorship, so that he could accommodate the construction of a church in



his land and exercise all the rights of ownership of the land, being the right to use, abuse and dispose of the land as he wished.

8. Having considered all the material placed before the court, I find that even if the Hon Z J Nyakundi had considered the Replying Affidavit and the submissions, he may still have relied on the evidence of the team of village elders who visited the land and ascertained the goings on thereat and filed the Affidavit dated 2/1/23. Apart from what the parties have averred, the village elder's report provides an independent account of the matter and confirms the Respondent's claims that the Applicant had indeed disobeyed the court orders dated 2/6/21. I therefore find that the Application has no merit and the same is dismissed with costs."
5. Aggrieved by the ruling delivered on May 2, 2023, the appellant filed this appeal, contemporaneously with Notice of Motion dated May 10, 2023. When the application came up before me on May 25, 2023 for inter parte hearing, Ms Aligula, counsel for the applicant informed the court that the applicant has since been committed to civil jail on account of contempt of court. The respondent confirmed it and showed the court a committal order for a term of three months.
6. Ms Aligula argued that the appeal will be rendered nugatory if stay is not granted and that no prejudice will be occasioned to the respondent if the orders are granted. She relied on *Global Tours & Travels Limited*; Nairobi HC Winding up Cause No 43 of 2000 as cited in *Watu Credit v Geoffrey Mokaya Aboki & Karen Chepkurui* [2022] eKLR. In response, the respondent relied wholly on his replying affidavit and urged the court to dismiss the application. The replying affidavit is essentially a narration of the steps and orders in matter so far.
7. I have considered the application, the affidavits, and the submissions. In doing so, I bear in mind that the appeal is yet to be determined. Even the application dated June 2, 2021 is yet to be heard inter parte by the Subordinate Court. Equally, the suit before the Subordinate Court is yet to be heard and determined on its merits. I will therefore steer clear of any observation or conclusion that may affect the outcome of all the foregoing. Considering that the record of appeal has so far not been filed, I found it necessary to reproduce large parts of the various rulings purely for purposes of shedding light on how the parties got where they are now.
8. The applicant seeks stay of further proceedings in Butali MCELC No E024 of 2021 and stay of execution of the orders made in the said case on May 2, 2023 and November 24, 2022 pending hearing and determination of this appeal. I will first deal with the aspect of stay of proceedings.
9. Stay of proceedings is a serious matter, since it brings to a halt, even if temporarily, the smooth flow of the process of dispensation of justice. Needless to state, a delay of even a day is a cost and an inconvenience to litigants. Consequently, it is a relief that must be granted sparingly and only in exceptional circumstances. Even more circumspection is required before stay of proceedings pending determination of an appeal is granted since delay in the appeal will only exacerbate the situation in so far as early determination of the matter appealed from is concerned.
10. Consequently, the decision on whether to grant stay of proceedings, though discretionary, must be exercised judiciously and on sound principles. Ringera, J (as he then was) discussed the principles in the case of *Re Global Tours & Travel Ltd* HCWC No 43 of 2000 Ringera, J as follows:

“...As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice



to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...”

11. Applying the above principles to the present situation, an order of stay of proceedings will stall the entire suit before the Subordinate Court yet the dispute in this appeal revolves around an interlocutory order. Such a course of action would not be in the interest of justice. I am thus not persuaded to grant stay of proceedings.
12. The last issue that I need to resolve is whether to grant stay of execution of the orders made by the Subordinate Court on May 2, 2023 and November 24, 2022 pending hearing and determination of this appeal. As we have already seen, the order of November 24, 2022 was to the effect that the appellant was in contempt of court while the order of May 2, 2023 dismissed the appellant’s application dated December 15, 2022, through which he had sought stay of execution of the orders of November 24, 2022 as well as review, variation or setting aside of orders of June 2, 2021 and those of November 24, 2022. Basically, the appellant wanted the court to stay execution of the finding that he was in contempt and to ultimately set aside the ex parte injunction of June 2, 2021.
13. The principles that underpin this court’s exercise of jurisdiction to grant stay of execution pending appeal are outlined at Order 42 rule 6 (1) and (2) of the [*Civil Procedure Rules, 2010*](#) which provide as follows:

“6.

- (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 sub rule (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."

14. Thus, a litigant seeking stay of execution pending appeal must demonstrate that substantial loss will result to him if stay is not granted, and that the application has been made without unreasonable delay. The applicant is further required to give such security as the court may order for the due performance of the decree. See *Kenya Power & Lighting Co Ltd v Kigaita Ngare Unduthu & 36 others* [2020] eKLR and *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR.
15. The applicant has argued that he will suffer substantial loss if stay is not granted. If the appellant had succeeded in his application dated December 15, 2022, he would have obtained stay of execution of the orders of November 24, 2022 and setting aside the ex parte injunction of June 2, 2021. As we now know, the dismissal of the said application has since resulted in the appellant being committed to civil jail. This appeal will ultimately decide whether application dated December 15, 2022 ought to have been allowed. In the meantime, unless stay is granted, the appellant will serve the entire term of the civil jail. Loss of personal liberty is certainly substantial loss. I am thus persuaded that the applicant has demonstrated substantial loss. Regarding the other requirement that an application for stay be made without unreasonable delay, I note that the present application was filed on May 10, 2023, only eight days after the order appealed against was made. There has been no unreasonable delay.
16. In view of the foregoing, I am persuaded that a case has been made for granting stay pending appeal. To fast-track the appeal, I will also give directions on the appeal. Consequently, I make the following orders:
 - a. The orders made by the Subordinate Court on May 2, 2023 and November 24, 2022 are hereby stayed pending hearing and determination of this appeal.
 - b. The appellant to be released from civil jail forthwith, unless otherwise lawfully held.
 - c. The appellant to file and serve record of appeal and written submissions on the appeal within 30 (thirty) days from the date of this ruling.
 - d. The respondent to file and serve written submissions on the appeal within 30 (thirty) days from the date of service of the appellant's submissions.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF MAY 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Nafuye holding brief for Ms Aligula for the appellant/applicant

No appearance for the respondent/respondent

Court Assistant: E. Juma

