



**Ondieki v Ndusi (Environment and Land Appeal E024 of 2021)
[2023] KEELC 17580 (KLR) (29 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17580 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E024 OF 2021
DO OHUNGO, J
MAY 29, 2023**

BETWEEN

HEBISIBA MORAA ONDIEKI APPELLANT

AND

ELPHAS ABASI NDUSI RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Kakamega (Hazel Wandere, Senior Principal Magistrate) delivered on 15th June 2021 in Kakamega MCELC No 209 of 2018 Hebisiba Moraa Ondieki v Elphas Abasi Ndusi)

RULING

1. I delivered judgement in this appeal on October 4, 2022 as follows:

"I find no merit in this appeal and I therefore dismiss it. In view of the close family relationship between the parties, I order that each party shall bear own costs of the appeal."
2. Later, the appellant filed Motion dated October 18, 2022, which is the subject of this ruling. The following orders are sought in the application:
 - a. [Spent]
 - b. That this honourable court be pleased to order that the *status quo* prevailing over land parcel number Isukha/Lubao/1024 be preserved pending hearing and determination of the intended appeal.
 - c. That the honourable court be pleased to prohibit any dealings over land parcel number Isukha/Lubao/1024 pending hearing and determination of the intended appeal.
 - d. [Spent]



- e. Costs be provided for.
3. The application is supported by an affidavit sworn by the appellant who deposed that during the pendency of this appeal the suit property was transferred by the respondent to third parties and that the transferees who are the appellant's co-wife and sons were parties to this suit but later withdrew from it. That the respondent intends to dispose of the land to a purchaser in a bid to frustrate the appellant's efforts to regain her land and that if the orders sought are not granted the appeal shall be rendered nugatory.
 4. The respondent opposed the application through grounds of opposition dated November 2, 2022 wherein he contended that the application is fatally defective as there were no positive orders issued by the judgment delivered on October 4, 2022 that are capable of being stayed; that the applicant lacks *locus standi* to file the application pursuant to Sections 79 and 82 of the [Law of Succession Act](#) and further that this court is now functus officio and lacks the jurisdiction to entertain the application.
 5. The application was canvassed through written submissions. The appellant submitted that this court ought to allow the reliefs sought since the respondent intends to dispose of the parcel of land to a purchaser in a bid to frustrate her efforts to regain the land and that if the application is not allowed, she will suffer loss which will not be adequately compensated by an award of damages since the respondent will proceed to dispose of the land and also that the appeal will be rendered nugatory. She relied *inter alia* on the cases of [David Kimani Njagi & another v George Mwangi Kibiru & another](#) [2018] eKLR and [Nguruman Limited v Jan Bonde Nielsen & 2 others](#) [2014] eKLR.
 6. In response, the respondent submitted that the appellant lacks capacity to file an application on behalf of the estate of the deceased in the absence of her co-administrators and that the applicant has not established a prima facie case with a probability of success since she lacks capacity. The respondent further submitted that there is nothing to be stayed as there was no positive order in the judgment. I have considered the application, the affidavit in support, the grounds of opposition and the submissions.
 7. The record shows that following delivery of the judgment, the applicant filed notice of appeal on October 11, 2022, signalling an intention file a second appeal. The applicant is now seeking maintenance of *status quo* and prohibition any dealings over the suit property pending hearing and determination her appeal. The applicant is essentially seeking injunction pending appeal.
 8. Whereas under Order 42 Rule 6 (6) of the [Civil Procedure Rules 2010](#), this court has jurisdiction while exercising its appellate jurisdiction, to grant a temporary injunction pending appeal on such terms as it thinks just, no law has been cited which gives this court jurisdiction to make such an order pending hearing and determination of a second appeal to the Court of Appeal. I am not persuaded that I have such jurisdiction. This court having determined the appeal through the judgment delivered on October 4, 2022, the appellant should move to the Court of Appeal if she needs further relief.
 9. Consequently, Motion dated October 18, 2022 is dismissed. In line with the order made in the judgment delivered on October 4, 2022, each party shall bear own costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF MAY 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the appellant/applicant



No appearance for the respondent/respondent

Court Assistant: E. Juma

