



**Okach v Owuor (Environment and Land Appeal E006 of 2023)
[2023] KEELC 17663 (KLR) (24 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17663 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E006 OF 2023
GMA ONGONDO, J
MAY 24, 2023**

BETWEEN

HENRY OKACH APPELLANT

AND

ERICK OUMA OWUOR RESPONDENT

RULING

1. This ruling is in regard to an application by way of a notice of motion dated January 25, 2023 and filed on even date under, *inter alia*, Order 42 Rule 6 (1, 3 & 6) of the [Civil Procedure Rules, 2010](#) by the appellant/applicant, Henry Okach through the firm of Geoffrey O.Okoth and Company Advocates seeking the following orders;
 - a. Moot
 - b. This Honourable court be pleased to grant the Applicant herein stay execution of the judgment and decree in Mbita Senior Principal Magistrate ELC No. 21 of 2018 pending the hearing and determination of this appeal.
 - c. Moot
 - d. Such other orders be made as are just and expedient
 - e. Costs of this application be in the Appeal.
2. The application is premised upon grounds (i) to (vii) stated on the face of the same as well as the annexed affidavit of thirteen paragraphs sworn on even date by the applicant and the accompanying documents marked as “DO-1” to “DO-4” which include, a copy of the trial court’s ruling delivered on November 23, 2022 (DO-1) alongside another ruling rendered on January 25, 2023 (DO-3) and a copy of the memorandum of appeal of even date (D0-4) herein. Briefly, the applicant’s lamentation is that he is dissatisfied with the former ruling (DO-1) whereby the court disallowed prayer for stay of execution



- pending outcome of this appeal citing lack of jurisdiction. That the appeal has overwhelming chances of success and that the application has been brought in good faith and expeditiously.
3. By a replying affidavit of eleven paragraphs sworn on February 6, 2023, the respondent through the firm of Aluoch Odera and Nyauke Company Advocates, opposed the application. He deposed in part, that the applicant has kept him in court with several unending applications and appeals as cited on the face of the affidavit. That the applicant has not given any indication as to whether he will deposit the entire decretal money even after the respondent's request (letter E009 therein). The he is not serious with the matter. That the application is not merited and offends the law as even the subordinate court had no power to extend time for filing of appeal.
 4. Further, the respondent opposed the application by grounds of opposition dated February 6, 2023 on February 26, 2023 thus;
 - a. The main Appeal is improperly before the Court and is thus a nullity.
 - b. The application is scandalous, vexations and an abuse of due process of the law.
 - c. The Application lacks merits and is bad in law.
 - d. Prayer (b) of the Application is seeking to ask this Court to review its decision on the matter and already dealt with by the very court.
 - e. The applicant has not proposed to deposit the entire decretal sum as a condition for stay of execution.
 5. On March 1, 2023, this court directed that the application be heard by way of written submissions.
 6. Consequently, learned counsel for the appellant filed submissions dated March 16, 2023 on March 20, 2023. Counsel referred to, inter alia, the application, the replying affidavit and the grounds of opposition, analyzed the triple conditions for stay of execution under Order 42 Rule 6 (2) (*Supra*) in favour of the applicant and implored the court to allow the application as prayed. To fortify the submissions, counsel cited the case of *Nicholas Stephen Okaka and another -vs- Alfred Waga Wesonga* (2022) eKLR alongside *Njuca Consolidated Ltd-vs-Oonge* (2004) eKLR, among other authoritative pronouncements.
 7. The respondent's counsel filed submissions herein on May 1, 2023 opposing the instant application and termed the same bad as it does not mention any proposed deposits to cushion the respondent on costs. That the application is an abuse of the court process as the court noted that there has been an appeal to this court over the same matter. That the appeal was filed out of time and no leave was sought thereof.
 8. I have taken into account the application, the replying affidavit, the grounds of opposition and the parties' respective submissions in entirety. Therefore, the duty of this court is to determine whether the application has satisfied the triple conditions for stay of execution under Order 42 Rule 6 (*supra*) and the appropriate orders to grant to meet the ends of justice herein.
 9. On substantial loss, the same is what has to be prevented by preserving the status quo because such a loss would render the appeal nugatory; see *David Silverstein-vs-Atsango Chesoni* (2002) 1 KLR 867.
 10. The applicant laments that the land in dispute, LR NO. Kasgunga/Kamreri/770 is his only known property. That he is likely to lose it upon execution of the Judgment and decree hence, may render this appeal nugatory.



11. As regards delay, one of the principles of equity as anchored in Article 10 (2) (b) of the *Constitution* of Kenya, 2010 is that delay defeats equity. The application was lodged two months after the impugned ruling without any explanation; see *Nicholas Kiptoo Kipkorir Arap Salat-vs-IEBC and 7 other* (2014) on the length of delay, among other factors.
12. It is trite that delay for even a day will result to dismissal if not explained; see *Raphael Musila Mutiso and 3 Others -vrs- Joseph Ndara Nthuka* (2019) eKLR.
13. Concerning security, there is no mention of the same in the application. It is not a requirement but at the discretion of the court and not made as a matter of course. This condition rests upon genuine grounds, conditions, merit and dispatch; see *Malindi Law Society -vrs- Law Society of Kenya Nairobi branch and 5 Others* (2017) eKLR and *Joseph Kairu Mutahi-vs-British Army Training Unit Kenya* (2018) eKLR.
14. Notably, the Respondent contends that the application had filed several applications and appeals. On January 3, 2023, this court called for the original record of HomaBay Environment and Land Case Appeal No 1 of 2022 and noted that the same parties herein were involved therein. That matter is concluded.
15. Furthermore, from the annexure to the respondent's submissions, there was another related appeal. Also, there is a consent dated May 20, 2021 in Migori ELC Appeal No E022 of 2021 annexed to the said submissions. Clearly, there has been several cases including concluded ones involving the same parties and the same property.
16. In view of the above, this application is devoid of merit.
17. Accordingly, the application is hereby dismissed with costs in the cause.
18. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 24TH DAY OF MAY 2023

G M A ONG'ONDO

JUDGE

PRESENT.

1. Mr S Nyauke learned counsel for the respondent.
2. Court Assistant, Edith and Mutiva.

