



**Nyaloo & 5 others v Ochieng (Environment and Land Appeal
32 of 2021) [2023] KEELC 18378 (KLR) (20 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18378 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 32 OF 2021
GMA ONGONDO, J
JUNE 20, 2023**

BETWEEN

**FELIX NYALOO 1ST APPELLANT
BENARD NYOLOO 2ND APPELLANT
PETER NGOTHO KILONZO 3RD APPELLANT
TERESIA ADHIAMBO NYOLOO 4TH APPELLANT
ALICE ACHIENG RIARO 5TH APPELLANT
GEORGE OMONDI PAUL 6TH APPELLANT**

AND

RAPHAEL SUMBA OCHIENG RESPONDENT

RULING

1. On December 7, 2022, the applicant through R Ochieng and Company Advocates mounted an application by way of a notice of motion dated December 6, 2022 seeking the orders *infra*;
 - a Moot
 - b Moot
 - c Thatthis Honourable court be pleased to grant a stay of execution of the judgment/decree in Homa Bay ELC Appeal No e032 of 2022 pending the hearing and determination of the appeal filed before the Court of Appeal at Kisumu in the same matter.
 - d Moot
 - e Thatthe costs of this application abide by the appeal in this matter.



2. The application is anchored upon grounds a to f set out on its face alongside the applicant's affidavit of twelve paragraphs in support of the application and annexed documents namely the judgment delivered by this court on October 5, 2022 (ORO 1) and memorandum of appeal lodged on November 9, 2022 at the Court of Appeal, Kisumu in Civil Appeal No E 250 of 2022 (ORO 2). The applicant averred that by virtue of the said judgment/decreed, he is likely to be evicted from the disputed land parcel number East Kanyada/Kanyadier/2410. That he was aggrieved at the judgment hence, filed the appeal which has overwhelming chances of success but may be rendered nugatory if the application is not allowed.
3. There was no response to the application.
4. On December 7, 2022, the court directed that the application be heard by way of written submissions.
5. The applicants counsel filed submissions dated March 22, 2023 on even date. Counsel made reference to the orders sought in the application and delineated an issue for determination namely whether the applicants ought to be granted the stay of execution order sought in the application. In discussing the issue in favour of the applicants, counsel relied upon Order 42 Rule 6 (2) of the *Civil Procedure Rules, 2010*, the case of *Housing Finance Company of Kenya Ltd v Sharok Kber Mohamed Ali Hirji and another* [2015] eKLR and the case of *RWW v EKW* [2019] eKLR, among other authoritative pronouncements.
6. It is crystal clear that the respondent failed to file submissions in respect of the application.
7. I have thoroughly considered the entire application and the applicant's submissions. Therefore, is the application meritorious?
8. The conditions under Order 42 Rule 6 (2) (*supra*) are borne in mind in this application. The conditions are cumulative in nature as held in the case of *Trust Bank Ltd v Ajay Shah and 3 others* [2012] eKLR.
9. The applicants are aggrieved at this court's judgment (ORO 1) herein. They had the right to file an appeal against the decision.
10. Indeed, there is already a Civil Appeal duly lodged at the Court of Appeal in respect of the instant matter (ORO 2). Moreover, even a notice of appeal is deemed to be an appeal under Order 42 Rule 6 (4) of the Civil Procedure Rules (*supra*).
11. In Judicial Commission of Inquiry into the *Goldenberg Affair and 3 others v Kilach* [2003] KLR at 249 at 265/266, it was noted thus;

“.....It would not be right for the two matters to be heard the High Court and the Commission.....”

On costs, we order that the same shall abide the outcome of the intended appeal.....”
12. In the case of *Kakuta Maimai Hamisi-vs-Peris Pesi Tobiko and 2 others* (2013) eKLR, it was held that;

“.....we cannot venture into any consideration of this ill-fated appeal on its merits for to do so would be to embark on a meaningless misadventure the net result of which would be a nullity and a barren nothing for want of jurisdiction....”
13. In the instant application, it would not be right to grant the stay of execution as the applicants have lodged an appeal from this court's judgment at the Court of Appeal. In the circumstances, this court is devoid of jurisdiction over the application and this matter in entirety at this stage.



14. A fortiori, this application is hereby struck out.
15. Costs of the application to abide the outcome of the appeal at the Court of Appeal.
16. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 20TH DAY OF JUNE 2023

G M A ONG'ONDO

JUDGE

PRESENT

1 Odhiambo instructed by Ochieng learned counsel for the applicants.

2 Luanga, court assistant

