



**Oginga v Orera (Suing as the Legal Representative of the Estate of Selina Aoko Mbeche - Deceased)  
(Environment and Land Appeal 24 of 2021) [2023] KEELC 18377 (KLR) (20 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18377 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL 24 OF 2021  
GMA ONGONDO, J  
JUNE 20, 2023**

**BETWEEN**

**LUCY AKEYO OGINGA ..... APPLICANT**

**AND**

**CALEB OCHIENG ORERA ..... RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SELINA  
AOKO MBECHE - DECEASED**

**RULING**

1. On March 14, 2023, the appellant/applicant through S.O Madialo and Company Advocates generated an application by way of a notice of motion dated March 7, 2023 under, inter alia, order 9 rules 9 and 10 and order 42 rule 6 of the [Civil Procedure Rules, 2010](#). She is seeking the following orders;
  - a. Moot
  - b. Moot
  - c. Pending the hearing and determination of the intended appeal, this honourable court be pleased to issue a stay of execution of the judgment delivered on the February 15, 2023 subsequent decree and all further proceedings pursuant to the judgment.
  - d. Costs of the application be provided for.
2. The application is premised upon grounds (a) to (o) set out on the face of the same. It is also premised on the applicant's supporting affidavit of 23 paragraphs sworn on even date and documents marked as "LAO-1 to LAO-4" which include copies of this court's judgment, eviction orders and notice of appeal annexed thereto. Briefly, the applicant states that he is aggrieved by this court's decision and has lodged a notice of appeal dated February 28, 2023 setting out the grounds of appeal from the decision. That the respondent has obtained eviction orders against the applicant. That the eviction and subsequent



- demolition of her construction will in no way be capable of compensation by the award of damages if the intended appeal were to succeed,
3. The respondent through Oguttu Mboya, Ochwal and Partners Advocates opposed the application by way of a statement of grounds of opposition dated May 15, 2023 which include;
    - a. The honourable court has no jurisdiction to hear and determine the instant application as same is *functus officio* having pronounced itself *vide* judgment dated February 15, 2023.
    - b. The issues raised in the instant application can only be canvassed in the Court of Appeal particularly with the appellant /applicant herein having lodged the notice of appeal on the February 28, 2023 though the same not served on the respondent thus the court herein is bereft of jurisdiction to hear and determine the instant application.
    - c. Besides, the instant application is res-judicata as issues raised in the instant application and particularly pertaining to stay of execution herein have been determined *vide* ruling dated and delivered on the October 26, 2021
    - d. In the circumstances, the instant application is otherwise devoid of merits whatsoever and the orders issued on the March 14, 2023 ought to be discharged and/or vacated for want of jurisdiction.
    - e. Consequently, there does not exist any special and or peculiar circumstances to warrant granting the order of stay of execution sought, whatsoever and /or howsoever as the court is bereft of jurisdiction.
  4. The application was heard by written submissions pursuant to this court's directions herein, order 51 rule 16 of the [Civil Procedure Rules, 2010](#) and Practice Direction number 33 of the Environment and Land Court Practice Directions, 2014.
  5. So, the applicant's counsel filed submissions dated May 22, 2023 on even date. Counsel referred to the principal order of stay of execution of judgment sought in the application, order 42 rule 6 (2) of the [Civil Procedure Rules, 2010](#), section 13 (7) (a) of the [Environment and Land Court, 2015](#) (2011) and the case of [Board of Governors, Moi High School Kabarak and another v Malcolm Bell](#) (2013) eKLR. Thus, counsel submitted that the applicant has attained the cumulative conditions under order 42 rule 6 (2) (supra) for the grant of the said principal order.
  6. By the submissions dated May 8, 2023, learned counsel for the respondent stated the background and identified issues for determination including that this court is devoid of jurisdiction over the application and that the same is res judicata. In the analysis of the issues, counsel implored the court to disallow the application and relied on, *inter alia*, section 7 of the [Civil Procedure Act](#) chapter 21 Laws of Kenya and the case of [Butt v Rent Restriction Tribunal](#) (1979) eKLR on the discretionary power of the court to grant the principal order sought in therein.
  7. I have carefully considered the entire application, the grounds of opposition and the rival submissions. In that regard, is the present application merited?.
  8. This court is conscious of the triple conditions under order 42 rule 6 (2) (supra) namely substantial loss, delay and security. It must be noted that the same apply cumulatively and within judicial discretion.
  9. In *Butt case* (supra), the court remarked;

“.....the appellant has an undoubted right of appeal.....”



10. Besides, jurisdiction of this court to entertain this application has been raised by the respondent. Indeed, jurisdiction relates to judicial authority over a matter as defined in Halsbury's Laws of England 4<sup>th</sup> Ed Vol 9 at page 350.
11. In Republic v Karisa Chengo and 2 others (2017) KLR, the Supreme Court of the Republic of Kenya opined that;  

“..... Lack of jurisdiction renders a court’s decision void as opposed to being merely voidable....”
12. I take into account stay orders granted on October 26, 2021 and March 14, 2023 in this matter. Moreover, by the notice of appeal duly filed herein, an appeal is deemed to have been lodged pursuant to order 42 (6) (4) (supra)
13. In the case of Kakuta Maimai Hamisi v 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.....”
14. In the circumstances, it would not be right for the two matters to be heard by the Court of Appeal and this court; see also Judicial Commission of Inquiry into the Goldenberg Affair and 3 others v Kilach (2003) KLR at 249 at 265/266.
15. Accordingly, this court is devoid of jurisdiction over the instant application and the same is hereby strike out.
16. On costs, I order that the same shall abide the outcome of the appeal at the Court of Appeal.

**DATED AND DELIVERED AT HOMA BAY THIS 20<sup>TH</sup> DAY OF JUNE 2023**

**G. M. A ONG'ONDO**

**JUDGE**

**PRESENT;**

1. Ms. Fozah Onyimbo instructed by Madialo learned counsel for appellant/applicant
2. Mr. Nyakwamba instructed by Ochwal learned counsel for respondent
3. Court Assistant, Luanga

