



**Ogoma v Ogoma (Environment and Land Appeal E004 of 2023)
[2023] KEELC 18270 (KLR) (13 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18270 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E004 OF 2023
GMA ONGONDO, J
JUNE 13, 2023**

BETWEEN

PAUL YASHON OGOMA APPLICANT

AND

JAMES OMOLO OGOMA RESPONDENT

(Being an application for stay of execution of the judgment of the Homa Bay Chief Magistrate's Court (R.B.N Maloba (PM) delivered on 24th November 2022 in Homa Bay CMC Environment and Land case number 35 of 2019)

RULING

1. On January 16, 2023, the Appellant/applicant through the firm of Robert Ochieng and Company Advocates filed an application by way of a notice of motion of even date seeking the following orders;
 - a. Spent
 - b. Spent.
 - c. That this Honourable Court be pleased to Order a Stay of Execution of the Judgment and Orders of the Chief Magistrates Court at Homa-Bay rendered on November 24, 2022 in ELC Case No 35 of 2019 pending hearing and determination of this Appeal.
 - d. That the Court be pleased to grant such other relief as it may deem fit and just to grant.
 - e. That the costs of this Application be provided for.
2. The application is based on the applicant's supporting affidavit of even date and the annexed copy of judgment of the trial court delivered on November 24, 2022 and grounds 1 to 11 stated on the face of it's face. In brief, the applicant asserted that the said judgment sanctioned his eviction from the suit property, land reference number Kanyada/Kotieno/Katuma A/1415 hence, he is likely to suffer



substantial loss thereby. That the application has been generated without unreasonable delay and that he is ready and willing to furnish any security for the due performance of the decree which may be ultimately binding upon him should this appeal not succeed as may be directed by this Honourable court.

3. The respondent through the firm of Abisai and Company Advocates opposed the application by his replying affidavit sworn on February 23, 2023 and annexed documents marked as “JOO1 to JOO4” which include; a green card of the suit land and a map showing it, among other parcels of land. He deposed, inter alia, that the applicant wants to canvass a new case with a different set of facts than what was litigated in the trial court. That the appellant has failed to demonstrate that he has an arguable appeal which should entitle him to the orders sought in the application.
4. On February 27, 2023, this court directed that the application be heard by written submissions.
5. So, the applicant’s counsel filed submissions dated March 24, 2023. It was submitted that the applicant has attained the threshold for granting of the orders sought in the application under Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010. To buttress the submissions, Counsel relied upon *John Nyingi Muchiri v John Kamunya Mutai and 4 others* [2005] KLR and *Silverstein v Chesoni* [2002] 1 KLR 867, among other authorities.
6. In the submissions dated April 3, 2023 and filed herein on April 14, 2023, learned counsel for the respondent set out a brief background of the case including the application, the response thereto and that the applicant has been keen on stopping the respondent from effecting the lawful orders issued by this court. Counsel identified four issues for determination, *inter alia*, whether the application is merited and analyzed them in the negative thus, urged the court to dismiss the application with costs. To fortify the submissions, counsel cited Order 42 Rule 6 (2) (*supra*) as well as *Kenya Shell Ltd v Kiburu and another* [1986] eKLR and *Daniel Toroitich Arap Moi and another v Mwangi Stephen Mirithi and another* [2014] eKLR, among other authorities.
7. In that regard, has the applicant attained the requirements for the orders sought in this application?
8. The Application is mounted under Order 42 Rule 6(2) (*Supra*) which stipulates that;

“No order of stay of execution shall be made under sub rule 1 unless: -

 - a. The Court is satisfied that substantial loss may result to the 1st 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.” (Emphasis added)
9. Regarding substantial loss, the applicant averred that he is likely to be rendered homeless before the appeal is heard and determined if the stay order sought herein is not granted. However, the respondent stated that the applicant has not availed evidence of substantial loss in this application. I take into account Silverstein and Kenya Shell Ltd cases (*supra*) and since there is imminent eviction of the applicant from the suit property which is his only home, he is bound to suffer substantial loss.
10. Also, this appeal brought by way of memorandum of appeal duly lodged on January 16, 2023 contains trial issues including fair hearing of the original suit, registration and ownership of the suit property. The same is likely to be prevented in the event there is an eviction of the applicant from the suit property before the appeal is heard and determined as observed in Silverstein case (*supra*).



11. Furthermore, I subscribe to the decision in the case of *Butt v Rent Restriction Tribunal* [1979] eKLR that an appellant has an undoubted right of appeal; see also Articles 48 and 50 (1) of the *Constitution* of Kenya, 2010.
12. On delay, this court is guided by Order 50 Rules 1 to 8 of the *Civil Procedure Rules*, 2010 and the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2014] eKLR. In view of the facts of the surrounding circumstances of the case, the delay in generating the application is not unreasonable.
13. As regards security, I take notice of the memorandum of appeal herein. In *Halai and another v Thornton & Turpin [1963] Ltd* [1990] eKLR, it was held that the court has the jurisdiction and inherent powers to make an order for security.
14. It important to note that the court has the authority to issue orders for the preservation, in the interim, a subject matter of appeal. This does not exclude the stay order sought in this application. see section 13 (7) (a) of the *Environment and Land Court Act*, 2015 (2011) and *Board of Governors, Moi High School Kabarak and another v Malcolm Bell* [2013] eKLR.
15. In the result, the application is merited. I proceed to grant prayer (c) in this application.
16. Costs of the application to abide the outcome of this appeal.
17. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 13TH DAY OF JUNE 2023.

G. M.A ONG'ONDO

JUDGE

PRESENT

- a) Mr. R. Ochieng learned counsel for the appellant/applicant
- b) Mr. M.Migele instructed by B. Singei of Abisai and Company Advocates for the respondent
- c) Terrence, court assistant.

