



**Odongo & 3 others v Onyango (Environment and Land Appeal  
E014 of 2014) [2023] KEELC 18838 (KLR) (19 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18838 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL E014 OF 2014  
GMA ONGONDO, J  
JULY 19, 2023**

**BETWEEN**

**PATRICIA ODONGO ..... 1<sup>ST</sup> APPELLANT  
PETER OKELLO ..... 2<sup>ND</sup> APPELLANT  
MBUSE OKELLO ..... 3<sup>RD</sup> APPELLANT  
NDAR C/O NDIEGE ..... 4<sup>TH</sup> APPELLANT**

**AND**

**DOMINIC OTIENO ONYANGO ..... RESPONDENT**

*(Being an application for stay of execution of the judgment in  
Ndhiwa MCELC/E023/2021 delivered on 7th March 2023.)*

**RULING**

1. This ruling is in respect of an application by way of a notice of motion dated March 31, 2023 and filed on April 5, 2023 pursuant to order 42 rule 6 (1) (2) of the *Civil Procedure Rules, 2010*. The four applicants/appellants through the firm of Kirui and Company Advocates are seeking the orders infra;
  - a. Spent
  - b. Spent
  - c. That pending the lodging, hearing and determination of the appeal, this Honourable court be pleased to stay the execution of the judgment in Ndhiwa MCELC/E023/2021 delivered on 7<sup>th</sup> March 2023.
  - d. That cost be provided for.



2. The application is anchored in grounds (a) to (d) set out on its face and the 2<sup>nd</sup> applicant's supporting affidavit of ten paragraphs sworn on even date and copies of annexed documents marked as "PO1 to PO4" which include; the trial court's judgment (PO1) and the memorandum of appeal dated 21<sup>st</sup> March 2023 (PO2) herein. In a nutshell, the applicants' complaint is that they are dissatisfied with the trial court's judgment in Ndhiwa PMCELC E023 of 2021 delivered on March 7, 2023 hence lodged the present appeal by way of the memorandum of appeal which is arguable. That they are being evicted from land reference numbers Kanyamwa/Kabonyo/Kwandiku/1945 and 1576, the parcels of land in dispute which were awarded to the respondent by the said judgment and the appeal may be rendered nugatory. That the application has been made timeously and they are ready and willing to abide by any terms as may be imposed by this court.
3. The respondent through the firm of G.S Okoth and Company Advocates opposed the appeal and the application by grounds of opposition dated 17<sup>th</sup> April 2023 and filed on 20<sup>th</sup> April 2023 founded upon the grounds thus;
  - a. The applicant's Advocate is improperly before the court and thus the appeal is contrary to order 9 rule 9 of the *Civil Procedure Rules, 2010*
  - b. No consent or order to file appeal has been obtained.
4. In the submissions filed on April 28, 2023, learned counsel for the applicants set out the background of the matter including the trial court's judgment and the eviction orders made against the applicants as well as the memorandum of appeal. Counsel submitted that if the judgment is enforced, the applicants will wrongly and illegally be evicted from the parcels of land in dispute.
5. Further, that the said parcels of land have ancestral, financial and sentimental value to the applicants. That the instant appeal is arguable and the orders sought in the application be granted in the interest of justice.
6. By the respondent's submissions dated May 8, 2023, learned counsel for the respondent stated that since the date of judgment rendered by the trial court, no notice of change of advocate has been filed and served on the respondent as required by Order 9 Rules 1 and 5 or 6 of the Civil Procedure Rules (*Supra*). That although the appeal and the application have been lodged without unreasonable delay, the applicants have not shown the nature of substantial loss they are likely to suffer or offered any security as required under order 42 rule 6 of the *Civil Procedure Rules (supra)*.
7. Moreover, counsel submitted that on the date of judgment, the trial court granted a stay of execution of the judgment for 45 days from that date and that the process of eviction includes a notice of 90 days which is enough for the appeal to be heard and determined. That the judgment debtors who cultivate the land and not in occupation of the same, can vacate it upon harvest of the crops planted therein. That thus, the application is frivolous and devoid of merit and implored the court to dismiss the same with costs.
8. In the applicant's supplementary submissions dated May 9, 2023, it was stated that the instant application is not affected by order 9 rule 9 (*supra*) which does not apply to instances of an appeal where a party has a right to legal representation of counsel of own choice. Counsel relied upon the case of *Francis Omondi Odhiambo v Hippolitus Omondi Ochieng* [2022] eKLR and *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd* [1989] EA 696.
9. In the foregone, the duty of this court is to resolve whether;
  - a. The appeal is contrary to order 9 rule 9 (*supra*) and



- b. Subject to the first issue above, whether the applicants have satisfied the requirements under order 42 rule 6 (1) (2) (*supra*).
10. With regard to the first issue, order 9 rule 9 (*supra*) is in respect of change of advocate by order of the court or consent of the parties. On April 17, 2023 and June 13, 2023, the applicants and the respondent were represented by their respective counsel on record in this appeal.
11. It is important to note that this is a new matter being an appeal by way of a Memo dated 21<sup>st</sup> March 2023 and lodged on even date. The applicant has the right to engage a counsel of his own choice in the appeal unlike the original suit after judgment where order 9 rule 9 (*supra*) is applicable.
12. More importantly, the instant appeal contains triable issues, inter alia, adverse possession, trespass, trust and fraud hence the same has to be determined on merit. The applicant is entitled to access justice and fair hearing in this appeal as provided for under articles 48 and 50 (1) of the [Constitution of Kenya, 2010](#) respectively. It is borne in mind that the right to fair trial shall not be limited as stipulated under article 25 (c) of the same [Constitution](#).
13. Furthermore, I subscribe to the case of [Butt v Rent Restriction Tribunal](#) (1979) eKLR, where it was held-
- “..... the appellant has an undoubted right of appeal.....”
14. On substantial loss requirement, the applicant asserted that he is being evicted from the parcels of land in dispute which are ancestral. Therefore, this is likely to occasion him loss of the parcels of land where he lives and may render this appeal nugatory in these special circumstances as observed in Butt case (*supra*).
15. As regards the second requirement namely delay, I bear in mind order 50 of the [Civil Procedure Rules, 2010](#) as regards time. It is common ground that the appeal and application were filed without unreasonable delay.
16. Concerning the security requirement, the 2<sup>nd</sup> applicant stated at paragraph 8 of his supporting affidavit that the applicants are ready and willing to abide by any terms to impose by the court. I am guided by the decision in the case of [Visbram Ravji Halai and another v Thornton & Turpin \[1963 Ltd\]](#) [1990] KLR 365 that stay of execution as sought in the application is within this court’s inherent jurisdiction.
17. Moreover, the court has the power to grant interim preservation orders under section 13 (7) (a) of the [Environment and Land Court Act, 2015](#) [2011]. The orders of stay of execution of judgment and or decree are envisaged therein in order to preserve the integrity of the parcels of land in dispute in this appeal pending the outcome of contested issues; see also [Board of Governors Moi High School Kabarak and another v Malcolm Bell](#) [2013] eKLR.
18. In conclusion, it is the finding of this court that the applicant has satisfied stay of execution requirements as stated in paragraph 9 (b) hereinabove. In the circumstances, the application is meritorious.
19. A fortiori, the application be and is hereby allowed in terms of stay of execution of the judgment in Ndhiwa Principal Magistrate’s court Environment and Land case number E023 of 2021 pending the hearing and determination of this appeal.
20. Costs of the application to abide the outcome of this appeal.

**DATED AND DELIVERED VIRTUALLY THIS 19<sup>TH</sup> DAY OF JULY 2023**



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

