



REPUBLIC OF KENYA



**Odongo v Wanyama & 3 others (Environment & Land Case
150 of 2017) [2023] KEELC 18647 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18647 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 150 OF 2017**

**BN OLAO, J
JULY 13, 2023**

BETWEEN

PETER OLAKHI ODONGO PLAINTIFF

AND

EGESA ODUORI WANYAMA 1ST DEFENDANT

DOMITILA MAERO 2ND DEFENDANT

COUNTY LAND REGISTRAR BUSIA 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. Dr Peter Olakhi Odongo (the plaintiff herein) approached this Court vide an amended plaint dated February 20, 2020 seeking various orders against Egesa Oduori Wanyama, Domitila Maero, County Land Registrar Busia and The Hon Attorney General (the 1st, 2nd, 3rd and 4th defendants respectively) following a land sale agreement gone sour.
2. Among the remedies sought by the plaintiff was a refund of the purchase price of Kshs 1,008,000 plus interest at Court rates.
3. The suit was heard by Omollo J who delivered a judgment in the plaintiff's favour in the following terms on July 7, 2022:
 - a. "The 1st defendant is in breach of the sale agreement dated July 31, 2013.
 - b. The 1st and 2nd defendants are ordered to refund to the plaintiff in the ratio of 60:40 within a period of sixty (60) purchase price in the sum of Kshs 1,000,000 together with the survey fees of Kshs 8,000 plus interest at court rates from the date of filing of this suit until payment is made in full. In default, execution to issue; and



c. Costs of this suit awarded to the plaintiff.”

Domitila Maero the 2nd defendant was aggrieved by that judgment and lodged a Notice of Appeal dated July 20, 2022 indicating her intention to appeal the same. She has since filed at the Court of Appeal registry in Kisumu Civil Appeal NO E41 of 2023.

4. She has now approached this Court vide her Notice of Motion dated March 14, 2023 premised under the provisions of Sections 1A and 65 of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules and Rule 1(3) and 47 of the Court of Appeal Rules 2010. She seeks from this Court the following orders:
 1. Spent
 2. That the execution of the judgment dated July 7, 2022 be stayed pending the hearing and determination of the appeal.
 3. That the costs and incidentals to this application be provided for.
5. The application is predicated on the grounds set out therein and supported by her affidavit of even date. The gravamen of the application is that the 2nd defendant, being dissatisfied with the judgment delivered on July 7, 2022 has lodged an appeal which is arguable and has good prospects of success. That the appeal may be rendered nugatory if an order of stay is not granted.
6. Further, that the appeal raises fundamental issues of both law and fact and the plaintiff will not suffer any prejudice if the order of stay is granted. To the contrary, the 2nd defendant shall greatly suffer if execution is carried out. That the application has been made within reasonable time and in very good faith. It is therefore in the interest of justice that the order sought be granted.
7. Annexed to the application are the following documents:
 1. Notice of Appeal.
 2. Memorandum of Appeal.
 3. Copy of judgment delivered on July 7, 2022.
8. When the application was placed before me on March 20, 2023; I directed that it be canvassed by way of written submissions. The 2nd defendant was to serve the application and written submission upon the plaintiff within 7 days after which the plaintiff would have 14 days from the date of service to file his response and submissions. The matter would then be mentioned on April 13, 2023 to confirm compliance and take a date for ruling to be delivered by way of electronic mail.
9. When the matter came up on April 13, 2023, the plaintiff and his counsel were both absent and no response had been filed to the application. The application is therefore not opposed. Mr. Ouma counsel for the 2nd defendant had however filed his submissions dated March 23, 2023 together with an affidavit of service as directed.
10. Notwithstanding the fact that the application is not opposed, this Court must however consider it in light of the provisions of Order 42 Rule 6 of the Civil Procedure Rules. It is not the law that any unopposed application must be allowed peremptorily without much ado. Far from it. This Court has a duty to consider the merits and otherwise of any application, opposed or otherwise. In doing so, it must be satisfied that it meets the threshold of the law upon which it is founded.
11. In this case, the relevant law is Order 42 Rule 6(2) and (1) of the Civil Procedure Rule which provides that:



- (1) “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) No order for stay of execution shall be made under subrule (1) unless -
 - (a) the court is satisfied that substantial loss may result to the 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.

Substantial loss, as was held by Platt Ag. JA (as he then was) in *Kenya Shell Ltd v Benjamin Karuga Kibiru & Another* 1986 KLR 410 1986 KLR], “...is the cornerstone of both jurisdiction for granting a stay”.

12. The jurisdiction of this Court while considering such an application was circumscribed in the case of *Visbram Ravji Halai & Another v Thornton & Turpin* (1963) Ltd 1990 KLR 365 where it was held that:

“Thus the Superior Court’s discretion is fettered by three conditions; Firstly, the applicant must establish a sufficient cause, secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

It is clear from the above as read together with the provisions of Order 42 Rule 6(1) and (2) of the Civil Procedure Rules that in order to justify the grant of any order of stay of execution pending appeal, the 2nd defendant was required to meet all the following conditions:

1. Show sufficient cause.
2. Demonstrate that she will suffer substantial loss unless the order is granted.
3. File the application without unreasonable delay.
4. Offer security.

Having filed a Notice of Appeal and subsequently the appeal itself, the 2nd defendant has shown sufficient cause.

13. The 2nd defendant has also deposed in paragraph 9 of her supporting affidavit as follows:

- 9: “That the Applicant/Appellant is willing and ready to comply with whatever conditions this Honourable Court shall give for stay of execution.”



I consider that averment to be a mark of good faith and a sufficient offer of security. It is of course the duty of this Court to determine the nature and extent of security to be deposited once an Applicant makes the offer to provide the same.

14. On the issue of substantial loss, the nearest that the 2nd defendant has come to satisfying that condition is in paragraph 8 of her supporting affidavit in which she has deposed thus:

8: “That the Respondent herein shall suffer no prejudice if stay of execution is granted. In the contrary, the Appellant/Applicant shall greatly suffer if the execution is carried out based on the judgment that is being challenged.”

Other than that bare allegation, the 2nd defendant has not demonstrated what “substantial loss” or, to use her own words, that she “shall greatly suffer if the execution is carried out based on the judgment that is being challenged.” That is not sufficient. The decree against the 1st and 2nd defendants required of them to refund to the plaintiff the sum of Kshs 1,008,000 within 60 days of the judgment appealed together with interest at Court rates. This is money which the Court found they had received from the plaintiff for an aborted agreement for the purchase of land. There is nothing to suggest that the plaintiff is so impecunious as to be un-able to refund the said Kshs 1,008,000 together with any costs should the appeal succeed. It is clear from the impugned judgment that this is money which was infact paid by the plaintiff for the land which he did not get. He cannot therefore be described as a man of straw.

15. The 2nd defendant has also averred in paragraph 10 of her affidavit that the application “has been made within reasonable time.” That cannot be correct. The judgment sought to be stayed was delivered on July 7, 2022 in the presence of her then counsel Mr. Ashioya in open Court. That means that the 2nd defendant knew about the judgment as far back as July 7, 2022. This application was filed on March 14, 2023 some eight (8) months later. That cannot be reasonable time. The delay of eight (8) months is clearly unreasonable and has not been explained. For that reason, the order sought is not available to the 2nd defendant.

16. Among the grounds raised in the application is that the appeal raises “fundamental issues of both law and fact” and has “good prospects of success.” That cannot be a consideration when this Court is considering an application for stay of execution pending an appeal from it’s own decision. It can only be a consideration when this Court is considering an application such as this pending an appeal from the decision of a subordinate court. The case of *HGE -V- S M* 2020 eKLR cited by counsel is not of any help because it was infact an application before the High Court for stay of execution of a judgment of the subordinate court pending an appeal to the Superior Court.

17. Ultimately, however, it is now clear that the 2nd defendant has only surmounted two (2) out of the four (4) conditions necessary to warrant the grant of an order of stay of execution pending appeal. She has therefore not met the threshold set out in Order 42 Rule 6(1) and (2) the *Civil Procedure Rules*.

18. The Notice of Motion dated March 14, 2023 is accordingly dismissed with no orders as to costs.

BOAZ N. OLAO

JUDGE

13TH JULY 2023

RULING DATED, SIGNED AND DELIVERED AT BUSIA ON THIS 13TH DAY OF JULY 2023 BY WAY OF ELECTRONIC MAIL AS WAS ADVISED TO THE PARTIES.

BOAZ N. OLAO



JUDGE

13TH JULY 2023

