



REPUBLIC OF KENYA



**KENYA LAW**  
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**Orachi v Oridi (Environment and Land Appeal E001 of 2023)  
[2023] KEELC 20075 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20075 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT AND LAND APPEAL E001 OF 2023**

**BN OLAO, J**

**SEPTEMBER 28, 2023**

**BETWEEN**

**FRED OMAMUKIROR ORACHI ..... APPELLANT**

**AND**

**HERBERT OCHODI ORIDI ..... RESPONDENT**

**RULING**

1. Before me is the Notice of Motion by Fred Omamukiror Orachi (the Appellant herein) dated February 23, 2023 founded upon the provisions of sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Orders 42 and 52 of the *Civil Procedure Rules* and article 159 (2) (d) of the *Constitution*. The Applicant seeks the following orders:
  1. Spent
  2. Spent
  3. That there be a stay of proceedings in Busia CMC ELC NO 82 of 2020 pending the hearing and determination of this appeal.
  4. That the intended judgment in Busia CMC ELC NO 82 of 2020 be arrested pending the hearing and determination of this appeal.
  5. That costs of this application be provided for.
2. The application is based on the grounds set out therein and is supported by the Appellant's affidavit also dated 23<sup>rd</sup> February 2023.
3. The gravamen of the application is that the Appellant and Herbert Ochodi Oridi (the Respondent herein) are litigating in the subordinate Court being Busia CMC ELC CASE NO 82 of 2020 over the ownership of the land parcels No South Teso/Osurette/3286, 3287, 3288, 3289, 3290 being sub-



divisions of the original land parcel No South Teso/Osurette/291. The case has proceeded to full hearing and judgment was stated for delivery on April 28, 2023 before this Court issued an ex-parte order on February 23, 2023 staying any further proceedings.

4. In the meantime, the Appellant decided that he had a better case filing an Originating Summons in this Court for a claim in adverse possession. He therefore filed a Notice withdrawing the suit in the subordinate Court after which he filed an Originating Summons in this Court being Busia ELC CASE NO E008 of 2023. He has already served the Respondent with the Originating Summons.
5. The parties then addressed the trial magistrate on the propriety of the notice of withdrawal of the suit. The trial magistrate however declined to have the suit before him withdrawn thus giving rise to this application.
6. Annexed to the application are the following documents:
  1. Notice of withdrawal of suit dated January 30, 2023 and filed in Busia CMC ELC CASE NO 82 of 2020 on January 30, 2023.
  2. Submissions filed in Busia CMC ELC CASE NO 82 of 2020.
  3. Originating Summons filed in Busia ELC CASE NO E003 of 2023.
  4. Copies of Green Cards and affidavits filed in Busia ELC CASE NO E003 of 2023.
7. The application is opposed and the respondent filed a replying affidavit dated May 9, 2023 in which he deposed as follows. That once a suit has been set down for hearing, it can only be withdrawn upon the filing of a consent signed by all the parties. It was therefore illogical for the appellant to file a Notice of withdrawal when the matter had been heard and all that was pending was the judgment. That the withdrawal ought to have been done at the earliest opportunity. This application is a forum shopping, an abuse of the Court process, brought in bad faith and should therefore be dismissed with costs.
8. The application has been canvassed by way of written submissions filed both by Mr Ashioya instructed by the firm of Ashioya & Company Advocates for the Appellant and by Mr Otsiula instructed by the firm of J. B. Otsiula & Associates Advocates for the Respondent.
9. I have considered the application, the rival affidavits and submissions by counsel.
10. This is an application premised on Order 42 Rule 6 of the [Civil Procedure Rules](#), sections 1A, 1B, 3 and 3A of the [Civil Procedure Act](#) and article 159(2) (d) of the [Constitution](#).
11. In his submissions, counsel for the Respondent has addressed the Court extensively on Order 25 Rule 2(1) of the [Civil Procedure Rules](#) which reads:

“Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.”

Counsel did not however also cite sub-rule (2) of the same which reads:

“Where a suit has been set down for hearing the court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.”
12. Having said so, both counsels submitted as if they were addressing me on the appeal itself. What I have for my determination is whether to stay the proceedings in the subordinate court and arrest the judgment. This court had earlier granted an order staying the proceeding in the subordinate court and



that means that the judgment due on April 28, 2023 was also stayed. Section 3A of the Civil Procedure Act provides that:

3A: Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.” Emphasis added.

13. The ruling delivered by Hon. P. Olengo Senior Principal Magistrate on February 17, 2023 in Busia Cmc’s Court Elc Case NO 82 of 2020 and which is the subject of the pending appeal has not been availed. But as is clear from paragraph 7 of the appellant’s supporting affidavit, the magistrate declined to allow the Appellant’s application to withdraw his suit. As I have already stated above, this court is not hearing the appeal at this stage. This being an interlocutory application, I must guard against delving into the appeal itself. Having said so, however, it is clear from the provisions cited above, as well as available precedents, that a party cannot be barred from withdrawing his suit. And that can be allowed at any stage. If the subordinate court proceeds to deliver it’s judgment and the Appellant succeeds on appeal, the parties will end up in a rather untidy situation and the judicial process will have been abused. section 3A of the Civil Procedure Act has donated to this court wide powers to ensure that such abuses do not happen and that justice is done.
14. It is also clear that this court, as an appellate court, has the jurisdiction vide Order 42 Rule 6 of the Civil Procedure Rules to grant an order of stay of proceedings even such an order has been denied in the lower court. As it is now, unless the proceedings in the subordinate court are stayed, there will be two suits running contemporaneously in two courts between the same parties over the same subject matter. The rule of sub-judice which is provided for under section 6 of Civil Procedure Rules frowns against such a process. Indeed the marginal notes of that provision read “stay of suit.”
15. In considering this application, this court is also guided by the decision in Butt v Rent Restriction Tribunal 1982 Klr 417 where it was held that in deciding whether or not to grant a stay of proceedings is a matter to be determined by the special circumstances of each case. The discretionary power to order a stay should be invoked so that an appeal is not rendered nugatory. Guided by all the above, I am persuaded that this application is for allowing.
16. Ultimately therefore and having considered the Notice of Motion dated February 23, 2023, I am satisfied that the same is merited. It is accordingly allowed with costs.

**BOAZ N. OLAO**

**JUDGE**

**28<sup>TH</sup> SEPTEMBER 2023**

**RULING DATED, SIGNED AND DELIVERED ON THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023 BY WAY OF ELECTRONIC MAIL AS WAS ADVISED TO THE PARTIES ON 11<sup>TH</sup> MAY 2023.**

**BOAZ N. OLAO**

**JUDGE**

**28<sup>TH</sup> SEPTEMBER 2023**

