



**Otieno v Osiembo (Environment & Land Case 7 of 2015)
[2023] KEELC 20928 (KLR) (24 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20928 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 7 OF 2015
BN OLAO, J
OCTOBER 24, 2023**

BETWEEN

LEONARD OCHIENG OTIENO PLAINTIFF

AND

SAMUEL OTIENO OSIEMBO DEFENDANT

RULING

1. By a judgment delivered on March 28, 2023, this court found in favour of Samuel Otieno Osembo (the plaintiff herein) in the dispute involving him and Leonard Ochieng Otieno (the defendant herein) over the ownership of the land parcel No Bukhayo/mundika/5042 (the suit land). Among the orders issued by the court in the said judgment was that the defendant, his agents or any other person claiming through him were given 3 months to vacate the suit land or be evicted therefrom. Meanwhile, and given the circumstances of this dispute, I allowed the parties time to try and cobble up some agreement so that either party purchases the other's interest in the subject property. That option appears not to have been successful, at least going by what Mr Okeyocounsel for the plaintiff informed the court on October 5, 2023.
2. Meanwhile, the defendant lodged a Notice of Appeal on May 26, 2023 demonstrating his dissatisfaction with the judgment and intention to appeal it.
3. I now have for my determination the defendant's Notice of Motion dated August 16, 2023 in which he seeks the following orders:
 - a. Spent
 - b. That this honourable court be pleased to extend the time for lodging and serving the Notice of Appeal.



- c. That this honourable court do extend the time for application to stay execution of judgment and decree out of time against ELC NO 7 of 2015.
 - d. That this honourable court be pleased to extend time for filing the Appeal against Busia ELC NO 7 of 2023 (sic).
 - e. That upon granting prayers (a), (b) and (c) above, provide timeline for filing application and appeal.
 - f. That costs of and incidental to this application be borne by the defendant.
4. The application is predicated on the provisions of article 59 of the Constitution, sections 3, 3A and 3B of the Appellate Jurisdiction Act and Rules 4, 31, 39B, 41, 42, 43, 47 and 53 of the Court of Appeal Rules. It is also premised on the grounds set out therein and supported by the defendant's affidavit of even date.
 5. The gravamen of the application is that the defendant's counsel Ashioya & Company Advocates Failed in his professional duty to inform the defendant of the delivery of the judgment herein until July 16, 2023 after he had made enquiries about the progress of the case. That he has an arguable appeal and given his frail state of health, he will suffer immensely if his homestead is demolished.
 6. Annexed to the application are the following documents:
 1. Copy of the judgment delivered on March 28, 2023.
 2. Copy of Memorandum of Appeal.
 7. The application is opposed and the plaintiff has filed both grounds of opposition thereto and a replying affidavit all dated September 22, 2023.
 8. In the grounds of opposition, the defendant has raised the following:
 1. The application offends the mandatory provisions of Order 9 Rule 9 of the Civil Procedure Rules.
 2. The application is brought under non-existent provisions of the law or provisions which do not support the prayers sought.
 3. The defendant has offered no explanation as to the unreasonable delay.
 4. The appeal has no chances of success as the plaintiff is the registered proprietor of the suit land and enjoys all the rights and privileges under Section 25 of the Land Registration Act.
 5. The defendant has not demonstrated any substantial loss that he is likely to suffer in the event the orders sought are not granted.
 6. The application is scandalous, vexatious and otherwise an abuse of the process of this Court.
 9. In his replying affidavit, the plaintiff has deposed, inter alia, that together with filing the suit herein, he also sought an order to restrain the defendant from collecting any rent from the suit premises pending the hearing and determination of the suit. That vide a ruling delivered on July 8, 2015, that prayer was allowed. However, the defendant did not comply with the said ruling and still collects rent from the premises. That judgment was delivered on March 28, 2023 by way of electronic mail to the firm of Okeyo Ochiel & Company Advocates For the plaintiff and Ashioya & Company Advocates for the defendant in which he was given 3 months to vacate the suit land and in default, execution to issue.



10. Upon receipt of the judgment, the defendant through his then counsel Ashioya & Company Advocates wrote to the plaintiff's counsel on April 28, 2023 on implementation of the judgment. The plaintiff further called the defendant informing him to vacate the suit premises as a pre-condition for the negotiations but the defendant refused and so the execution process set in.
11. After the Bill of Costs dated April 5, 2023 had been taxed, the defendant through his then counsel requested for a negotiation of the costs vide a letter dated August 7, 2023. It is therefore false for the defendant to allege that his previous counsel failed in his professional duty to inform him about the delivery of the judgement. That the plaintiff purchased the suit land in 2014 as a commercial premises in order to rent it out for income yet the defendant has been forcefully occupying it and has defied the Court's ruling dated July 8, 2015. That the plaintiff is likely to suffer irreparable loss if the process of execution is halted. The application is made in bad faith with the intention of continuing to occupy the suit land to the plaintiff's detriment. It should therefore be dismissed for being scandalous, frivolous, an abuse of this court's process and otherwise devoid of any merit.
12. The following documents are annexed to the replying affidavit:
 1. Copy of Ruling delivered by Kibunja J on July 8, 2015 on the plaintiff's Notice of Motion dated January 27, 2015.
 2. Copy of a letter dated April 28, 2023 from the defendant's then counsel Ashioya & Company Advocates And addressed to the plaintiff's counsel suggesting that the parties sit down and discuss.
 3. Copy of the letter dated August 7, 2023 from the defendant's then counsel Ashioya & Company Advocates requesting that the plaintiff's Bill of Costs which was coming up for taxation on that day be taxed at Kshs.150,000 with a stay for 30 days.
13. When the application was placed before me on September 25, 2023, I directed that it be canvassed by way of written submissions.
14. Those submissions were subsequently filed by Mr Jumba instructed by the firm of Balongo & Company Advocates for the defendant and by Mr Okeyo instructed by the firm of Okeyo Ochiel & Company Advocates for the plaintiff.
15. I have considered the application, the grounds of opposition and rival affidavits as well as the submissions by counsel.
16. I find it appropriate to first consider the grounds of opposition by the plaintiff. Although 7 grounds have been raised, only the first ground is worth considering because it is the only one raising a point of law. Grounds of opposition should be confined to issues of law only and must not raise issues of fact or evidence – *Leisure Lodges Limited v Dr Lalit D. Kotak C.A.* Civil Appeal No 95 of 2016.
17. The issue of law raised by the plaintiff is that the application offends the mandatory provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#) which provides that:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court -

 - (a) upon an application with notice to all the parties; or



(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

18. It is true that the defendant has previously been represented by the firm of Ashioya & Company Advocates upto the time the judgment herein was delivered on March 28, 2023. Indeed even after that date counsel continued to act for the defendant as is clear from the letters written by him. However, there is on record a consent letter dated August 15, 2023 and signed both by the firm of Ashioya & Company Advocates previously acting for the defendant and Balongo & Company Advocates incoming advocates for the defendant. In the circumstances, there has been no breach of the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*. Mr Jumba is therefore properly appearing for the defendant in these proceedings.

19. I shall now consider the substantive orders sought by the defendant in his application.

1.Extension of time to lodge a notice of Appeal:

20. Section 7 of the *Appellate Jurisdiction Act* (cap 9 Laws of Kenya) provides that:

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired: Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.” Emphasis mine.

Since the promulgation of the *Constitution* 2010, the reference to High Court must of course include this court. The judgment herein was delivered on March 28, 2023. The Notice of Appeal should have been filed within 14 days at least by April 11, 2023. It was however not until May 26, 2023 that it was filed which was way beyond the statutory period set out in the *Court of Appeal Rules*. The discretion to extend time is however not a matter of course. It must be exercised on sound grounds and any delay should be explained to the satisfaction of this court. In paragraphs 5 and 6 of his supporting affidavit, the defendant has averred that the judgment was delivered in his absence and that it was not until July 16, 2023 that his then counsel informed him about the delivery of the judgment. That cannot possibly be true because as early as April 28, 2023, his then counsel wrote to the plaintiff’s counsel requesting if the parties could sit down “and agree on the 30m² building that as per the surveyor’s report has extended into LR. NO Bukhayo/Mundika/5042.” His counsel could not have been addressing the plaintiff’s counsel in those terms unless he had specific instructions from him. A party seeking such a remedy must approach the court with clean hands. The defendant has not. That remedy is declined and so too is prayer NO (d).

2.Stay Of Execution:

21. Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules* provides that:

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(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 mine.

From the above, it is clear that a party seeking an order for the stay of execution of a judgment pending appeal must satisfy the following conditions:

1. Show sufficient cause.
2. Demonstrate that he will suffer substantial loss unless the order for stay of execution pending appeal is granted.
3. File the application without unreasonable delay.
4. Offer security.

The above conditions were re-stated by the Court of Appeal in the case of *Vishram Ravji Halai v Thornton & Turpin (1963) LTD* 1990 KLR 365 where it said:

“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.”

The centrality of proving substantial loss in such an application was emphasised by Platt Ag. J.A. (as he then was) in the case of *Kenya Shell Ltd v Kibiru & another* 1986 KLR 410 as follows:

“It is usually a good rule to see if order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money”. Emphasis mine.

22. I have looked at the application and the supporting affidavit. The defendant avers that if the stay is not granted, his homestead stands to be demolished and he will suffer immensely. I have not seen any evidence that his homestead is in danger of demolition. The judgement allows him to retain a portion covering 50m² out of the total of 80m² of the suit land if the parties cannot agree on buying out each



other's interest. I do not consider that to be substantial loss especially considering that he will still retain part of the suit land. court's cannot act on presumptions.

23. The judgment sought to be stayed was delivered on March 28, 2023. This application has been filed five (5) months later on August 16, 2023. That is a delay which I consider to be unreasonable. The explanation offered by the defendant as per paragraph 5 and 6 of his supporting affidavit is:

“ 5: That the judgment was delivered in my absence and I was not informed of it after the delivery.”

6: That the information was not relayed to me by my Advocate till the July 16, 2023 after I sent my son to enquire of the progress of the case.”

As I have already stated earlier in this ruling, the defendant is being economical with the truth. He was not in court on March 28, 2023 when the judgment sought to be stayed was delivered because it was delivered on-line. But he certainly did not learn about it on July 16, 2023 because some 3 months earlier and precisely on April 28, 2023, his then counsel Mr Ashioya had written to Mr Okeyo counsel for the plaintiff proposing a meeting so that the parties could talk and agree. That proposal could not have been made by his then counsel without his approval.

24. It is also on record that by a ruling delivered on January 27, 2015, some eight (8) years ago, KIBUNJA J restrained him from receiving any rent from the tenants on the suit property and directed that the monthly rent be paid to the plaintiff as the owner thereof. That order, as deposed in paragraph 16 of the plaintiff's replying affidavit, has been defied. A person who contemptuously defies an order of the court cannot be deserving of the court's exercise of its discretion jurisdiction in his favour. If anything, he has since January 27, 2015 been a candidate for committal to civil jail, a fine or both for contempt of court orders. It is idle and preposterous for him to now claim, as he has done in paragraph 9 of his supporting affidavit, that he will “suffer immensely” if the order of stay is not granted. One would have thought that it is infact the plaintiff who has suffered being kept out of his rent for eight (8) years.
25. Finally, the defendant was required to offer security. Such an offer, as was held in Wycliffe Sikuku Walusaka v Philip Kaita Wekesa 2020 eKLR:

“..... must of course come from the applicant himself as a sign of good faith to demonstrate that the application for stay of execution pending appeal is being pursued in the interest of justice and not merely as a decoy to obstruct and delay the Respondent's right to enjoy the fruits of his judgment.”

Again, it would have been expected of the defendant, acting in good faith and who is aware that he infact owes his adversary rent, to have at least made an offer to deposit that rent, whatever it is, either in Court or with the plaintiff's counsel. No such offer has been made.

26. It must be obvious by now that the defendant is not deserving of the orders sought.
27. The up-shot of all the above is that the Notice of Motion dated August 16, 2023 is devoid of any merit. It is accordingly dismissed with costs.

RULING DATED, SIGNED AND DELIVERED ON THIS 24TH DAY OF OCTOBER 2023 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO

JUDGE

