



**Obiero v Ogola (Environment and Land Appeal 18 of 2022)
[2023] KEELC 21810 (KLR) (28 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21810 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 18 OF 2022
GMA ONGONDO, J
NOVEMBER 28, 2023**

BETWEEN

JOSEPH OBIERO APPELLANT

AND

BEATRICE OGOLA RESPONDENT

RULING

1. By a Notice of motion application dated 15th March 2023 and filed in court on 20th March 2023 further to, inter alia, Order 42 Rules 6 and 14 of the [Civil Procedure Rules](#), 2010, the appellant/applicant, Joseph Obiero through C. Obiero & Company Advocates has sought thus;
 - a. Spent
 - b. Spent
 - c. Pending hearing and determination of the Kisumu Appeal COACA/E059/2023 (Kisumu COACA No. E059 of 2023 herein), the court do stay execution and proceedings in ELC Appeal No. 18 OF 2022 until the Kisumu appeal is heard and determined.
 - d. Cost to abide the cause.
2. The application is founded upon the applicant's nine-paragraphed supporting affidavit of even date accompanied by copies of filing receipts of complete record of appeal and a memorandum of appeal marked as "JO003" and "JO004" respectively and annexed to the affidavit. Furthermore, the application is premised on grounds 1 to 8 stated on the face of the same. Briefly, the applicant's lamentation is that this court rendered judgment on 15th November 2022 and he was aggrieved at it. That he then filed an appeal, Kisumu COACA No. E059 of 2023 as disclosed by the memorandum of appeal annexed to the applicant's affidavit. That he has a prima facie case with high chances of success



in the appeal. That the application has been lodged timeously and the applicant has paid security for costs in Kisumu COACA No. E059 of 2023.

3. By a replying affidavit sworn on 12th April 2023, the respondent through H.Obach and Partners Advocates, opposed the application, termed the same premature, ill-intentioned and prayed that it be dismissed with costs. He deposed in part, that the applicant was granted stay of execution of this court's judgment on 15th November 2022, the memorandum of appeal was lodged late and that Equity only aids the vigilant and not the indolent.
4. In a further affidavit sworn on 3rd November 2023 and filed on 7th November 2023, the applicant averred, inter alia, that the respondent was served with a Notice of Appeal marked as "JA-1" annexed to it. That he moved with speed and filed the appeal and paid security for costs and is awaiting directions.
5. Hearing of the application was by way of written submissions further to this court's directions given on 25th July 2023.
6. By the applicant's submissions dated 1st June 2023, reference was made to the application, Order 42 Rule 6 (*supra*), Butt v Rent Restriction Tribunal (1979) eKLR and other authorities to buttress the submissions. Counsel submitted that the application has attained the threshold for the grant of the orders sought therein.
7. The respondent's counsel filed submissions dated 8th June 2023 where reference is made to the judgment rendered by this court, the application and implored the court to determine that the application is merited. To fortify the submissions, counsel cited the case of *RWW v EKW* (2019) KLR and *Kenya Shell Ltd v Benjamin Karuga Kibiru and another* (1986) eKLR.
8. By supplementary submissions dated 3rd November 2023 and filed on 7th November 2023, the applicant's counsel stated that he filed a record of appeal on 14th March 2023 as shown in the supporting affidavit of even date, among other things. Also, he stated that Order 42 Rule 1 of the *Civil Procedure Rules*, 2010 has been met for the grant of orders sought in the application. Counsel cited the case of *G.N. Muema P/A (Sic) Mt. View Maternity & Nursing Home v Mariam Maalim Bisbar & Another* (2018) eKLR to further reinforce the submissions.
9. I have duly considered the application, the response thereto and the rival submissions inclusive of all the authorities relied upon in entirety. Therefore, is the application meritorious?
10. Order 42 Rule 6 (*supra*) provides for the triple conditions regarding stay of execution sought in the application. I bear in mind the conditions namely; substantial loss may result to the applicant unless the stay of execution order is made, the application has been made without unreasonable delay and 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.
11. The applicant has affirmed that he filed the Kisumu COACA No. E059 of 2023. That furthermore, he has paid security for costs in that matter.
12. In the case of *Malindi Law Society v Law Society of Kenya, Nairobi Branch v and 5 others* (2018) eKLR, the Supreme Court of the Republic of Kenya observed thus;

“Grant of stay of existing orders cannot be a matter of course. It rests upon genuine conditions of urgency, merit and dispatch.....”



13. It is noteworthy that the Court of Appeal becomes seized of a matter after a Notice of Appeal has been filed under the Rules of that Court; see *Halai & Another v Thornton & Turpin (1963) Ltd* (1990) eKLR.
14. In the present matter, the record of appeal has been filed in the Court of Appeal at Kisumu. Taking into account that this matter is before the Court of Appeal, it would not be right for the matter to be heard simultaneously by that Court and this court; see also *Judicial Commission of Inquiry into Goldenberg Affair & 3 others v Kilach* (2003) KLR at 249 at 265/266.
15. Clearly, the Court of Appeal is seized of the jurisdiction of the matter.
16. Thus, this court is devoid of jurisdiction in respect of the instant application.
17. Wherefore, I proceed to strike out the application dated 13th March 2023.
18. Costs of the application to abide the outcome of Kisumu COACA No. E059 of 2023.
19. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 28TH DAY OF NOVEMBER 2023

G.M.A ONGONDO

JUDGE

Present;

- a. Ms Omondi learned counsel for the applicant
- b. Ms Otieno learned counsel for the respondent
- c. Luanga and Mutiva, court assistants

