



**Okwach (Suing as the Administrator of the Estate of George Okwach Aboge,
Deceased) v Othiwo & another (Environment and Land Case Civil Suit
522 of 2015) [2023] KEELC 21658 (KLR) (22 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21658 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 522 OF 2015
SO OKONG'O, J
NOVEMBER 22, 2023**

BETWEEN

**PHELGONA AKINYI OKWACH (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF GEORGE OKWACH ABOGE, DECEASED) PLAINTIFF**

AND

MAURICE OURU OTHIWO ALIAS OWAK OTHIWO 1ST DEFENDANT

JOHN ODIYO ADERO 2ND DEFENDANT

RULING

1. What is before the court is the Defendants' application brought by way of a Notice of Motion dated 17th November 2022 seeking a stay of execution of the judgment of this court delivered on 7th October 2022 and the subsequent decree issued on 14th November 2022. The application is brought on the grounds that the Defendants are dissatisfied with the judgment of the court and have filed a Notice of Appeal against the judgment. The Defendants have averred that in the said judgment, the Defendants have been ordered to vacate and hand over possession of all that parcel of land known as Title No. East Kisumu/Dago/250 (the suit property) to the Plaintiff within 90 days from the date of the judgment failure to which the Defendants would be forcefully evicted and the 2nd Defendant's home on the property demolished. The Defendants have averred that the 2nd Defendant has a legitimate claim over the suit property having purchased the same from the 1st Defendant. The Defendants have averred that if the 2nd Defendant is evicted from the suit property, he will be rendered homeless and the Defendants' appeal would be rendered nugatory. The Defendants have averred that they have an arguable appeal with good chances of success. The Defendants have annexed to their affidavit in support of the application among others, a copy of the judgment, a copy of the decree, a copy of the Notice of Appeal, a letter to the Deputy Registrar requesting for certified copies of the proceedings and judgment, and photographs of the 2nd Defendant's home on the suit property.



2. The application is opposed by the Plaintiff through a replying affidavit sworn on 19th January 2023. The Plaintiff has averred that the Defendants have not served upon the Plaintiff's advocates the Notice of Appeal and the letter requesting for certified copies of the proceedings and judgment. The Plaintiff has averred that the Notice of Appeal was supposed to be served before filing or seven days after filing in court. The Plaintiff has averred that the Defendants have also not placed any evidence before the court showing that they have paid for the certified copies of the proceedings. The Plaintiff has averred that there appears to be no genuine attempt on the part of the Defendants to pursue the intended appeal. The Plaintiff has averred that from the evidence that was tendered by the parties at the trial, the Defendants have no legitimate claim over the suit property that should entitle them to the order of stay sought. The Plaintiff has averred that the Defendants are not deserving the grant of an order of stay. The Plaintiff has averred that in the event that the court is inclined to grant the stay sought, the Defendants should be ordered to deposit in an interest-earning bank account a sum of Kshs. 1,000,000/- as security.
3. The Defendants filed a supplementary affidavit sworn by the 2nd Defendant on 31st August 2023 in which the Defendants stated that they did not know if the Notice of Appeal and the letter requesting for proceedings were served upon the Plaintiff's advocates within time. The Defendants have stated that their advocates on record have served the said documents upon the Plaintiff's advocates. The Defendants have averred that the mistake of their previous advocates should not be visited upon them.
4. The Defendants' application was heard by way of written submissions. The Defendants filed their submissions dated 1st September 2023 while the Plaintiff filed her submissions dated 2nd June 2023. The Defendants have submitted that they have an arguable appeal against the judgment of this court and that they will suffer substantial loss if the stay sought is not granted. The Defendants have submitted further that they brought the present application without unreasonable delay and that they are willing to furnish any reasonable security that may be ordered by the court.
5. In her submissions, the Plaintiff has contended that there is no appeal on the basis of which a stay can be granted in that the Notice of Appeal filed by the Defendants was not filed and served in accordance with Rules 77 and 79 of the Court of Appeal Rules, 2022. The Plaintiff has submitted that although the Notice of Appeal was filed within time, the same was not served within 7 days as prescribed by the rules of the Court of Appeal. The Plaintiff has submitted that the Defendants have not filed an application for an extension of time to serve a Notice of Appeal out of time. The Plaintiff has submitted that failure to serve a Notice of Appeal within time or at all was in contravention of Order 42 Rule 6 (4) of the *Civil Procedure Rules* which provides that the Notice of Appeal must be given in accordance with the rules. The Plaintiff has submitted that without a Notice of Appeal that has been filed and served in accordance with the rules, there is no appeal on which an application for stay can be based.
6. The Plaintiff has submitted further that the Defendants have not established sufficient cause to warrant the grant of the orders sought. The Plaintiff has submitted that there must exist a good reason why a decree-holder should be deprived from enjoying the fruits of his judgment none of which has been shown in this case. The Plaintiff has submitted that the Defendants' intended appeal has no chance of success the Defendants having acquired the suit property from a person who was not registered as the owner of the property.
7. On the issue of security, the Plaintiff has submitted that the Defendants have not offered any security for the due performance of the decree. The Defendants have submitted that if the court is inclined to grant the stay sought, the Defendants should be ordered to deposit in court a sum of Kshs. 1,000,000/- as security. The Plaintiff has submitted that her costs alone has been assessed by the taxing officer at Kshs. 280,149.60/-.



8. In conclusion, the Plaintiff has submitted that no good reason has been given to warrant the grant of the order sought. The Plaintiff has submitted that the application is being used by the Defendants to buy time and postpone the day of reckoning. The Plaintiff has urged the court to dismiss the application.

Analysis and determination

9. I have considered the application together with the affidavits filed in support thereof. I have also considered the replying affidavit filed by the Plaintiff/Respondent in opposition to the application. Finally, I have considered the submissions by the advocates for the parties.
10. The Appellants' application was brought principally under Order 42 Rule 6 of the *Civil Procedure Rules*. Order 42 Rule 6(2) of the *Civil Procedure Rules* provides that:
- (2) No order for stay of execution shall be made under sub-rule (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 ultimately be binding on him has been given by the applicant.”
11. In *Kenya Shell Limited v Karuga* [1982 – 1988] I KAR 1018 the court stated that:
- “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.”
12. I am persuaded that the Defendants would suffer substantial loss if the stay sought is not granted. It is not disputed that the 2nd Defendant has his home on the suit property where he is residing with members of his family. In the judgment of this court delivered on 7th October 2022, the Defendants were ordered to vacate and hand over possession of the suit property to the Plaintiff within 90 days from the date of the judgment (now past) in default of which they were to be forcefully evicted and their structures on the suit property demolished. This means that if the stay sought is not granted, the 2nd Defendant risks being rendered homeless. Apart from the consequences resulting from forceful eviction, there is also a likelihood of the Plaintiff disposing of the suit property once it is vacant. In such an event, the chances of the suit property being completely put beyond the reach of the Defendants if the stay sought is not granted is real. Due to the foregoing, I am in agreement with the Defendants that the loss the 2nd Defendant is likely to suffer if the stay is not granted would be irreparable. On the issue of delay, I am satisfied that the application was brought without unreasonable delay. With regard to the issue of security, the Defendants have stated that they are willing to abide by any reasonable order on security that the court may make as a condition for granting the stay sought.
13. The Defendants have sought a stay of execution pending the hearing and determination of the Appeal. The Plaintiff has contended that there is no competent appeal filed by the Defendants and as such,



the Defendants' application is hinged on a vacuum. Order 42 Rule 6 (4) of the Civil Procedure Rules provides that:

For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”

14. The Court of Appeal Rules dealing with the filing and service of a Notice of Appeal are, Rules 77 and 79 which provide as follows:

77.

- (1) A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.
- (2) Each notice under sub-rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against which the appeal is lodged.
- (3) Each notice of appeal under sub-rule (1) shall state whether it is intended to appeal against the whole or part only of the decision and, where it is intended to appeal against a part only of the decision, shall—
 - (a) specify the part complained of;
 - (b) the address for service of the appellant; and
 - (c) the names and addresses of the persons intended to be served with copies of the notice.
- (4)
- (5)
- (6) A notice of appeal shall be substantially in Form D as set out in the First Schedule and signed by or on behalf of the appellant.”

79.

- (1) An intended appellant shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal:

“Provided that the Court may, on application which may be made ex parte, within seven days after the lodging of the notice of appeal, direct that service need not be effected on any person who did not take part in the proceedings in the superior court.”

15. The Plaintiff has contended that although the Defendants filed a Notice of Appeal within the time provided in the Court of Appeal Rules, the same was not served within the time fixed by the said rules. According to the Plaintiff, failure to serve a Notice of Appeal within the prescribed time renders the appeal defective and incompetent. The Plaintiff argued that a defective appeal cannot support an application for a stay of execution. I have anxiously considered the submissions by the Plaintiff on this issue. Although the Defendants filed their submissions after the Plaintiff, the Defendants did not respond to this issue. My view on the matter is this; what I am required to ascertain on an application for stay is whether a Notice of Appeal has been given in accordance with the *Court of Appeal Rules*. I am in agreement with the Plaintiff that giving a notice of appeal entails filing and serving that notice. There is no dispute that the Defendants filed a Notice of Appeal and that the filing was done within



the time provided in Rule 77 (1) of the [Court of Appeal Rules, 2022](#). What is disputed is whether the said notice was served within the time provided in Rule 79(1) of the [Court of Appeal Rules, 2022](#). In his supplementary affidavit, the 2nd Defendant stated that he did not know if their previous advocates who filed the Notice of Appeal served the same upon the Plaintiff's advocates. The 2nd Defendant stated that the Defendants' current advocates had taken the initiative of serving the Notice of Appeal upon the Plaintiff's advocates. It appears from the foregoing that the Defendants served the Notice of Appeal outside the time provided for service under Rule 79(1) of the [Court of Appeal Rules](#). I am in agreement with the Plaintiff that a Notice of Appeal served contrary to Rule 79(1) of the [Court of Appeal Rules](#) is not in compliance with the requirements of Order 42 Rule 6 (4) of the [Civil Procedure Rules](#). Such a Notice of Appeal cannot therefore be deemed as an appeal under Order 42 Rule 6 (4) of the [Civil Procedure Rules](#). It follows that the Defendants did not file an appeal which could form a basis for the stay application. The application was therefore based on a vacuum.

Conclusion

16. Although the Defendants have made a case for the grant of an order of stay of execution, the stay sought cannot be granted in the absence of a competent appeal. The upshot of the foregoing is that the Defendants' Notice of Motion application dated 17th November 2022 has no basis. The application is struck out with costs to the Plaintiff.

DELIVERED AND DATED AT KISUMU ON THIS 22ND DAY OF NOVEMBER 2023

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Ragot for the Plaintiff

Mr. Sala for the Defendants

Ms. J.Omondi-Court Assistant

