



Etaru v Ikolong; Omuse (Suing as Legal Rep. of the Estate of Lazaro Omuse - (Deceased) (Interested Party) (Environment & Land Case 43 of 2015) [2023] KEELC 21631 (KLR) (21 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21631 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 43 OF 2015
BN OLAO, J
NOVEMBER 21, 2023**

BETWEEN

WENCESLAS OGEMA ETARU PLAINTIFF

AND

JULIANA TATA IKOLONG DEFENDANT

AND

VERONICA TATA OMUSE (SUING AS LEGAL REP. OF THE ESTATE OF LAZARO OMUSE - (DECEASED) INTERESTED PARTY

RULING

1. Wenceslas Ogema Etaru (the Plaintiff) filed this suit seeking the eviction of Juliana Tata Ikolong (the Defendant – now deceased) from the land parcel No Teso/Apokor/1215 (the suit land) as well as an injunction to restrain her from re-entering. The case was heard by Kaniaru J who delivered a judgment in favour of the Plaintiff on 27th June 2019.
2. Veronica Tata Omuse (the Interested Party) who is the legal representative of the Estate of Lazaro Omuse (the deceased), has now approached this Court vide her Notice of Motion dated 1st July 2023. By that Motion, she seeks the following orders:
 1. Spent
 2. Leave be and is hereby granted to the Interested Party to join this suit and prosecute her application.
 3. Spent.



4. That this Honourable Court be pleased to review in judgment dated 27th June 2019 and order a re-hearing of the case.
5. That the costs and incidental to this application be provided for.
3. The application is premised vide Articles 19(2), 21(3), 22(1), 28, 40, 43, 47, 50(1), 57, 60(f) and 159 of the Constitution, Sections 13(2)(e), 13(3), (7), 18(a)(ii) (d) and 19 of the Environment and Land Court Act, Section 80 of the Civil Procedure Act, Order 45 Rule 1 and 2, Order 51 of the Civil Procedure Rules.
4. The application is based on the grounds set out therein and is also supported by the Interested party's affidavit.
5. The gist of the application is that the Interested Party was not aware about the proceedings herein and is aggrieved by the judgment. That there is a mistake and error apparent on the face of the record and that the Interested Party's right to be heard was curtailed by the counsel then on record. That the Interested Party is at the verge of losing her home. It is the Interested Party's case that the Court was misled into delivering the judgment herein and it has the requisite jurisdiction to grant the orders sought. She adds that if the execution proceeds, she will suffer substantial loss.
6. The Interested Party has narrated in her supporting affidavit that she was surprised to see persons at her home on 8th December 2021 trying to execute the eviction orders. It was then that she came to Court and was advised to see and talk to the judge. She then met Counsel Mr Omeri who volunteered to assist her on pro-bono basis but meanwhile, the file could not be traced. It was not until 10th July 2023 that the file was traced and she discovered that the judgment had been delivered on 27th June 2019. Upon perusal of the file, she discovered that only her mother had testified on behalf of the defence and which is an error. That the other witnesses were not given an opportunity to speak. The counsel was to blame and the Interested Party is now in danger of losing her home yet, as an old woman, she is entitled to live in dignity. That the counsel was in a hurry in this case as even the Court on 30th January 2017, 25th April 2017, 16th May 2017 and 2018 had expressed its concerns that counsel was not serious and seemed not interested in prosecuting the case. This mistake of counsel should not be used to close the doors of justice to parties. The respondent will not suffer any prejudice if this case is re-opened.
7. Annexed to the application are the following documents:
 1. Copy of Limited Grant of Letters of Administration issued to the Interested Party for purposes of this suit.
 2. Copy of the judgment delivered on 26th June 2019.
 3. Copy of the Decree.
 4. Copy of eviction order.
 5. Defendant's list of documents.
 6. Proceedings.
8. The application is opposed and the Plaintiff has filed a replying affidavit dated 28th August 2023 in which he has averred, inter alia, that the judgment herein was delivered on 27th June 2019 and this application was filed on 1st July 2023 a delay of over 4 years which is inordinate and has not been explained. Further, that there is no new and important matter or evidence nor any mistake on the record to warrant a review of the judgment herein.



9. That the applicant filed Busia ELC Case No 52 of 2021 which was determined via a ruling delivered on 19th December 2022 and that ruling has never been challenged. There was also a decision made in Busia High Court Succession Cause No 447 of 2011 and the grant issued therein was revoked. That revocation was also not challenged. The Plaintiff then filed Busia High Court Succession Cause No 175 of 2020 in which the Interested Party's application for revocation of grant was dismissed on 2nd November 2022. When the Interested party tried to bury the remains of the Defendant, now deceased, on the suit land, the dispute was determined via a consent order dated 20th March 2019.
10. Therefore, there have been previous cases over the suit land and the Interested Party has not shown what identifiable stake or legal interest she has in these proceedings and the issues which she is now canvassing were raised by the deceased Defendant and were conclusively determined.
11. This application is an abuse of the process of this Court and should be dismissed with costs.
12. This Court directed that the application be canvassed by way of written submissions. However, only Mr Fwaya counsel for the respondent filed his submissions on 11th October 2023.
13. I have considered the application, the rival affidavits and the submissions by counsel for the Plaintiff.
14. Prayer No 2 is hereby allowed.
15. With regard to the prayer for stay, the Interested Party/Applicant has not indicated whether the order for stay of execution is to be issued pending the hearing and determination of an intended appeal. However, considering that the deceased filed a Notice of Appeal on 16th July 2019, I will take it that the order for stay is sought pending the hearing and determination of the intended appeal. That remedy is governed by the provisions of Order 42 Rule 6(1) and (2) which 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.”

From the above, it is clear that a party seeking an order for stay of execution 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.
16. The above were re-stated by the Court of Appeal in the case of *Visbram Ravji Halai v Thornton & Turpin (1963) LTD* [1990] KLR 365 where it said:

“Thus the Superior Court’s discretion to order a stay of execution of it’s order or decree 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 deceased Defendant did file a Notice of Appeal on the 16th July 2019 so that is sufficient cause.

17. The Interested Party has deposed that she is sickly and elderly aged over 70 years and is on the verge of losing her home. I consider that to be substantial loss.
18. However, the Interested Party has not offered any security for the due performance of any decree or order that may ultimately be binding on her.
19. Finally on the requirement for filing the application without unreasonable delay, the judgment by Kaniaru J was delivered on 27th July 2019 some 4 years before this application was filed. The Interested Party has averred in paragraph 3 of her supporting affidavit that she became aware about this judgment on 8th December 2021 when people went to her home with the intention of evicting her. She then came to Court and that was when she became aware about this judgment. She started looking around for help and, luckily, met Mr Omeri Advocate who agreed to take up her case on pro bono basis. Mr Omeri must be applauded for that very kind gesture. Counsel however asked her to look for the file which was eventually found on 10th July 2023. However, what she has deposed in paragraph 8 and 9 of her supporting affidavit has left me deeply horrified and startled. It is also a great shame. She says therein that:

“8: I was not able to trace the file and all my attempts failed (*sic*) futile.

9: That I went back and cried to OmerI asking him just to file something that will quickly be presented to the judge for me his name (*sic*) as I had been advised elsewhere that when a person is acting in person, the file takes long to be acted upon or to be taken to the judge’s chambers. I was told that if you get lucky and the file is taken in some chambers, it may come out after three to four days which may find when your property has been taken.”

20. I would like to believe that whoever was giving the Interested Party such advice is not a member of staff in this Court. I will certainly share the contents of this affidavit when I meet with my registry staff



later this week. I will also be hoping that the Interested Party attends our open-day scheduled for 23rd November 2023. I will be keen to hear more details on this very sad episode and assuage her and other litigants that no Court in this country, as far as I am aware, gives preference to parties represented by counsel. I can only inform the Interested Party that whoever was advising her had no good intentions.

21. It is clear however that this file was subsequently retrieved on 10th July 2023 and this application was filed on 2nd August 2023. Taking everything into consideration, I am satisfied that the application was filed without unreasonable delay.
22. I allow prayer No 2 taking into account that notwithstanding the fact that the Plaintiff has a decree in his favour dating back to 2019 allowing him to evict the deceased Defendant and her family which include the Interested Party, no such eviction has taken place to-date. No doubt the Plaintiff is sympathetic and appear not to be prejudiced with that state of affairs which is not surprising considering that in the impugned judgment, Kaniaru J while considering the issue of costs observed that:

“On the issue of costs, I hold that this is a delicate family matter. Each side should bear its own costs.”
23. Finally, on the prayer for review of the judgment delivered on 27th June 2019, Order 45 Rule 1(1) of the Civil Procedure Rules provide that:

“Any person considering himself aggrieved –

 - (a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not without his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error different on the face of the record, or for any other sufficient reasons, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.” Emphasis mine.
24. No doubt the Interested Party approached this Court without unreasonable delay considering that she filed this application some 20 days after she found this file. However, as there is a Notice of Appeal filed on 16th July 2019 manifesting an intention to appeal the judgment herein, the remedy of review is not available to the Interested Party.
25. Secondly, and as is clear from her supporting affidavit, the Interested Party is basically challenging the judgment of Kaniaru J in this review application. For instance, she avers that the case was not determined on the merits, that the deceased’s witnesses did not testify, that the Court was misled into arriving at the judgment, that the advocate was in a hurry to finish the case etc. These issues can be canvassed in the appeal. They are not issues which this Court, exercising its review jurisdiction, can grant.
26. The up-shot of all the above is that having considered the Notice of Motion dated 1st July 2023 and filed herein on 2nd August 2023, I make the following disposal orders:
 1. Prayer No 2 is allowed.



2. Prayer No 3 is allowed for stay of execution pending appeal.
3. Prayer No 4 is declined.
4. From the judgment delivered on 26th June 2019, it is clear that the parties are a family. Each shall therefore bear their own costs.

BOAZ N. OLAO

JUDGE

21ST NOVEMBER 2023

RULING DATED, SIGNED AND DELIVERED ON THIS 21ST DAY OF NOVEMBER 2023 IN OPEN COURT.

Interested Party/Applicant present.

Mr. Fwaya for the Respondent - Absent

