



REPUBLIC OF KENYA



**Kobe & 2 others v Osewe (Environment and Land Appeal 19 of 2023)  
[2023] KEELC 21695 (KLR) (21 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21695 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL 19 OF 2023  
GMA ONGONDO, J  
NOVEMBER 21, 2023**

**BETWEEN**

**MOSE KOBE ..... 1<sup>ST</sup> APPELLANT  
JANE AKUKU ..... 2<sup>ND</sup> APPELLANT  
PAUL ODIRA ..... 3<sup>RD</sup> APPELLANT**

**AND**

**JOHN OCHIENG OSEWE ..... RESPONDENT**

**RULING**

1. On 17<sup>th</sup> May 2023, the three appellants/applicants through Omuthe and Company Advocates mounted an application by way of a Notice of Motion dated 16<sup>th</sup> May 2023 seeking the orders infra;
  - a. Moot
  - b. Moot
  - c. The Honourable Court be pleased to grant an Order of Stay of Execution of the Decree in respect of Oyugis PMC MCELIC No. 77 of 2021, together with all consequential orders arising there from, pending the Hearing and determination of the Appeal already lodged by the Appellants/Applicants herein, to wit Civil Appeal No. 19 of 2023.
  - d. An order of Temporary injunction be granted against the Respondent herein, either by himself, agents, servants and/or employees from trespassing onto, interfering and/or dealing with LR No. Central Kasipul /Sino/393 (The suit land), Pending the hearing and determination of Civil Appeal No. 19 of 2023.
  - e. Costs of the Application do abide the outcome of the Appeal already lodged.
  - f. Such further and/or other orders be made as the court may deem fit and expedient.



2. The basis of the application is the 1<sup>st</sup> applicant's 12-paragraphed supporting affidavit of even date alongside grounds (a) to (i) set out on the face of it. Briefly, the applicants asserted that the trial court entered judgment against the respondent on 30<sup>th</sup> March 2023 and secured an eviction order dated 10<sup>th</sup> May 2023 marked as "MJP 1" annexed to the supporting affidavit against the applicants. That they have filed the instant appeal which raises salient and pertinent issues of law hence, it may be rendered nugatory if the respondent executes the order herein.
3. The respondent who appears in person, opposed the application.
4. Hearing of the application was by way of written submissions pursuant to the directions of this court given on 24<sup>th</sup> May 2023.
5. So, by the submissions dated 12<sup>th</sup> June 2023, learned counsel for the applicants made reference to the trial court's judgment rendered on 30<sup>th</sup> March 2023 in favour of the respondent, this appeal lodged by way of a memorandum of appeal dated 12<sup>th</sup> April 2023 and that the appeal has strong and arguable grounds with a likelihood of success. That the respondent has obtained an eviction order against the applicants and if execution proceeds, the appeal will be rendered nugatory. Counsel relied on Order 42 Rule 6 of the *Civil Procedure Rules*, 2010, *Butt-vs-Rent Restriction Tribunal* (1982) KLR and *E.Muiru Kamau & another-vs-National Bank of Kenya Ltd* (2009) eKLR, among other authorities, to reinforce the submissions.
6. The respondent's submissions dated 11<sup>th</sup> October 2023 relates to the appeal in lieu of this application. He submitted that the suit land belongs to him and urged the court to dismiss the appeal.
7. In the foregone, the duty of this court is to determine whether the applicants have established that they are entitled to the orders sought in the application.
8. Order 42 Rule 6 (supra) provides for the triple conditions for stay sought in the application and these are;
  - a. There is a likelihood of substantial loss on the applicant,
  - b. That the application has been brought without delay and
  - c. Security for the due performance of decree in this case.
9. As pertains to the first condition, the applicants lamented that they are likely to suffer irreparably as the respondent is set to repossess the suit land which is their livelihood upon execution of the decree and eviction order herein. Therefore, this appeal is likely to be rendered nugatory and those are the special circumstances in this application as noted in Butt case (supra).
10. As regards delay, Order 50 of the *Civil Procedure Rules*, 2010 provides for time. The decree or order in the trial court was given on 10<sup>th</sup> May 2023 and the instant application was commenced six days from that time. In the circumstances, the delay thereof is not inordinate.
11. On security, the applicants stated at paragraph 9 of the supporting affidavit that they are ready and willing to offer such security, if any as this court may deem fit and expedient. However, this requirement is within the discretion of the court; see *Halai & Another-vs-Thornton & Turpin (1963) Ltd* (1990) eKLR.
12. It is noteworthy that in the case of Butt (supra), the Court of Appeal observed;

“.....The appellant has an undoubted right of appeal.....”



13. This court is conscious of its inherent and special jurisdiction of this court under sections 3 and 3A of the *Civil Procedure Act* Chapter 21 Laws of Kenya as read with sections 3 and 13 (7) (a) of the *Environment and Land Court Act*, 2015 (2011) to grant orders of stay of execution to safeguard the character and integrity of the subject matter of appeal, pending the resolution of the contested issues; see *Board of Governors Moi High School Kabarak and another-vs-Malcolm Bell* (2013) eKLR.
14. Order 40 of the *Civil Procedure Rules*, 2010 governs temporary injunction sought in the application. This court is guided by *Giella-vs-Cassman Brown & Co. Ltd* (1973) EA 358 concerning the triple requirements in an interlocutory application. Further, I take into account that the very foundation of the jurisdiction to issue orders of injunction vests in, inter alia, the probability of irreparable injury as noted in *Nguruman Ltd...vs-Jean Bonde Nielsen & 2 others* (2014) eKLR.
15. In *Hutchings Biemer Ltd-vs-Barclays Bank of kenya Ltd & 2 others* (2006) KLR, the Court of Appeal held;

“ .....injunctive orders are meant to preserve the suit property and maintain the status quo.....”
16. It is the finding of this court that the applicants have established that they are bound to suffer substantial loss as the respondent has obtained the order or decree and they are set to execute the same further to the trial court’s judgment delivered on 30<sup>th</sup> March 2023 thus, may render this appeal nugatory. On that score, the instant application is meritorious.
17. In the result, the application dated 16<sup>th</sup> May 2023, be and is hereby allowed in terms of the stay of execution, temporary injunction and costs to abide the outcome of this appeal sought therein and as stated in paragraph 1 (c) (d) and (e) hereinabove.
18. Orders accordingly.

**DATED AND DELIVERED AT HOMA BAY THIS 21<sup>ST</sup> DAY OF NOVEMBER 2023.**

**G.M. A ONG’ONDO**

**JUDGE**

Present;

- 1) Mr. Omuthe learned counsel for the applicants’/respondent in person.
- 2) Luanga and Mutiva, court assistants.

