



**Ado v Ogodo (Environment and Land Appeal E002 of 2023)
[2023] KEELC 22436 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22436 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E002 OF 2023
GMA ONGONDO, J
DECEMBER 14, 2023**

BETWEEN

MOSES OTIENO ADO APPELLANT

AND

BENARD OCHIENG OGODO RESPONDENT

RULING

1. The appellant/applicant, Moses Otieno Ado through Quinter Adoyo and Company Advocates filed an application by way of a notice of motion dated 17th July 2023 pursuant to, *inter alia*, Articles 40, 48 and 50 of the [Constitution of Kenya](#), 2010 and Order 42 Rule 6 (4 and 6) of the [Civil Procedure Rules](#), 2010 seeking the orders infra;
 - a. Moot
 - b. Moot
 - c. That upon the hearing of this Application inter-partes, the Honourable Court be pleased to issue orders staying execution of the judgment of Honourable B.O Omwansa delivered on the 29th day of September, 2023 (I think the applicant meant 2022 in view of the instant context) together with the ensuring decree until such a time as ELC Appeal No. E002 of 2023 is heard and determined on merits.
 - d. That for the avoidance of doubt, upon hearing of the instant Application inter-partes, orders be made for the maintenance of the status quo obtaining before institution of Oyugis Senior Principal Magistrate’s Court Environment and land Case No. 46 of 2018.
 - e. Costs
2. The application is rooted in grounds 1 to 8 set out on the face of it and the applicant’s affidavit of ten paragraphs sworn on even date by the applicant. In a nutshell, the applicant’s concern is that the trial



court allowed the respondent who was the plaintiff in the original suit to prosecute the suit ex parte and it resulted in the trial court's ex parte judgment herein. Also, that his application to set aside the said judgment was dismissed by the trial court's ruling delivered on 28th June 2023. That he was never notified of entry of judgement until he was served with the certificate of costs in this matter hence, attracting the application.

3. The respondent through O.H Bunde and Company Advocates, opposed the application by way of his replying affidavit of nineteen paragraphs sworn on 7th August 2023 with the annexed copies of affidavits of service. The respondent deposed in part that the applicant has not given any sufficient reason or cause to warrant the orders sought in the application. That the court should dismiss the application with costs.
4. Also, the respondent averred that the applicant was duly served in the suit before the trial court but showed that he no longer wanted to pursue it. That it was the role of applicant and his counsel to proceed with the matter. That the therefore, the trial court dealt with the matter expeditiously.
5. The application was heard by way of written submissions in line with court's directions given on 2nd of October 2023; see Order 51 Rule 16 of the *Civil Procedure Rules*, 2010 and Practice Direction number 33 of the *Environment and Land Court Practice Directions*, 2014.
6. The applicant's counsel filed submissions dated 12th October 2023 referring to the provisions of the Constitution and the law under which the application was initiated. Briefly, counsel stated the background information including the grounds of the application which allegedly raise weighty issues for the court's determination in favour of the applicant. That the applicant was not given a proper opportunity to be heard in the suit and the application to set aside the ex parte judgment was brought timeously as the impugned ruling was delivered on 28th June 2023. Counsel relied on authorities inclusive of the case of *Republic-vs-Procurement Administrative Review Board & 2 others* (2018) eKLR and *RWW-vs-EKW* (2019) eKLR, to reinforce the submissions.
7. By the submissions dated 10th November 2023, learned counsel for the respondent made reference to the application, the background and details of the case. Counsel submitted that stay of execution of judgment is a free one and is intended to be exercised judiciously to avoid injustice or hardship and not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice. To reinforce the submissions, reliance was made to, *inter alia*, *Eco Bank Ltd-vs-Minolta Ltd & 2 others* (2018) eKLR, Order 12 Rule 2 of the *Civil Procedure Rules*, 2010, *Black's Law Dictionary*, Butter Worth's 9th Edition on the definition of the term "Status Quo" as well as the case of *Fatuma Abdi Jiilo-vs-Kuro Longesen & Another* (2021) eKLR and *RWW* case (supra). Furthermore, counsel termed the application devoid of merit and that the same be dismissed with costs to the respondent.
8. I have considered the application, the replying affidavit and the rival submissions in entirety. On that account, is the applicant entitled to stay of execution and status quo orders alongside costs sought in the application?
9. Stay of execution is founded upon Order 42 Rule 6 (supra) which provides for triple conditions; substantial loss likely to be suffered by the applicant, the application has been initiated without unreasonable delay and the satisfaction of the court that security has been offered for the due performance of such decree or order. On that score, the applicant asserted that execution of the decree in question may cause him irreparable harm and that the application was brought without delay as the impugned ruling was rendered on 28th of June 2023. So, I note the said special circumstances of the case and the court's jurisdiction and inherent power to grant the orders sought in the application; see



New Stanley Hotel Ltd-vs-Arcade Tobacconist (1980) KLR 757, Butt case (infra), *Halai & another-vs-Thornton & Turpin (1963) Ltd* (1990) eKLR.

10. Moreover, I subscribe to the decision in *Garama-vs-Karisa & 3 others* (2023) eKLR where the Supreme Court of the Republic of Kenya emphasized that before the grant of an order for stay of execution, the applicant must satisfy the court that;
 - a. the appeal or intended appeal was arguable or not frivolous; unless the order of stay was granted,
 - b. the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory and
 - c. the same was in the public interest.
11. It is borne in mind that the applicant duly lodged the instant appeal by way of a memorandum of appeal dated 13th July 2023 based on ten grounds. The same is arguable as it contains triable issues including the right to be heard, illegality and fraud raised in the applicant's pleading.
12. Notably, Articles 48 and 50 (1) of the *Constitution of Kenya*, 2010 anchor access to justice and unlimited right to fair hearing/trial. Therefore, the applicant is entitled the said rights herein.
13. Similarly, in the case of *Butt-vs-Rent Restriction Tribunal* (1979) eKLR, the Court of Appeal reasoned;

“.....and the appellants has an undoubted right of appeal.....”
14. Additionally, this court is conscious of the meaning of “Status Quo” as per *Black's Law Dictionary* (supra) and the mandate of the court under Section 13 (7) (a) of the *Environment and Land Court Act*, 2015 (2011) to grant interim preservation orders. As such, the subject matter of this appeal cries for its preservation, in the interim, pending the resolution of the contested issues; see also *Board of Governors Moi High School Kabarak and Another-vs-Malcolm Bell* (2013) eKLR and *Ogada-vs-Mollin* (2009) KLR 620
15. A fortiori, there is merit in the application and the same is hereby allowed it terms of stay of execution as pointed out in paragraph 1 (c) hereinabove. For clarity, the status quo obtaining before delivery of the trial court's judgment be maintained pending the hearing and determination of the present appeal on merits
16. Costs of the application to be costs in this appeal.
17. It is so ordered

DATED AND DELIVERED AT HOMA BAY THIS 14TH DAY OF DECEMBER 2023

G. M. A. ONGONDO

JUDGE

PRESENT;

- a. S. Akinyi instructed by Quinter Adoyo learned counsel for the applicant/appellant
- b. Kachuodho, court assistant

