



**County Government of Homabay v Liech (Land Case Appeal
45 of 2021) [2023] KEELC 22260 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22260 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
LAND CASE APPEAL 45 OF 2021
GMA ONGONDO, J
DECEMBER 14, 2023**

BETWEEN

COUNTY GOVERNMENT OF HOMABAY APPELLANT

AND

DR. OKELLO ROBERT LIECH RESPONDENT

RULING

1. The appellant/applicant, County Government of Homa Bay through Aluoch Odera & Nyauke Advocates mounted a notice of motion dated August 28, 2023 pursuant to, *inter alia*, order 42 Rule 6 of the [Civil Procedure Rules, 2010](#) (The application herein) seeking the following orders;
 - a. The honourable court be pleased to issue an order of stay of execution of the decree pending hearing and final determination of the appeal filed in the Court of Appeal in Kisumu.
 - b. The costs of this application be provided for.
 - c. Such further and/or other orders be made as the Court may deem fit and expedient.
2. The application is based on grounds I to VIII set out on the face of it alongside a 10-paragraphed supporting affidavit sworn on even date by George Illah, the applicant's legal secretary and the accompanying two receipts marked as "G1-01" and a demand letter by the respondent's counsel, M/ S G.S Okoth and Company advocates marked as "G1-02" both annexed to the affidavit. Briefly, the applicant alleged that being dissatisfied with this court's judgment delivered on December 7, 2022, the applicant preferred civil appeal No. E046 of 2023 in the Court of Appeal at Kisumu. That the respondent is in the process of execution of the decree and the applicant may suffer substantial loss thereby. That the appeal has high chances of success and that he is willing to pay security herein.
3. The respondent through the firm of G.S Okoth and Company Advocates opposed the application by grounds of opposition dated September 12, 2023 thus;



- a. The applicant is guilty of Laches and being so indolent, he is not entitled to benefit from an equitable relief such as stay of execution.
 - b. No evidence has been adduced to justify the grant of equitable relief of stay of execution.
 - c. There is an application filed in the Court of Appeal by the respondent to strike out the notice of appeal and subsequent record of appeal.
4. Hearing of the application was by way of written submissions pursuant to the court's directions given on 17th October 2023 in line with order 51 rule 16 of the [Civil Procedure Rules, 2010](#) and Practice Direction number 33 of the Environment and Land Court Practice Directions, 2014.
 5. The applicant's counsel filed submissions dated October 18, 2023 relying on order 42 rule 6 (2) (*supra*) and delineated two issues for determination namely whether the applicant has established likelihood of substantial loss and entitlement to the orders sought in the application. In analyzing the issues, counsel submitted that this case involves money decree and since the respondent is elderly with no source of income, there is no guarantee of recovery of the decretal amount from him. That the applicant undertakes to pay security with the court or any joint bank account. That the application is made in good faith and for the interest of both parties thus, meritorious.
 6. By the submissions dated November 16, 2023, learned counsel for the respondent made reference to the application, the grounds of opposition and implored the court to dismiss the application. That this court is *functus officio* as defined in [Black's Law Dictionary](#) 10th Edition. That the proper forum to ventilate the issues in the application is the Court of Appeal. That thus, this court must down it's tools in the instant application. To buttress the submissions, counsel relied on this court's decision in the case of *Raphael Obudho Mamba and another v John Kamau kariuki and another* Homa Bay ELCC No 43 of 2021 (OS) as well as the case of [Dickson Muricho Muriuki v Timothy Kagonda Muriuki & 6 others](#) Civil Application No 21 of 2013 (UR).
 7. I have anxiously considered the application, the response thereto and the submissions of the respective parties in entirety. So, is the applicant deserving of the orders sought in the application?
 8. It is noteworthy that stay of execution under order 42 rule 6 (*supra*) is premised upon triple requirements;
 - a. That substantial loss that may occasion on the applicant unless the stay order sought is not granted.
 - b. The application is made without any reasonable delay.
 - c. Such security as the court orders for the due performance of such decree or order.
 9. It must be borne in mind that the court has the discretion to grant a stay where special circumstances of the case so require; see also [Butt v Rent Restriction Tribunal](#) (1979) eKLR, among other authoritative pronouncements.
 10. The applicant has deposited a total sum of Kshs. 6,000/= being security for costs at the Court of Appeal in COACA No. E046 of 2023 as captured in a receipt (G1-01) annexed to the affidavit in support of the application.



11. In *Black's Law Dictionary* 10th Edition at page 1562, the term "Security for costs" means;
"Money, property or a bond given to a court by a plaintiff or an appellant to secure the payment of court costs if that party loses."
12. It is therefore, crystal clear that the instant matter rests exclusively within the jurisdiction of the Court of Appeal. As such, this court has no power to take one more step and I have to down the tools in this matter; see *Owners of Motor Vessel Lillian "S" v Caltex Oil (Kenya) Ltd* (1989) KLR 1, *Raphael Mamba case (supra)* and *Republic v Karisa Chengo & 2 others* (2017) eKLR.
13. To that end, this court is devoid of jurisdiction in respect of the application dated August 28, 2022 and the same, be and is hereby struck out.
14. Costs of the application to abide the outcome of the appeal namely Civil Appeal No E046 of 2023 in the Court of Appeal at Kisumu.
15. It is so ordered.

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

G. M. A. ONGONDO

JUDGE

PRESENT;

- a. Ms Otieno instructed by Aluoch Odero learned counsel for the Applicant
- b. Ms P.Odhiambo instructed by G.S Okoth learned counsel for the Respondent
- c. Kachuodho, court assistant

