



REPUBLIC OF KENYA



KENYA LAW
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**Jectons & 3 others v Bugo (Environment and Land Appeal
E010 of 2021) [2022] KEELC 3608 (KLR) (23 February 2022) (Ruling)**

Neutral citation: [2022] KEELC 3608 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E010 OF 2021
GMA ONGONDO, J
FEBRUARY 23, 2022**

BETWEEN

**JANE OMOLO JECTONS ALIAS JENNIFER ODOYO OLANDO 1ST
APPLICANT**

MAURICE ODOYO 2ND APPLICANT

WYCLIFFE ODOYO 3RD APPLICANT

HASSAN ODOYO 4TH APPLICANT

AND

NIXON OTIENO BUGO RESPONDENT

RULING

1. By a notice of motion dated October 28, 2021 and filed in court on November 4, 2021 under order 51 rule 1, order 42 rule 6 of the *Civil Procedure Rules*, 2010 and sections 1A, 1B, 3A of the *Civil Procedure Act* Chapter 21 Laws of Kenya (the application herein), the four (4) applicants through the firm of H. Obach and Partners Advocates, are seeking the following orders;
 - a. Spent
 - b. That this Honourable court be pleased to grant an order for stay of execution of the judgment of the Principal Magistrate's court of Kenya at Ndhiwa which was delivered on the September 28, 2021 in the matter herein pending the hearing and determination of the appeal.
 - c. That the costs of this application be provided for.
2. The application is grounded upon the 1st applicant's supporting affidavit of even date and paragraphs 1 to 11 set out on the face of the application. Precisely and concisely, the applicants claim that they were aggrieved by the judgment of the trial court thus, filed this appeal by way of a memorandum of



appeal dated October 15, 2021 herein. That they have a prima facie case with high chances of success in the instant appeal. That the application has been made without unreasonable delay. That if the trial court's judgment is executed, then they stand to suffer great prejudice and the present appeal will be rendered nugatory hence provoking this application.

3. The respondent through the firm of Odongo, Okal and Company Advocates, opposed the entire application by way of his 36-paragraphed replying affidavit sworn on December 8, 2021 and duly filed in court on December 9, 2021. In support of the said affidavit are copies of documents including two title deeds in respect of the suit land, LR No. Ndhiwa/Kamdar/1115 and marked as "NOB/1 and "NOB/2" as well as decree issued on November 12, 2021 in Ndhiwa PMCCC No. 22 of 2020 marked as "NOB/3" and annexed thereto.
4. In the replying affidavit, the respondent deposed, inter alia, that the trial court delivered judgment in his favour and that he has not been served with any notice of appeal. That the applicants have failed the requisite test of securing stay of execution sought in the application and that the same is a quest to deny him enjoyment of the fruits of his judgment.
5. The application was heard by way of written submissions further to this Honourable court's orders and directions given on November 4, 2021. Accordingly, learned counsel for the applicants filed submissions dated December 6, 2021 while learned counsel for the respondent filed submissions dated January 18, 2022.
6. It was submitted by the applicants that the respondent initiated a suit before the trial court by way of a plaint dated July 27, 2020 seeking, inter alia, a permanent injunction and eviction orders against them. That the suit was fully heard and determined as per the impugned judgment by which the applicants were dissatisfied thus, filed this appeal by way of the memorandum of appeal. That the applicants have the right to be heard in the appeal and that conditions under order 42 rule 6 (2) (supra) have been satisfied in the application.
7. To buttress the submissions, counsel for the applicants cited persuasive decision in the case of Stephen Muna Mugo and 2 others-vs-Edward Njagi Mugo and another and James Ndegwa and another (interested parties) (2019) eKLR on the court's discretionary power to grant the orders sought in the application. Counsel further relied on the Court of Appeal decision in the case of Kenya Shell Limited-vs- Benjamin Karuga Kibiru and another (1986) eKLR on substantial loss being the cornerstone of both jurisdictions for granting stay.
8. The respondent's counsel submitted by providing the background information and context of the application including the suit before the trial court and the evidence presented at the said trial. Counsel identified four issues for determination, inter alia, whether the applicants will suffer substantial loss unless the orders sought in the application are granted and whether if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. In discussing the issues, counsel termed the application vexatious and intended to avoid a lawful decree which has been partially executed.
9. To reinforce the submissions, counsel cited the case of Paul Kamuru Kirunge-vs-John Peter Nganga (2019) eKLR on substantial loss, among other authorities. Counsel submitted that the applicants have failed to meet the conditions set out in order 42 rule 6 (2) (supra) and urged this court to dismiss the application with costs.
10. I have thoroughly considered the application, the replying affidavit and the rival submissions in their entirety. On that score, have the applicants satisfied the conditions under order 42 rule 6 (2) (supra) to entitle them to the orders sought in the application?



11. Regarding substantial loss, I take note of paragraphs 7 and 9 of the supporting affidavit and grounds (d) and (e) of the application as well as paragraph 34 of the replying affidavit. Taking into account the allegation of adverse possession over the suit land and the likely execution of the judgment, then the applicants are bound to suffer substantial loss if the principal order sought in the application is not granted.
12. As regards delay, the trial court rendered the judgment on September 28, 2021. The instant application was lodged in court on October 28, 2021. So, a period of thirty (30) days' delay to file this application is not unreasonable bearing in mind order 50 rules 1, 2 6 and 8 of the *Civil Procedure Rules*, 2010 and the circumstances of the matter.
13. On the issue of security, the respondent's contention at paragraph 34 of the replying affidavit, is borne in mind. I am also guided by the decision in *Doshi Iron Mongers Ltd-vs-Kenya Revenue Authority and another* 2020 KLR that no person inclusive of a statutory body is exempt from providing security for the due performance of a decree. Indeed, the nature of security is within the discretion of the court.
14. In addition, there are special circumstances as disclosed in paragraph 7 of the supporting affidavit and ground (d) of the application. The bottom line is the prevention of substantial loss as noted in Kamuru Kirunge and Kenya Shell Limited cases (supra)
15. Similarly, in the case of *Butt-vs-Rent Restriction Tribunal* (1979) eKLR, it was held, inter alia;

“...The special circumstances in this case are that there is a large amount of rent in dispute between the parties and the appellant has an undoubted right of appeal...”
16. Moreover, the applicants have the undoubted right to access justice and unlimited right to fair hearing in this appeal as stipulated under articles 48 50 (1) and 25 (c) of *the Constitution* of Kenya, 2010; see also Butt case (supra).
17. Notably, the applicants mounted this appeal by way of the memo of appeal on October 21, 2021. There are triable issues including fraud and adverse possession as discerned therein which should be heard and determined on merits as held by the Court of Appeal in the case of *John Odhiambo Roche-vs-Cyprian Laura Roche and another* (2021) eKLR.
18. Section 13 (7) (a) of the *Environment Land Court Act*, 2015 (2011) empowers this court to grant preservation orders. The principal order sought in the present application is envisaged thereunder.
19. Wherefore, the application dated October 28, 2021 and filed in court on November 4, 2021 is merited. The same is hereby allowed in terms of the stay of execution sought therein and as stated in paragraph 1(b) hereinabove. The applicants shall within twenty-one (21) days from this date, deposit a sum of Kshs. 50,000/= (Kenya shillings fifty Thousand only) in this court for the due performance of the judgment and decree in this matter failure of which the stay order to lapse without further orders.
20. Costs of the application to abide this appeal.
21. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 23RD FEBRUARY 2022

G.M.A ONG'ONDO

JUDGE

Present;



- a. Ms Nyarige holding brief for Otieno, learned counsel for the applicants
- b. Ms Opondo holding brief for Okal, learned counsel for the respondent
- c. Okello, court assistant

