



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Opanga & another v Ochieng & another (Environment and Land Appeal
E004 of 2022) [2022] KEELC 3358 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3358 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E004 OF 2022
GMA ONGONDO, J
MAY 31, 2022**

BETWEEN

FLORENCE ATIENO OPANGA 1ST APPELLANT

MORNICA ADHIAMBO AGAN 2ND APPELLANT

AND

SUSAN ANYANGO OCHIENG 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. In an application by way of a Notice of Motion dated 4th February 2022 and filed in court on 18th February 2022, the two appellants through the firm of G.S. Okoth and Company Advocates, are seeking the orders infra;
 - a. Spent
 - b. The Honourable court be pleased to issue an order that the status quo be maintained on the suit parcels of land in the first instance the presence of the respondents be dispensed with.
 - c. The Honourable court be pleased to extend the stipulated time for filing appeal and the Memorandum of Appeal out of time and the Memorandum of Appeal dated the 28th day of January 2022 be deemed to have been duly filed within time.
 - d. The costs of this application do abide the result of the intended appeal.
2. The application is anchored on a ten (10) paragraphed supporting affidavit sworn on 4th February 2022 by the 1st appellant (1st applicant) namely Florence Atieno Opanga duly instructed by the 2nd appellant/ applicant, Mornica Adhiambo Agan. Copies of documents marked as “FAO 1, FAO2 and FAO3” being the trial court’s judgment delivered on 1st December 2021, a letter dated 7th December 2021



- duly filed on 21st December 2021 by the applicants' counsel requesting for typed certified copies of proceedings and judgment of the trial court and a memorandum of appeal dated 28th January 2022 respectively, are attached to the affidavit. The application is further anchored on grounds 1 to 6 set out on the face of it. The grounds include; that the appeal is arguable and stands a good chance of success.
3. In a nutshell, the applicants' lamentation is that upon delivery of judgment against the applicants by the trial court, the applicants' counsel closed his office for annual holiday and could not obtain instructions, the trial court's proceedings and judgment in time to appeal from the decision. That this appeal as per the memorandum of appeal (FAO-3) herein, is arguable. That since both the applicants and the respondents have erected permanent structures on the land parcels in dispute, the applicants are likely to suffer irreparable loss, if the orders sought in the application are not allowed.
 4. The 1st respondent, Susan Anyango Ochieng through learned counsel, L.K Obwanda, opposed the application by her replying affidavit of thirteen paragraphs sworn on 1st April 2022 and filed in court on even date. She deposed, inter alia, that the application is fatally defective, lacks merit, an abuse of the court process, an afterthought and that the same be dismissed with costs. That the applicants have not shown sufficient cause for their failure to file the appeal within the required time. That the delay of eighty-nine (89) days thereof as shown in the letter dated 7th December 2021 (SAO-1, which is also FAO-2 annexed to the application) to the replying affidavit, is inordinate.
 5. The 1st respondent further deposed that the applicants failed to annex a copy of the decree or certificate of costs to the application as required by law. That the application is meant to deny the 1st respondent the fruits of her judgment and must fail as justice delayed is justice denied.
 6. On 2nd March 2022, this court ordered and directed that the application be heard by way of written submissions; 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.
 7. Learned counsel for the applicants filed submissions dated 8th April 2022 on 14th April 2022 and made reference to the orders sought in the application. Counsel urged the court to note that the respondent's counsel is not properly on record for failure to comply with Order 9 Rule 9 of the Civil Procedure Rules, 2010.
 8. Counsel relied on the Black's Law Dictionary 9th Edition at page 1542, Bakari Shaban Gakere-vs-Mwana Idd Guchu and 3 others (2022) eKLR as regards status quo. Counsel further cited Sections 65 (1) and 79G of the Civil Procedure Act Chapter 21 Laws of Kenya, Order 50 Rules 4 and 6 of the Civil Procedure Rules, 2010, Nicholas Kitoo Arap Korir Salat-vs-The Independent Electroral and Boundaries Commission and 7 others (2014) eKLR as well as Palata Investment Limited-vs-Butt & Sinfield Ltd (1985) 2 ALL E.R 517 (CA), among others, to fortify the submissions.
 9. On 1st April 2022, the 1st respondent's learned counsel filed submissions dated 1st April 2022 urging this court to be guided by the conditions under Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 and to dismiss the application with costs. Counsel gave brief background information of the matter, termed the application an abuse of the court process and that it is intended to deny the 1st respondent the fruit of her judgment as held in the case of M/S Portraeitiz Maternity-vs-James Karanja Kabia Civil Appeal No. 63 of 1991.
 10. Counsel framed twin issues for determination namely whether the applicants should be granted leave to appeal out of the prescribed period and the party to bear the cost of this application. In the analysis of the said issues against the applicants, counsel relied on section 75G of the Civil Procedure Act Chapter 21 Laws of Kenya, Aviation Cargo Support Limited-vs-St. Mark Freight Services Limited (2003) eKLR and Dilpack Kenya Limited-vs-William Muthama Kitonyi (2018) eKLR, amongst other authorities.



11. I have thoroughly considered the entire application, the replying affidavit and the rival submissions herein. In that regard, have the applicants demonstrated that they deserve the orders sought in the application?
12. The meaning of the term “Status quo” as stated in *Black’s Law Dictionary* and *Bakari Gakere* case (supra) is borne in mind by this court. Similarly, the said term is defined in the Concise Oxford English Dictionary 12th Edition at page 1411 thus;

“The existing state of affairs.”
13. It is trite law that that an order of status quo is meant to preserve the property in dispute pending the determination or termination or outcome of the dispute; see *Ogada-vs-Mollin* (2009) KLR 620.
14. Section 13 (7) (a) of the *Environment and Land Court Act*, 2015 (2011) provides for interim preservation orders. The same include status quo order, an ancillary relief. In this matter, the parties deserve the preservation of the property in dispute pending the outcome of the appeal.
15. Section 75 of the *Civil Procedure Act* Chapter 21 Laws of Kenya sets out the orders from which appeal lies. Section 79 G of the same Act stipulates the time for filing of appeals from subordinate courts.
16. Order 50 Rules 4, 6, 7 and 8 of the *Civil Procedure Rules*, 2010 provides for when time does not run, power to enlarge time, enlargement of time and computation of days respectively. Bearing in mind the date of judgment and date of mounting the instant application, the applicants have given satisfactory explanation in the circumstances.
17. Notably, the applicants failed to attach a certificate or decree to the application as prescribed. However, the failure is cured under Section 19 (1) of the *Environment and Land Court Act*, 2015 (2011) aligned to Article 159 (2) (d) of *the Constitution* of Kenya, 2010.
18. This court is conscious of the rights of the applicants under Articles 48, 50 (1) as read with Article 25 (c) of the said *Constitution*. So, it is not the intention of this court to deprive the appellants their right of appeal as enshrined in the said Constitutional provisions, Palata case (supra) as well as the decision in *Butt-vs-Rent Restriction Tribunal* (1979) eKLR, where the Court of Appeal held that;

“.....The appellant has an undoubted right of appeal.”
19. Plainly, the memorandum of appeal (FAO 3) contains triable issues to be heard and determined on merits; see *Philip Keipto Chemwolo and another-vs-Augustine Kubende* (1986) eKLR.
20. In view of the nature of the matter including sections 1A, 1B and 6 of the *Civil Procedure Act* Chapter 21 Laws of Kenya and other provisions stated on the face of the application and the circumstances herein, the applicants have advanced sufficient and good reason for the grant of the orders sought in the application as noted in Dilpack case (supra). The application is meritorious.
21. The upshot is that prayers 2, 3 and 4 sought in the application dated 4th February 2022 and as stated in paragraph 1 (b), (c) and (d) hereinabove respectively, are hereby granted accordingly.
22. The applicant’s counsel shall file and serve the record of appeal on the respondents within forty five (45) days from this date.
23. It is so ordered.

DATED, SIGNED AND DELIVERED IN HOMA BAY THIS 31ST DAY OF MAY 2022



G.M.A ONGONDO

JUDGE

PRESENT;

- a. Ms I. Opar, learned counsel for the appellants/applicants
- b. Mr. Ngararu Maina holding brief for L.K Obwanda, learned counsel for the 1st respondent
- c. Okello, court assistant

G.M.A ONGONDO

JUDGE

