



**Oginga v Nyarera (Sued as the legal representative of the Estate of Selina Aoko Mbeche, Deceased)
(Environment and Land Appeal 24 of 2021) [2022] KEELC 2661 (KLR) (18 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2661 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 24 OF 2021
GMA ONGONDO, J
MAY 18, 2022
FORMERLY MIGORI ELCA NO. E035 OF 2021**

BETWEEN

LUCY AKEYO OGINGA APPLICANT

AND

CALEB OCHIENG NYARERA RESPONDENT

**SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SELINA AOKO
MBECHÉ, DECEASED**

(Hon. Kullow J sitting at Migori Environment and Land Court issued temporary stay orders.)

RULING

1. On March 17, 2022, the applicant, Lucy Akeyo Oginga through S. O. Madialo & Company Advocates mounted an application by way of a Notice of Motion dated March 14, 2022 pursuant to, inter alia, Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Section 13 of the [Environment and Land Court Act](#), Order 9 Rule 9 and 10 of the [Civil Procedure Rules, 2010](#) as read with Order 42 Rule 6 and Order 51 Rule 1 of the [Civil Procedure Rules, 2010](#). She is seeking the orders infra;
 - a) Spent
 - b) Spent
 - c) The honourable court be pleased to reinstate the injunction order that lapsed after thirty (30) days from 26th October 2021.
 - d) The honourable court be pleased to expand and/or extend the time within which the applicant shall comply with the orders of this honourable court issued on October 26, 2021.



- e) Pending the hearing and determination of this appeal, the honourable court be pleased to issue a stay of execution of the Ruling of the Chief Magistrate's Court in Homa Bay CMCC ELC No. 35 of 2018 (Hon. R. B. N Maloba, PM) dated 18th January 2022, subsequent decree and all further proceedings pursuant to the Ruling.
- f) Costs of the Application be provided for.
2. The application is anchored on the applicant's supporting affidavit filed on even date and annexed documents including documents and correspondences between the applicant and Migori Environment and Land Court Registry and a copy of ex-parte eviction order issued on February 14, 2022. It is also based on grounds 1 to 19 set out on the face of the same.
 3. Briefly, the applicant laments that on 16th June 2021, the Principal Magistrate in Homa Bay Chief Magistrates Court, delivered a judgment in Chief Magistrates Court Environment and Land Case No. 35 of 2018. The applicant was the plaintiff in the said suit.
 4. In the said judgment, the Learned Trial Magistrate dismissed the suit and found in favour of the respondent herein, declaring the respondent as the valid proprietor of the suit property, Land Parcel No. Kanyada Kotieno Katuma 'B'/686. The Learned magistrate further directed the applicant's immediate eviction from the suit property.
 5. Aggrieved by the decision, the applicant lodged an appeal against the entirety of the said decision. The applicant also filed an application by way of a Notice of Motion dated June 24, 2021 seeking the protection and preservation of the substratum of the appeal vide Migori Environment and Land Court Miscellaneous Application No. 18 of 2021. My brother, Hon. Kullow J sitting at Migori Environment and Land Court issued temporary stay orders.
 6. The Migori Environment and Land Court Registry opened another file, being Migori Environment and Land Court Appeal No. E035 of 2021.
 7. Following the establishment of this Court (Environment and Land Court at Homa Bay), on July 28, 2021 the Honourable Court while mentioning Migori ELC Misc. Application No. 18 of 2021 directed that the matter be transferred to Homa Bay for hearing and determination.
 8. Subsequently, Migori ELC Misc Application No. 18 of 2021 was assigned a new file number, to wit, Homa Bay ELC Misc. No. 1 of 2021 while Migori ELC Appeal No. E035 of 2021 was assigned Homa Bay ELC Appeal No. 24 of 2021.
 9. It is the applicant's case that the transfer occasioned a communication breakdown hence, the applicant and her advocate were not aware of the ruling delivered by this honourable court in Homa-Bay ELC Misc. No. 1 of 2021 on October 26, 2021 requiring the applicant to deposit KES 50,000 (fifty thousand only) as security within 30 days from the date of the ruling, failure to which there would be an automatic lapse of the Orders of stay pending appeal.
 10. The applicant contends that the Respondent, being aware of the court's ruling, moved the trial Magistrate's court ex parte and obtained eviction orders against the applicant on account of non-compliance with the condition attached to the grant of order of stay of execution as per the court's ruling delivered on October 26, 2021.
 11. The applicant further contends that she is in possession of the suit property and will suffer substantial loss if evicted and her house gets demolished. Additionally, the applicant asserts that preserving the suit property will not cause any prejudice to the respondent. That she is willing to comply with any



- directions of the court that may be appurtenant to the grant of the orders sought in the instant application.
12. In a replying affidavit sworn on April 20, 2022 and filed on April 21, 2022, the respondent through the firm of M/S Oguttu Mboya, Ochwal and Partners Advocates, opposed the application and sought that it be dismissed with costs.
 13. The respondent deposed, inter alia, that he filed an application for eviction in line with the trial court's judgment delivered on June 16, 2021 when the applicant failed to comply with the conditional order of the court issued on 26th October 2021. The respondent accused the applicant of abusing the court process and averred that the instant application is res judicata as the same issues were dealt with by this honourable court vide the application dated June 24, 2021.
 14. Furthermore, the respondent stated that the applicant has not demonstrated in what manner she is likely to suffer any loss in the event the orders sought herein are not granted. He emphasized that the suit property is registered in the names of Selina Aoko Mbeche, the deceased.
 15. The respondent contends that there has been inordinate delay on the part of the applicant. That the instant application has been brought more than 5 months after the conditional order was granted on October 26, 2021.
 16. On March 17, 2022, the court (Kullow J) ordered and directed that the application be argued by way of written submissions; see Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction No. 33 of the Environment and Land Court (ELC) Practice Directions, 2014.
 17. The applicant filed no submissions despite the court's directions as per paragraph 16 hereinabove and further court directions issued by this court on April 21, 2022.
 18. Learned counsel for the respondent filed submissions dated April 20, 2022 on April 21, 2022 giving the background of the matter. Counsel identified six (6) issues for determination including whether the applicant has met the conditions set out for stay of execution of the decree.
 19. Counsel submitted that since the conditions for grant of order of stay under Order 42 Rule 6 of the Civil Procedure Rules have not been met, the Notice of Motion Application dated March 14, 2022 ought to be disallowed with costs. Counsel relied on several cases including the Court of Appeal decision in *Butt -vs- Rent Restriction Tribunal* (1979) eKLR, to buttress the submissions.
 20. From the foregoing, the following are the issues for determination:
 - a. Whether the applicant has proved the conditions set for grant of orders of stay of execution;
 - b. Whether the stay orders granted by this honourable court on October 26, 2021 should be reinstated; and
 - c. Who should bear the costs of the instant application
 21. This court is pretty aware of the conditions as regards an order for stay of execution under Order 42 Rule 6 (supra) alongside the Constitutional and statutory provisions under which the application is mounted. Order 42 Rule 6 (supra) provides in part thus:
 - (2) No order for stay of execution shall be made under subrule (1) unless:
 - a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and



- b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant. (Ephasis laid)
22. It is not disputed that this honourable court delivered a ruling on October 26, 2021 concerning this matter as stated in paragraph 9 hereinabove.
23. It is also not in dispute that there was non-compliance with the condition attached to the grant of order of stay of execution as per the court's ruling delivered on October 26, 2021 since the applicant failed to deposit the amount of KES 50,000 within the requisite time.
24. Thus, the respondent moved the lower court ex parte and obtained eviction orders against the applicant on account of non-compliance with the condition as pointed out in paragraph 23 above.
25. The Court of Appeal in the case of *Fred Matiang'i, The Cabinet Secretary, Ministry of Interior and Co-ordination of National Government –vs- Miguna Miguna & 4 Others* [2018]eKLR, stated the following with regard to orders of the court: -
- “...When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities...”
26. It is my considered view that the appellant was obliged, obey the court order on conditional preservation of the suit property. See the case *Shimmers Plaza Limited vs. National Bank Of Kenya Limited* (2015) eKLR where the court held thus:-
- “We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not.”
27. The applicant deposed that there was a communication breakdown which was occasioned by the transfer of this matter from the Environment and Land Court at Migori to the Environment and Land Court at Homa Bay hence, neither the applicant nor her counsel were aware of the court's ruling of October 26, 2021.
28. Furthermore, the applicant laments that she is in possession of the suit property. That she will suffer substantial loss if evicted and her house gets demolished thereon.
29. The Applicant has also indicated willingness to comply with any directions of the court that may be appurtenant to the grant of the orders sought in the instant application.
30. Article 48 of *the Constitution* of Kenya, 2010 anchors the right of access to justice. Furthermore, the applicant is entitled to fair hearing of this appeal as stipulated in Article 50 (1) of the same Constitution.



31. In the instant case, there is an impending eviction of the applicant from the suit property as disclosed in ground 3 of the Application. Those are special circumstances in this application and the applicant has an undoubted right of this appeal.
32. On that account, I subscribe to the Court of Appeal decision in Butt case (supra), where it was observed that;

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise it’s best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson –vs –Church* (No. 2) 12 Ch D (1879) 454 at p 459.....

....and the appellant has an undoubted right of appeal.” (Emphasis added)
33. In the premises, I find the application dated March 14, 2022and filed in court on March 17, 2022 meritorious.
34. A fortiori, the stay order sought in the application dated March 14, 2022and filed in court on March 17, 2022, be and is hereby granted pending the hearing and determination of the instant appeal.
35. The applicant to deposit in this court within fifteen (15) days from this date, the sum of Kshs.50,000 (Fifty thousand only) as security for the due performance of such decree or order as may ultimately be binding upon her, failing which the stay so granted shall automatically lapse without further order(s) herein.
36. Costs of this application be the costs in the appeal.
37. Orders accordingly.

DELIVERED, SIGNED AND DATED AT HOMA BAY THIS 18TH DAY OF MAY 2022.

G.M.A ONG’ONDO

JUDGE

Present:

- a. Mr. H. Bunde holding brief for W. Ochwal, learned counsel for the respondent.
- b. Okello, Court Assistant.

G .M.A ONG’ONDO

JUDGE

