



REPUBLIC OF KENYA



**Ong'ondo v Ongus (Environment and Land Appeal E007 of 2022)
[2022] KEELC 3559 (KLR) (17 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3559 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E007 OF 2022**

GMA ONGONDO, J

MAY 17, 2022

BETWEEN

ERICK ODHIAMBO ONG'ONDO APPLICANT

AND

ALOICE OBONGO ONGUS RESPONDENT

RULING

1. On March 8, 2022, the applicant, Erick Odhiambo Ongondo through M/S Nyauke and Company Advocates mounted an application by way of a Notice of Motion dated March 4, 2022 pursuant to, inter alia, Order 51 Rule 1, Order 42 Rule 6 of the *Civil Procedure Rules*, 2010 as read with Section 3A, 1A of the *Civil Procedure Act* chapter 21 Laws of Kenya (The CPA). He is seeking the orders infra;
 - a. Spent
 - b. Spent
 - c. Upon hearing this application the Honourable Court be pleased to stay the lower court's proceedings pending hearing and determination of this appeal.
 - d. Costs of this application be provided for.
2. The anchorage of the application is the applicant's supporting affidavit sworn on even date and memorandum of appeal dated March 4, 2022 and filed on March 8, 2022. The application is further anchored on grounds I to IV stated on face of the same.
3. In brief, the applicant laments that on September 17, 2021, a ruling was issued by Hon. J. S. Wesonga (Principal Magistrate) staying Homa Bay ELC No. 44 of 2020 and subsequently fast-track the hearing of Homa Bay ELC No. 55 of 2019 (hereinafter referred to as "the suit"). Aggrieved by the said ruling, the applicant filed the instant appeal which is yet to be heard.



4. The applicant contends that on February 17, 2022, the trial court proceeded to fix the suit for hearing on the 4th of April 2022. One of the orders being sought in the suit is an order of eviction of the applicant from land parcel number Kanyada/Kanyango/Kalanya/1600 (the suit property herein).
5. The applicant is therefore, apprehensive that if the suit is dispensed with prior to the hearing and determination of this appeal and the outcome is against the applicant, the appeal will be rendered nugatory.
6. The application is unopposed as the respondent did not file a replying affidavit or submissions on the same. Service upon the respondent was effected as per the affidavit of service sworn on April 12, 2022 and filed in court on April 13, 2022.
7. On March 17, 2022, the court ordered and directed that the application be argued by way of written submissions pursuant to Order 51 Rule 16 of the *Civil Procedure Rules*, 2010; see also Practice Direction number 33 of the Environment and Land Court Practice Directions, 2014.
8. Consequently, learned counsel for the applicant filed submissions dated April 8, 2022 on April 11, 2022 reiterating the contents of the applicant's supporting affidavit on record. Counsel adopted the reasoning in Civil Appeal No. 118 of 2020 *Peter Kariuki Mburu & anor v Neema Shah and Re-Global Tours and Travel Ltd.* HCWC No. 43 of 2000.
9. From the foregoing, the following are the issues for determination:
 - a. Whether the applicant has met the threshold for grant of stay of proceedings in Homa Bay ELC No. 55 of 2019; and
 - b. Who should bear the costs of the instant application?
10. A decision on whether or not to grant stay of proceedings is discretionary as I endorse the decision of Ringera, J (as he then was) in the case of *Re Global Tours & Travel Ltd.* (*supra*).
11. This court has jurisdiction to stay proceedings pending an appeal pursuant to Order 42 Rule 6 (1) (*supra*).
12. For this court to grant stay of proceedings in the manner sought, the Applicant ought to have shown that he has an arguable appeal with high chances of success such that if stay of proceedings is not granted the appeal will be rendered nugatory. That it is in the best interest of justice.
13. In the case of *Kenya Wildlife Service v James Mutembei* (2019) eKLR the court held that:

“... stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceeding is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay is high and stringent...”
14. Article 159(2) (b) of the *Constitution* of Kenya, 2010 provides for timely exercise of justice; see also section 1A and 1B of the *CPA* and section 3 of the *Environment and Land Court Act*, 2015 (2011).
15. Article 48 of the *Constitution* (*supra*) 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*.
16. It is established law that the right to be heard before an adverse decision is taken against a person is fundamental and permeates the entire justice system: see *James Kanyita Nderitu and another v Marios Philotas Ghikas and another* (2016) eKLR and *Onyango Oloo v Attorney General* (1986-89) EA 456.



17. In the instant case, the applicant submits that the relief sought in Homa Bay ELC No. 55 of 2019 is for orders of his eviction from the suit property. That if the subordinate court proceeds with the matter and a judgment is rendered against the applicant prior to the determination of the instant appeal then the appeal would be rendered nugatory.
18. Additionally, I subscribe to the Court of Appeal decision in *Butt v Rent Restriction Tribunal* (1979) eKLR, where it was observed that;

....and the appellant has an undoubted right of appeal.” (Emphasis added)
19. Clearly, the draft memorandum of appeal on record herein raises triable issues. Those are also special circumstances in this application..
20. In the foregone, I find that the application has met the requirements for the grant of stay of proceedings in Homa Bay ELC No. 55 of 2019 sought therein. The application is merited.
21. A fortiori, the stay order as regards the trial court’s proceedings sought in the application dated March 4, 2022 and filed in court on March 8, 2022, be and is hereby granted pending the hearing and determination of the instant appeal.
22. Costs of this application to abide the appeal.
23. Orders accordingly.

DELIVERED, SIGNED AND DATED at Homa Bay this 17th day of May 2022.

G M A ONGONDO

JUDGE

PRESENT

a. Mr. S. Nyauke, learned counsel for the applicant

b. Okello, court assistant

G.M.A ONGONDO

JUDGE

