



**Magany & another v Ouma & 5 others (Environment and Land
Appeal 22 of 2021) [2022] KEELC 91 (KLR) (10 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 91 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 22 OF 2021
GMA ONGONDO, J
MAY 10, 2022
(FORMERLY MIGORI ELCA NO. 35 OF 2019)**

BETWEEN

**SERFINA OKUTA MAGANY 1ST APPELLANT
ANDREW ONYANGO MAGANY 2ND APPELLANT**

AND

**MICHAEL ABONYO OUMA 1ST RESPONDENT
ISAYA JUMA MWERE 2ND RESPONDENT
MARTIN JOHN OKECH 3RD RESPONDENT
LAND ADJUDICATION OFFICER- SUBA/MBITA 4TH RESPONDENT
LAND REGISTRAR 5TH RESPONDENT
HON. ATTORNEY GENERAL 6TH RESPONDENT**

RULING

1. On February 11, 2022, the 1st, 2nd and 3rd applicants through Mbugua Mureithi and Company Advocates mounted an application by way of a Notice of Motion dated April 10, 2022 pursuant to, inter alia, Order 42 Rule 6 of the [Civil Procedure Rules, 2010](#) and Section 3A of the [Civil Procedure Act](#), Cap 21 Laws of Kenya. They are seeking the orders infra;
 - a. Spent
 - b. Spent



- c. The Honourable Court be pleased to grant an order of stay of execution in this case pending the hearing and determination of an appeal filed by the 1st, 2nd and 3rd applicants in Environment and Land Court at Homa Bay.
 - d. Costs of this Application do abide by the outcome of the appeal.
2. The anchorage of the application is the applicants' supporting affidavit sworn by the 3rd applicant, Martin John Okech, on even date and annexed documents including a copy of Notice of appeal, a copy of letter dated February 8, 2022 requesting for the certified copy of the proceedings and judgment and a copy of the draft decree and cover letter marked as "MJO 1, MJO 2 and MJO 3" respectively.
 3. Briefly, the applicants' case is that judgment in this case was delivered on 25th January 2022. Being aggrieved with the decision, the applicants lodged a notice of appeal to the judgment on February 11, 2022.
 4. The applicants contend that the advocates of the respondents have regrettably served them with draft copies of decree, showing their intention of proceeding with the execution of the said decree. That should the execution proceed, they will suffer irreparable loss and damage since the 1st and 3rd applicants have lived on the suit property for over 30 years and it is their rural home.
 5. The applicants further affirm that they hold first registration as regards the suit land, LR No. Kaksingir/K.Waregi/43. That as such, the same cannot be challenged unless on the grounds of fraud, which was not proven in the magistrate's court.
 6. The applicants aver that the respondents will not suffer any prejudice if stay orders are granted. That however, if stay orders are not granted in the instant application then this appeal shall be rendered nugatory.
 7. In a replying affidavit sworn on February 17, 2022 and filed on February 18, 2022, the respondents through the firm of Ayoo-See and Company Advocates, opposed the application. They deposed, inter alia, that the application is incompetent, frivolous and misconceived and does not meet the criteria for grant of the orders sought. That the instant application is undeserving and is meant to buy court's time and deny the respondents a chance to enjoy the fruits of the judgment of this honourable court delivered on January 25, 2022.
 8. The 2nd respondent also accused the applicants of harassment, a matter that he reported at Nyatoto Police Station vide OB No.3/11/2/2022. He prayed that the honourable court be pleased to compel the applicants to stop harassing him before the instant application is allowed.
 9. On February 11, 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](#).
 10. Consequently, learned counsel for the applicants filed submissions dated February 22, 2022 on even date giving. Counsel submitted that the applicants have satisfied the conditions required for the grant of an order of stay of execution under Order 46 Rule 2 of the [Civil Procedure Rules, 2010](#). To buttress the submissions, counsel relied on the following authorities; [Esther Wanjiru v Jackline Arege](#) [2014] eKLR, [Tassam Logistics Ltd v David Macharia & another](#) [2018] eKLR and [Tabro Transporters Ltd v Absalom Dova Lumbasi](#) [2012] eKLR.
 11. On February 25, 2022, learned counsel for the respondents filed submissions dated February 24, 2022 and identified two issues for determination namely; whether the applicants will suffer substantial loss if the orders sought are not made; and whether the applicant has deposited the security of costs for due performance of the decree.



12. In discussing the issues, counsel urged this court to dismiss the application with costs to the respondents and relied on Order 42 Rule 6(2) (supra), *Osero & Company Advocates v Easy Properties Limited* [2014] eKLR among others. Counsel prayed that if the honourable court is inclined to grant a stay, then it should direct the applicants to deposit the costs for both the lower court and this honourable court in an interest earning account in the joint names of the advocates for the respective parties.
13. I have examined the application, the replying affidavit and the rival submissions. On that score, the twin issues for determination are whether on the basis of the application;
 - a. The applicant has proved the conditions set for grant of orders of stay of execution; and
 - b. Who should bear the costs of the instant application
14. 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. (Emphasis laid)
15. In the instant case, the 1st and 3rd applicants have built their homes in the suit land and have been living thereon for over 30 years as disclosed in ground 3 of the Application. In those special circumstances, the applicants are bound to suffer substantial loss if the stay orders sought in the application are not granted. Moreover, the appeal as deemed by the notice appeal, may be rendered nugatory.
16. Clearly, the application was commenced sixteen days after the delivery of judgment in this appeal. It is the considered view of this court that the delay to initiate the application was not unreasonable in the circumstances.
17. I subscribe to the Court of Appeal decision in *Butt v Rent Restriction Tribunal* [1979] eKLR, 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 v Church* (No. 2) 12 Ch D (1879) 454 at p 459.....

....and the appellant has an undoubted right of appeal.” (Emphasis added)
18. 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*.
19. 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.



20. In the foregone, I find that the application has met the requirements for the grant of stay of execution sought therein. The same is merited.
21. A fortiori, the stay order sought in the application dated 10th February 2022 and filed in court on 11th February 2022, be and is hereby granted pending the hearing and determination of the appeal as envisaged in the Notice of Appeal dated 3rd February 2022 and as stated in paragraph 1 (d) hereinabove. The applicants' counsel to formally file and serve the appeal within sixty days from this date in default the stay orders granted herein to lapse automatically.
22. Costs of this application be the costs in the appeal.
23. Orders accordingly.

DELIVERED, SIGNED AND DATED AT HOMA BAY THIS 10TH DAY OF MAY 2022

G .M .A ONG'ONDO

JUDGE

Present:

1. Ms. Opar holding brief for Mr. Olewe, learned counsel for 1st, 2nd and 3rd applicants.
2. Court Assistant, Okello.

G .M .A ONG'ONDO

JUDGE

