



**Odumba v Mingo (Environment and Land Appeal E016 of 2022)
[2022] KEELC 2449 (KLR) (19 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2449 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E016 OF 2022
GMA ONGONDO, J
JULY 19, 2022**

BETWEEN

SAMWEL OGENO ODUMBA APPELLANT

AND

CARINA AUMA MINGO RESPONDENT

RULING

- 1) By a notice of motion application dated 27th April 2022 and lodged in court on even date under Order 42 Rule 6 of the *Civil Procedure Rules*, 2010, among other provisions of the law, the applicant, Samwel Ogeno Odumba through the firm of Nyauke and Company Advocates, has sought the following orders;
 - a) Spent
 - b) Spent
 - c) Upon hearing this application inter partes, the Honourable court be pleased to issue an order of stay of the lower court's decree pending final determination of the appeal.
 - d) The costs of this application be provided for.
 - e) Such further and/or other orders be made as the court may deem fit and expedient.
- 2) The application is premised on grounds I to VI set out on the face of the same. It is also founded upon the applicant's supporting affidavit of even date. In summary, the applicant laments that on April 27, 2022, the learned trial magistrate, Honourable J.Nangea delivered judgment against him in Homa Bay Chief Magistrate's Court Land and Environment case number 24 of 2020. That he is aggrieved thereby hence lodged the present appeal which has high chances of success. That execution of the decree in terms of cancellation of his certificate of title in respect of the suit property, LR NO.Kochia/Kamenya/426 and transfer of the same, is to issue. That thus, he will suffer substantial loss.



- 3) The respondent who appears in person opposed the application by way of a replying affidavit of six paragraphs sworn on May 13, 2022 and duly filed herein on May 16, 2022. She deposed in part that whereas judgment was entered in his favour by the trial court, the applicant has not demonstrated the substantial loss he is will incur if execution was issued against him. That if the alleged transfer of title is likely to occasion him loss, then the applicant ought to be compelled to deposit security as he pursues his appeal which has no triable issues. So, she prayed that the application be dismissed.
- 4) The respondent also opposed the application by grounds of opposition dated 13 May 2022 simultaneously filed with the replying affidavit. The three grounds are;
 - a) The application is mischievous and an abuse of the court process meant to delay the execution of the decree awarded to the respondent.
 - b) The application lacks merit and in any case the appellant should be condemned to give security awaiting the hearing and determination of the appeal.
 - c) The entire application is an affront to the judgment entered on the 27th day of April 2022 and no new reasons have been expounded by the appellant to warrant the said orders sought.
- 5) The application was heard by way of written submissions further to this court's directions of 18th May, 2022; 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.
- 6) By the applicant's submissions dated May 4, 2022 and filed in court on May 5, 2022, his counsel invited the court to determine whether the applicant deserves the orders sought in the application. Counsel submitted that by the judgment of the trial court, the applicant is likely to suffer substantial loss if the orders in the application are not granted. That the appeal has trial issues and that neither party would be prejudiced if the application is allowed. To buttress the submissions, counsel cited Order 46 Rules 6 (1) and 7 (2) of the Civil Procedure Rules, 2010.
- 7) In the respondent's submissions dated June 2, 2022, reference is made to the orders sought in the application and that the applicant must satisfy the court that substantial loss would result if no stay is granted. The respondent submitted that the applicant's assertion do not amount to prove of substantial loss and she relied on *Kenya Shell Ltd-vs-Benjamin Karuga Kibiru and another* (1986) eKLR, and urged that in case the orders in the application are granted, the applicant ought to deposit a decretal sum as security.
- 8) I have duly considered the entire application, the replying affidavit, the grounds of opposition and the rival submissions. On that score, I am of the considered view that the issue for determination is whether there is merit in the application.
- 9) Order 42 Rule 6 (supra) provides in part thus:
 - (2) No order for stay of execution shall be made under sub-rule (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.
- 10) On substantial loss, the same is the cornerstone of both jurisdictions namely whether the appeal is arguable appeal and whether if the application for stay is refused, the appeal, if successful, would be rendered nugatory. That the same is what has to be prevented. The applicant's contention relates to



cancellation of title and transfer of the subject matter of this appeal thus, it falls within the ambit of substantial loss as held in *Kenya Shell* case (supra).

- 11) Regarding delay, the application was lodged immediately after delivery of the trial court's judgment. For clarity, it was made on April 27, 2022 hence the same was mounted without any delay or all.
- 12) In regard to security, I subscribe to the decision in the case of *Doshi Iron Mongers Ltd-vs-Kenya Revenue Authority and another* (2020) KLR that nobody is exempt from providing security for the due performance of a decree. The requirement applies to the applicant in this application.
- 13) Additionally, a memorandum of appeal dated 27th April 2022 and lodged on even date contains trial issues which include; adverse possession and fraud. The issues call for hearing and determination on their merits; see *Philip Keipto Chemwolo and another-vs-Augustine Kubende* (1986) eKLR
- 14) Moreover, it is settled law that the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system; see James Kanyiita Nderitu and another-vs-Marios Philotas Ghikas and another (2016) eKLR.
- 15) Undoubtedly, the applicant is entitled to access to justice and fair hearing of his appeal pursuant to Articles 48 and 50 (1) of *the Constitution* of Kenya, 2010. Furthermore, I subscribe to the decision in the case of *Butt-vs-Rent Restriction Tribunal* (1979) eKLR where the Court of Appeal observed thus;
“.....the appellant has an undoubted right of appeal.”
- 16) In the foregone, I find the instant application dated 27th April 2022 meritorious. I proceed to determine the same as hereunder;
 - a) The stay order sought in the application and as stated at paragraph 1(c) hereinabove, be and is hereby granted.
 - b) The applicant shall deposit, a security in the sum of Kshs. 20,0000 (Kenya Shillings Twenty Thousand shillings only) for the due performance of decree herein in this court within the next thirty (30 days from this date
 - c) Costs of the application to abide the appeal.
- 17) It is so ordered.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT HOMA BAY THIS 19TH DAY OF JULY, 2022.

G. M.A ONGONDO

JUDGE

PRESENT;

- a) Odera, learned counsel for the appellant/applicant
- b) Respondent in person
- c) Okello, court assistant

