



REPUBLIC OF KENYA



KENYA LAW
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**Ekakor v Ekesa (Environment & Land Case 55 of 2018)
[2022] KEELC 12820 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12820 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 55 OF 2018
AA OMOLLO, J
SEPTEMBER 29, 2022**

BETWEEN

GAD EJAPU EKAKOR APPLICANT

AND

JOHN ONYA EKESA RESPONDENT

RULING

1. The applicant brought the present application under section 3A, orders 42 rule 6 and order 51 rule 1 of the *Civil Procedure Rules* on the 9th of May, 2022 for orders:
 - a) Spent;
 - b) Spent;
 - c) That there be a stay of execution of the decree delivered on the November 10, 2021 pending hearing and determination of the appeal;
 - d) That the costs of the application be provided for.
2. The application is supported by the affidavit of John Onya Wekesa and on the grounds *inter alia*:
 - a) That the judgement delivered awarded the respondent 4 acres of land out of L.R South Teso/ Amukura/166 which measures 6.916 acres. Out of the same land, 3.76 acres had been acquired by KETRACO hence leaving only 3.156 acres for the applicant and his brother who between them have 8 sons and 3 daughters;
 - b) That the applicant and his brother will now be compelled to surrender their ancestral land they occupy to the respondent as the respondent has already asked the County Surveyor to hive off the 4 acres;



- c) That the applicant has filed a notice of appeal and is in the process of compiling a record of appeal for filing at the Court of Appeal;
 - d) That the intended appeal has a high chance of success as it raises arguable grounds both on law and in fact;
 - e) That the instant application has been brought without undue delay.
3. The respondent opposed the application *vide* grounds of opposition filed on the 8th of March, 2022:
- a) That there is no competent appeal and or notice of appeal filed hence stay pending one cannot issue;
 - b) That the application is incurably defective and incompetent having been filed by a firm of advocates not properly on record;
 - c) That the application has been overtaken by events and that the implementation process has been completed.
4. The parties canvassed the application by way of written submissions with the applicant filing his submissions on the 7th of June, 2022 and the respondent filing his on the 8th of June, 2022. The applicant while relying on the case of *Halal & Another vs. Thornton & Turpin (1963) Ltd* (1990) eKLR stated that his application had fulfilled all the provisions for granting stay of execution listed by this case as well as under order 42 rule 6 1(2) of the *Civil Procedure Rules*. He submitted that although the court's judgement was to hive off four acres of the suit land and have the same registered in the respondent's name, there exists an easement registered in favour of KETRACO for 3.76 acres leaving the applicant's family with 3.156 acres. That the respondent being awarded the four acres meant that the applicant and his brother will have to vacate their ancestral home for the respondent. That there was no survey done to confirm that the respondent occupies the 4 acres he claims as he only lives on about 1 ½ acres. The applicant submitted further that the purpose of the stay pending appeal was to preserve the subject matter so that in the event that the appeal succeeds so the appellant's rights are not rendered nugatory
5. On the other hand, the respondent submitted that the applicant has not demonstrated what substantial loss he is bound to suffer or incur in the event that the stay is not granted. That the parties have already consented on the issue of the payment of costs and that the fact that the applicant has failed to honour the consent does not aid his case for stay. The respondent submitted further that the applicant has not produced any evidence to indicate that whatever loss he will suffer cannot be remedied in the event that his appeal succeeds. They asked this court to disallow the application with costs but in the event that the same is allowed the appellant be given stringent conditions on security as to costs within a period specified by court.
6. In demonstrating substantial loss, the applicant stated that together with his brother and the respondent, they live on the suit land being South Teso/Amukura/166 and the judgement of this court ordered him to hive off 4 acres of the suit land and have the same registered in favour of the respondent. That the acres to be hived off are more than what is occupied by the respondent on the ground. In his affidavit and submissions, the applicant deposes that the land measures 6.916 acres with 3.156 acres being an easement by the Kenya Electricity Transition Company (KETRACO) leaving only 3.156 acres for the applicant and his family. The applicant avers that his family and that of his brother will suffer irreparable harm if the decree is executed because they will end up losing their ancestral home.



7. On the point whether there is a valid appeal, the applicant through the firm of JP Makokha & Co Advocates filed a notice of appeal on the 17th of November, 2021. Upon perusal of the file, I also saw another notice of appeal dated November 22, 2021 filed by the applicant in person. Both notices were filed within the time allowed to lodge an appeal. It is the Court of Appeal that is clothed with jurisdiction to determine the question of whether the notices lodged are legit. I will stay away from determining this objection raised by the respondent for want of jurisdiction.
8. Although the respondent has submitted that the applicant has not demonstrated what loss he will suffer, it is evident from the foregoing that the hiving off the respondent's land as per the decree will most likely affect the outcome of the appeal and the argument raised by the applicant that his family will be rendered homeless.
9. Security is an essential ambit in the issue of stay and although the applicant has not offered up any, this court has the discretion to order that a party offer security. The costs for the trial court's case were taxed at Kshs 84,620 by consent of both parties. The respondent's submission is that the applicant would be unable to pay these costs as he has already not honoured some instalments for the same. The applicant will therefore have to provide some security for the costs awarded to the respondent in case his appeal does not succeed.
10. I conclude by finding the application is merited and that the applicant has demonstrated that substantial loss will occur in the event that execution of the decree proceeds. However, the stay of execution is granted on the following terms:
 - a. Stay of execution of the decree be and is hereby issued pending hearing and determination of the appeal.
 - b. The applicant shall deposit the sum of Kshs 84,620 or balance thereof into a joint interest account opened in the names of the advocates as security within 30 days from the date of opening of such an account but not later than 60 days from the date of this ruling;
 - c. In default of (b) above the respondent shall be at liberty to execute; and
 - d. The costs of this application ordered in the cause.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 29TH DAY OF SEPT., 2022.

A. OMOLLO

JUDGE

