



**Diang'a v Akongo (Environment and Land Appeal E022 of 2021)  
[2022] KEELC 4785 (KLR) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4785 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL E022 OF 2021  
GMA ONGONDO, J  
SEPTEMBER 21, 2022**

**BETWEEN**

**BENARD OTIENO DIANG'A ..... APPLICANT**

**AND**

**JAMES ODHIAMBO AKONGO ..... RESPONDENT**

**RULING**

1. This ruling is in regard to an application by way of a Notice of Motion dated March 8, 2022 and filed in court on March 9, 2022 by the appellant, Benard Otieno Diang'a (the applicant herein) through the firm of Mwamu and Company Advocates. The application is mounted pursuant to, inter alia, Order 40 Rules 1, 2, 3 (3) ad 4 of the *Civil Procedure Rules*, 2010 (The Rules herein) seeking the orders infra;
  - a) Spent
  - b) Spent
  - c) That this court be pleased to issues an order of stay of execution of the decree/judgment of Honourable B.O Omwansa delivered on November 23, 2021 and all consequential orders flowing therefrom pending the hearing and determination of the appeal.
  - d) Spent
  - e) A temporary injunction restraining the respondent either by himself, agents, servants and / or anyone claiming under the respondent from entering upon, re-entering, cultivating, trespassing onto, fencing, interfering with and/or in any other manner dealing with the suit property that is land parcel number West Kasipul/Konuonga/563 pending the hearing and determination of this appeal.
  - f) Costs of the application be in the cause.



2. The application is anchored upon grounds 1, 2, 3 and 4 set out on the face of it namely that unless the stay is granted, the applicant is bound to suffer irreparably, among others. The same is further premised on the applicant's supporting affidavit of sixteen paragraphs sworn on even date and the annexed documents marked as "BOD-1 to BOD-5" which include; a copy of title deed in respect of the suit property, LR No. West Kasipul/Konuonga/563 (BOD-1), a copy of the trial court's judgment rendered on 23<sup>rd</sup> November 2021 (BOD-3) and the memorandum of appeal herein (BOD-5).
3. Briefly, the applicant laments that he is the registered proprietor of the suit property which he is currently utilizing. That he sued the respondent regarding the same before the trial court which rendered judgment and he is dissatisfied thereby. Thus, he has lodged this appeal which raises serious issues with high chances of success and that unless the orders sought in the application are granted, the appeal will be rendered nugatory. That the application has been brought without unreasonable delay.
4. In the grounds of opposition dated July 19, 2022, the respondent, James Odhiambo Akong'o through the firm of Bana and Company Advocates, opposed the application on the grounds that;
  - a) The application is misconceived, incompetent and does not meet the threshold for grant of the orders sought.
  - b) The application was filed after inordinate delay and is thus an abuse of the process of court.
  - c) The application is defective and without merit.
  - d) Having been in possession of the suit property since 1983 and further having had that possession justified by judgment of the court below, it would be inequitable and inconvenient to issue an order of injunction against the respondent.
5. The application was heard by way of written submissions further to this court's directions of March 17, 2022 as provided for under Order 51 Rule 16 of the Rules.
6. By the submissions dated April 12, 2022 and lodged in court on July 20, 2022, learned counsel for the applicant was of the view that the issues for determination include; whether the application merit the condition for grant of the orders of stay of execution and whether an injunction should be issued against the respondent. Counsel submitted that the execution of the trial court's judgment is likely to cause substantial loss to the respondent, that the application has been made timeously and that the appeal is arguable as shown in the memorandum of appeal.
7. To fortify the submissions, counsel cited, inter alia, the case of *Giella-vs-Cassman Brown* (1973) EA 358 and as reiterated in the case of *Nguruman Limited-vs-Jan Bonde Nielsen and 2 others* (2014) eKLR alongside *Mrao Ltd-vs-First American Bank of Kenya Ltd* (2003) eKLR regarding the three requirements for an order of any injunction. Therefore, counsel urged this court to grant the orders sought in the application.
8. In the respondent's submissions dated July 19, 2022 and filed herein on July 20, 2022, his counsel referred to the application and the grounds thereon which he summarized to whether the applicant is bound to suffer irreparable loss if an order for stay sought is not granted and whether the appeal has high chances of success. Counsel cited Order 42 Rule 6 (2) (supra) and submitted that the applicant who has not been in occupation of the suit property has failed to satisfy the triple conditions set out thereunder. That the grounds for a temporary injunction are more or less similar to those for a stay of execution sought and the applicant has not brought himself within the threshold for the grant of an injunction.



9. To buttress the submissions, counsel cited the case of *Charles Wabome Gethi-vs-Agnela Wairimu Gethi* (2008) eKLR that the applicant must demonstrate the substantial loss he is likely to suffer if the respondent executes the judgment and subsequent decree against him. That the court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal and the respondent who is seeking to enjoy the fruits of his judgment as held in the case of *Charles Kariuki Njeru-vs-Francis Kimaru Rwara* (2020) eKLR. So, counsel termed the application devoid of merit and urged the court to dismiss it with costs.
10. In that regard, it is the court's duty to determine whether the applicant has established his case for the grant of the stay of execution order, a temporary injunctive relief and costs as sought in the application.
11. It is paramount to note that the three conditions for an order of stay of execution are cumulative as captured in Order 42 Rule 6 (2) of the Rules which reads;
  - “(2) No order for stay of execution shall be made under sub-rule 91) 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 may ultimately be binding on him has been given by the applicant.”
12. The applicant has contended that the respondent may commence execution process against him further to the trial court's judgment (BOD-4). That since he is utilizing the suit land, he may suffer irreparably.
13. Both the applicant and the respondent claim to be in possession of the suit land. I bear in mind the case of Gethi and Njeru cases (supra). Since there is disclosure of the applicant's livelihood on the suit property, he is bound to suffer substantial loss if stay of execution sought in the application is not granted worthwhile; see also *New Stanley Hotel Ltd-vs-Arcade Tobacconist Ltd* (1980) KLR 757.
14. The applicant further asserted that there are serious points of law contained in the memorandum of appeal (BOD-5) hence, the same be canvassed in the appeal. Plainly, ownership of the suit property including adverse possession, are discerned in the memorandum of appeal which call for the hearing of the appeal on its merits as I subscribe to the Court of Appeal decision in *Philip Chemwolo and another-vs-Augustine Kubende* (1986) eKLR.
15. Moreover, the applicant has an undoubted right of the instant appeal; see *Butt-vs-Rent Restriction Tribunal* (1979) eKLR and Articles 25 (c), 48 and 50 (1) of *the Constitution* of Kenya, 2010.
16. As regards delay, this court is guided by Order 50 Rules 1, 3 and 8 of the Rules. Bearing in mind the character of the application, the respondent's response thereto and the submissions, I am of the considered view that the period of delay to initiate the instant application is not inordinate in the circumstances.
17. The application is brought under Order 40 (supra) which provides for temporary injunctions. This court is aware of the very foundation of the jurisdiction to issue injunctive orders as held in *Nguruman Ltd* case (supra). Since both the applicant and the respondent claim possession of the suit property, a status quo order to preserve the suit property pending the outcome of the appeal as held in *Ogada-*



vs-Mollin (2009) KLR 620 is merited herein in lieu of a temporary injunction in the manner sought in the application.

18. This court has the mandate to grant preservation orders under section 13 (7) (a) of the Environment and Land Court Act, 2015 (2011). The same include orders 3 and 5 sought in the application. In the case of Hutchings Biemer Limited-vs-Barclays Bank of Kenya Limited and 2 others (2006) eKLR, it was held-

“..... injunctive orders are meant to preserve property and maintain the status quo.....”

19. In the case of Board of Governors, Moi High School, Kabarak and another-vs-Malcolm Bell (2013) eKLR, the Supreme Court of the Republic of Kenya held that the court can grant stay of orders of execution in the exercise of it’s ancillary power;

“.....of safeguarding the character and integrity of the subject matter of the appeal pending the resolution of the contested issues.”

20. Concerning security, nobody is exempt from providing for the same for the due performance of a decree as noted in Doshi Iron Mongers Limited-vs-Kenya Revenue Authority and another (2020) eKLR. No security has been offered herein by the applicant who is bound to provide it within the discretion of the court.

21. To that end, I find the application dated 8<sup>th</sup> March 2021 partially merited. I proceed to determine the same in the terms infra;

- a. That there be an order of stay of execution of the decree/judgment of Honourable B. O. Omwansa delivered on November 23, 2011 and all consequential orders flowing therefrom pending the hearing and determination of the appeal.
- b. That the applicant shall deposit in court within the next thirty days from this date, the sum of Kshs 25,000/= (Kenya shillings Twenty Five Thousand only) as security for the due performance of the decree as may ultimately be binding upon him, failing which the stay order shall lapse without a further order of this court.
- c. The parties herein to maintain the status quo over the suit property as at the date of delivery of the trial court’s judgment pending the hearing and determination of this appeal.
- d. Costs of the application to abide the appeal.

**DATED, DELIVERED AND SIGNED AT HOMA BAY THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2022**

**G M A ONGONDO**

**JUDGE**

**PRESENT;**

- a. Ms B. Nyakwana instructed by Mwamu and Company Advocates, learned counsel for the applicant/appellant
- b. Ms P. Odhiambo holding brief for Mr. J. Bana, learned counsel for the respondent
- c. A. Okello, court assistant

