



**Ogendo v Adala (Environment and Land Appeal E014 of 2024)
[2025] KEELC 3035 (KLR) (2 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3035 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND APPEAL E014 OF 2024**

**BN OLAO, J
APRIL 2, 2025**

BETWEEN

GEORGE PETER BWIRE OGENDO APPLICANT

AND

VINCENT ADALA RESPONDENT

RULING

1. What calls for my determination is the Notice of Motion by George Peter Bwire Ogengo (the Applicant) dated 4th September 2024. He seeks the following orders against Vincent Adala (the Respondent) with regard to the land parcel No Marachi/Bujumba/1021 (the suit land):
 1. Spent
 2. Spent
 3. Spent
 4. That there be a stay of proceedings, ruling and order issued on 22nd August 2024 in Busia CMC ELC Case No E147 of 2023 pending the hearing and determination of the appeal.
 5. That pending the hearing and determination of the appeal, the Court do restrain the Respondents by themselves, their servants and/or agents or otherwise from entering, remaining, leasing, charging, pledging, disposing off, transferring, constructing any structures or interfering with the Applicant's quiet possession of the suit land known as Marachi/Bujumba/1021,
 6. That costs be in the cause.
2. The Motion is founded on the provisions of Article 159 of *the Constitution*, Sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act* and Order 12 Rule 7, Order 40 Rule 7 and Order 51 Rule 1 of the Civil



Procedure Rules. It is anchored on the grounds set out therein and is supported by the Applicant's affidavit of even date.

3. The gravamen of the Motion is that the Respondent filed a plaint in Busia Chief Magistrate's Court ELC Case No E147 of 2023 simultaneously with an application seeking to injunct the Applicant from the suit land. That application was heard and allowed in favour of the Respondent who has since threatened to interfere with the construction activities on the suit land on which he has also encroached yet the Applicant is the registered proprietor of the suit land and has been in possession of the same. The Applicant therefore has an arguable appeal as the trial Court allowed the application by issuing injunctive orders on a separate parcel of land which was not part of the sale agreement between the parties since the Applicant is the registered proprietor of the land parcel No Marachi/Bujumba/1021 but the parties entered into a sale agreement over the parcel No Marachi/Bujumba/1022 for which the Respondent was to pay Kshs.800,000 but only paid Kshs.500,000 and has refused to pay the balance of Kshs.300,000. That in 2018 while the Applicant was nursing his wife out of the country, the Respondent took advantage of his absence and encroached onto the suit land mistaking it for the land parcel No Marachi/Bujumba/1022 which he had purchased. Upon learning of the trespass, the Applicant wrote to the Respondent asking him to vacate the suit land which the Applicant has been using peacefully since 2021 until 2020 when the suit in the subordinate Court was filed by the Respondent purporting to own the suit land yet the agreement was in respect of the land parcel No Marachi/Bujumba/1022 which the Respondent has defaulted in paying the purchase price.
4. The Applicant has an arguable appeal which will be rendered nugatory unless the orders sought are granted and has also established a prima facie case to warrant the orders sought. The application has been made timeously and in good faith and the Respondent will not suffer any prejudice or loss for which costs will not be a sufficient compensation in the circumstances.
5. The following documents are annexed to the Motion:
 1. Copy of application dated 29th December 2023.
 2. Copy of replying affidavit dated 10th January 2024.
 3. Copy of ruling delivered on 22nd August 2024.
 4. Copy of Memorandum of Appeal.
 5. Copy of title deed for the land parcel No Marachi/Bujumba/1021.
 6. Copy of sale agreement dated 28th November 2021.
 7. Copy of letter dated 22nd April 2021.

I may add at this point that there were other documents annexed to the Motion but which were not captured such as the Certificate of Search for the land parcel No Marachi/Bujumba/1022, Mutation Form for land parcel No Marachi/Bujumba/956 and copy of title deed for the land parcel NO Marachi/Bujumba/1022. Then there was a reference to a copy of an Occurrence Book as GPB 05 in paragraph 6 of the supporting affidavit but the same was not annexed. Parties and their counsel must always ensure that all documents referred to in any application are all filed and properly marked if they are to serve any useful purpose.

6. In opposition to the Motion, the Respondent filed a replying affidavit dated 15th March 2025 in which he has deposed, inter alia, that the application is an abuse of the process of this Court and the appeal has no chances of success as the Applicant has not demonstrated in what way the trial magistrate misdirected herself. That there is no need to stay the proceedings but rather, the injunctive



orders should be up-held to allow for the expeditious disposal of the suit by the trial Court. That he purchased two plots measuring a total of 0.1HA for which he paid Kshs.800,000 and Kshs.500,000 and has been in occupation thereof since 2011 peacefully without interruption having developed them. It was then that he discovered that the Applicant had changed the positions of the land parcels No Marachi/Bujumba/1021 and 1022. They tried resolving the issue but the Applicant directed his son and agents to demolish part of his buildings and is in the process of bringing down his shops. That there is no irreparable harm which the Applicant will suffer and it is illogical for him to claim that he has been in continuous possession of the land while at the same time claiming that the Respondent has encroached it. That indeed in paragraph 12 of his replying affidavit dated 10th January 2024 and filed in the subordinate Court, the Respondent confirmed that he has never been in occupation of the suit land and is trying to gain entry. If the order of injunction is set aside, the Respondent will be affected as the Applicant will take advantage and continue demolishing his building.

7. Directions were issued that the Motion be canvassed by way of written submissions. However, only the Applicant filed his submissions through Theldred Wesonga instructed by the firm of Makonjio Nyaberi & Company Advocates. The firm of Masiga Otieno & Associates Advocates who are on record for the Respondent did not file any submissions.
8. I have considered the application, the rival affidavits and annexures as well as the submissions by counsel for the Applicant.
9. The Applicant seeks the following substantive orders i.e.;
 - a. An order of stay of proceedings, ruling and order issued on 22nd August 2024 in the trial Court pending the hearing and determination of the appeal.
 - b. An order restraining the Respondent by himself from entering, remaining, leasing, charging, pledging, disposing off, transferring, constructing any structures on the suit land.
10. I will start with prayer No (b). That prayer was the subject of the ruling delivered by the trial magistrate on 22nd August 2024 and which is the subject of the pending appeal. The trial magistrate having found in favour of the Respondent by granting an order of injunction restraining the Applicant from interfering with the suit land pending the hearing and determination of the suit, this Court cannot now purport to issue the order in favour of the Applicant. To do so would amount to reversing the orders issued by the trial magistrate and which are the same issues which will be determined in the pending appeal. That will be a recipe for anarchy and confusion. I am not about to take that route. The parties will have to await the decision of this Court on the pending appeal. That prayer is declined.
11. In prayer (a), the Applicant seeks an order of stay of proceedings, ruling and order issued on 22nd August 2024 by the trial magistrate pending the hearing and determination of the appeal. In the case of William Odhiambo Ramogi & 2 Others -v- A.g & 3 Others 2019 eKLR, a 5 Bench of the High Court having considered the available jurisprudence on the question of stay of proceedings laid down the following principles to guide a Court considering an application for stay of proceedings pending appeal over an interlocutory application to the High Court.
 1. There must be an appeal pending.
 2. Where such stay is sought in the Court hearing the case as opposed to the higher Court to which the appeal has been filed and there is no express provision of the law allowing for such application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential for stay of proceedings to inordinately delay trial, there is a policy in favour of application for stay being handled in the Court to which an appeal



is preferred because such Court is familiar with it's docket and is therefore in a position to calibrate any orders it gives accordingly.

3. The Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable.
4. The Applicant must demonstrate that the appeal would be rendered nugatory if the stay of proceedings is not granted.
5. The Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal.
6. The Applicant must demonstrate that the application for stay was filed expeditiously and without delay.

A reading of Halsbury's Laws of England 4th Edition VOL 37 at page 330 shows that stay of proceedings is a serious, grave and fundamental interruption in the right of a party to conduct his litigation towards the determination of the suit on it's merits. The general practice therefore is that a stay of proceedings should not be ordered unless the proceedings, beyond reasonable doubt, ought not to be allowed to continue. I am also guided by the words of J. Ngugi J in the case of Turbo Highway Ltd -v- Muniv Civil Appeal No E040 of 2021 [2022 KEHC 10197 KLR] where at paragraph 23, he states that:

“As a general matter, an appellate Court will only exercise its discretion to grant a stay of proceedings pending an appeal over an interlocutory matter before a magistrate's Court or Tribunal only in exceptional circumstances, while difficult to determine with mathematical precision when the Court will use this power, it is only to be sparingly used where, in the words of South African Authors, Gardiner And Lansdown (6th Edition VOL 1 page 750) “grave injustice might otherwise result or where justice might not by other means be attained.”

The judge proceeds to quote the same authors and adds that the Court will generally;

“hesitate to intervene especially having regard to the effect of such procedure upon the continuity of the proceedings in the Court below.”

Each case must be considered on it's peculiar circumstances. In this case, I am not persuaded that the Applicant's appeal will be rendered nugatory if the proceedings in the subordinate Court are not stayed. I agree with NGUGI J (as he then was) that if Appellate Courts were to easily accede to applications for stay of proceedings arising out of interlocutory appeals, that;

“... would seriously impede proceedings in the trial Courts. This is because a party who is keen on obstructing a case from proceeding would simply prefer multiple appeals against interlocutory rulings by the trial Court and then seek stay of proceedings in the trial Court.”

Taking all the above into account, I am inclined to decline prayer (a) of the Applicant's Motion.

12. The up-shot of all the above is that having considered the Notice of Motion dated 4th September 2024, I issue the following disposal order:
 1. The Motion is dismissed.



2. Costs shall abide by the appeal.

BOAZ N. OLAO

JUDGE

2ND APRIL 2025

RULING DATED, SIGNED AND DELIVERED ON THIS 2ND DAY OF APRIL 2025 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE

2ND APRIL 2025

