



**Owaya v Okuro & another (Environment & Land Case 17 of 2021)
[2022] KEELC 13556 (KLR) (18 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13556 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 17 OF 2021
GMA ONGONDO, J
OCTOBER 18, 2022
FORMERLY MIGORI ELC O.S NO. E009 OF 2020**

BETWEEN

ISHMAIL OWANO OWAYA PLAINTIFF

AND

LONAH BOL OKURO 1ST DEFENDANT

CLIFF ORIWO OKURO 2ND DEFENDANT

RULING

1. On March 16, 2022, the 1st and 2nd defendants/applicants namely Lorna Bol Okuro and Cliff Oriwo Okuro respectively, through the firm of Ochwangi and Company Advocates, mounted an application by way of notice of motion dated March 15, 2022 under, *inter alia*, order 42 rule 6 (e) of the [Civil Procedure Rules, 2010](#) (the application herein). They are seeking the orders *infra*;
 - a. Spent
 - b. Spent
 - c. The honourable court be pleased to grant an order of stay of execution and/or enforcement of the judgment and decree issued on March 1, 2022 together with consequential orders arising therefrom and/or attendant pending the hearing and determination of the appeal in terms of the notice of appeal dated March 8, 2022.
 - d. Costs
2. The applicants have premised the application on the 1st applicant's supporting affidavit of nineteen paragraphs sworn on even date. It is further based on grounds (a) to (i) set out on the face of the same



- and the annexed documents marked as “LBO-1”, “LBO-2” and “LBO-3” being the 2nd applicant’s authority, copy of this court’s judgment and a copy of notice of appeal respectively.
3. In brief, the applicants’ complaint is that they are aggrieved by this court’s judgment rendered on March 1, 2022. That they have preferred an appeal which is arguable and that they should be afforded an opportunity to pursue the same. That any execution of the judgment and subsequent decree, may occasion substantial loss unto the applicants as the suit parcels of land reference numbers Kanyada/Kanyabala/3646 and 3647, may be placed beyond their reach. That they have commenced this application without unreasonable delay.
 4. The plaintiff/respondent, Ishmael Owano Owaya through the firm of O H Bunde and Company Advocates, opposed the application by way of his eighteen paragraphed replying affidavit sworn on May 11, 2022 and filed herein on May 18, 2022. He deposed, *inter alia*, that that whereas this court is bestowed with jurisdiction to grant the orders sought in the application, the same is not absolute but is dependent on the circumstances of the case and the consequences such orders may occasion. That the applicants have neither demonstrated the loss they are likely to suffer in the event the orders sought in the application are not granted nor furnished security as a condition set for grant of the orders.
 5. The respondent also deposed that the appeal filed by the applicant is dead on arrival. That the applicants have not met the minimum threshold for granting of the stay of execution order sought in the application and that the same is devoid of merit. That thus, the application ought to be dismissed.
 6. In her supplementary affidavit of twenty paragraphs sworn on July 18, 2022, the 1st applicant deposed in part that following this court’s judgment, the suit parcels of land are likely to be transferred to the respondent and or third parties. That therefore, the applicants may be evicted from the same hence run at a loss thereby. That there are salient and or pertinent issues of law raised in the instant appeal. That the application has been filed timeously and with due promptitude.
 7. On June 21, 2022, the court ordered and directed that the application be heard by way of written submissions pursuant to order 51 rule 16 of the [Civil Procedure Rules, 2010](#).
 8. So, by the applicants’ submissions dated July 18, 2022 and duly filed on July 21, 2022, counsel referred to the orders sought in the application, the response thereto in form of the replying affidavit, the judgment rendered by this court on March 1, 2022 and the notice of appeal duly filed herein. Counsel submitted that the application is meant to protect their interests over the suit parcels of land and that the appeal is not rendered nugatory.
 9. To reinforce the submissions, counsel cited the decision in [UAP Provincial Insurance Company Ltd v Michael John Beckett](#) Court of Appeal Civil Appeal No 26 of 2007 (2013 eKLR, among other authorities. Counsel therefore, urged this court to allow the application in the interest of justice.
 10. On the part of the respondent, his counsel filed submissions dated May 11, 2022 providing background of the suit which stimulated the judgment of this court and the instant application. Counsel proceeded to identify four issues for determination, *inter alia*, whether there is sufficient cause to warrant the orders of stay of proceedings and whether the orders shall be in the interest of justice. In discussing the issues, counsel termed the application devoid of merit and at variance with the requisite statutory conditions and requested this court to dismiss the same.
 11. In support of the submissions, counsel relied upon, *inter alia*, order 42 rule 6 (supra), the case of [Carter and sons Ltd v Deposit Protection Fund Board and 2 others](#) Court of Appeal Civil Appeal No 291 of 1991 (UR) regarding the triple conditions for grant of stay of execution as sought in the application. Also, reference was made to the case of [James Wangalwa and another v Agnes Naliaka Cheseto](#) (2012) eKLR pertaining to security for the due performance of the decree of the lower court.



12. In light of the application, the replying affidavit, the supplementary affidavit and the parties' respective submissions including all the authorities cited therein, has the applicants' claim attained the threshold for the grant of the orders sought in the application?
13. It must be noted that the application is partially premised upon order 42 rule 6 (2) (supra) which provides for the triple conditions for the grant of stay of execution sought herein and it reads;
 - “(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.”
14. Concerning substantial loss, I note grounds (g) and (h) of the application and paragraphs 6 and 7 of the 1st applicant's supporting affidavit. In the replying affidavit, the respondent stated that substantial loss has not been established by the applicants.
15. It must be appreciated that the substantial loss is the cornerstone of jurisdiction for granting a stay of execution of existing orders. That is what has to be prevented; see *Kenya Shell Ltd v Benjamin Karuga Kibiru and another* (1986) eKLR. Further to this court's judgment, the respondent is bound to dispose of or transfer the suit parcels of land thus, evict the applicants who are likely to suffer substantial loss thereby.
16. As regards delay, this court is guided by order 50 rules 2, 3, 5 6, 7 and 8 of the *Civil Procedure Rules, 2010* and bear in mind ground (i) of the application. On account that judgment was delivered on March 1, 2022, the application was commenced within a reasonable period of time.
17. On security, the respondent asserted that the applicants have not offered the same for the due performance of the judgment and subsequent decree. It is trite that no party is exempt from providing security in cases such as the instant one; see *Doshi Iron Mongers Ltd v Kenya Revenue Authority and another* (2020) eKLR.
18. Admittedly, the issue of security is within the unfettered discretion of the court; see Carter and Wangalwa cases (supra).
19. Notably, the applicants have mounted an appeal in terms of the notice filed (LBO-3 and as per order 42 rule 7 of the *Civil Procedure Rules, 2010*. Therefore, if the application is disallowed, the appeal may be rendered nugatory as held in UAP Case (supra)
20. The applicants have an undoubted right of appeal of the Court of Appeal; see *Butt v Rent Restriction Tribunal* (1979) eKLR and articles 48 and 50 (1) of the *Constitution* of Kenya, 2010
21. Section 13 (7) (a) *Environment and Land Court Act*, 2015 (2011) provides for interim preservation orders. The stay order sought in the application is envisaged thereunder.
22. Furthermore, it is established law that the court has authority to issue orders for the preservation, in the interim, of a subject matter of appeal; see *Board of Governors, Moi High School, Kabarak and another v Malcolm Bell* (2013) eKLR.



23. To that end, the applicants have established the threshold for grant of orders 3 and 4 sought in the application and as stated in paragraphs 1 (c) and (d) hereinabove. So, I proceed to determine the application as follows:
- a. An order of execution of this court's judgment and decree of March 1, 2022, is hereby granted as per prayer 3 in the application.
 - b. The applicants shall deposit in this court, security of Kshs 15,000/-(fifteen thousand only) for the due performance of the decree as may ultimately be binding upon them, within the next thirty days from this date, failure of which the order of stay granted, shall lapse automatically without a further order.
 - c. Costs of the application to abide the appeal.

24. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 18TH DAY OF OCTOBER 2022.

G.M.A ONG'ONDO

JUDGE

Present

1. Mr. Nyakwemba holding brief for Mr. H. Bunde, Learned Counsel for the Plaintiff
2. Respondent & Defendants –Absent.
3. Okello, Court Assistant.

