



REPUBLIC OF KENYA



**Sakwa v Oduor & another (Environment & Land Case 384 of 2017)
[2022] KEELC 14960 (KLR) (22 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14960 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 384 OF 2017
DO OHUNGO, J
NOVEMBER 22, 2022**

BETWEEN

PATRICK MAKOKHA SAKWA PLAINTIFF

AND

FREDRICK BARASA ODUOR 1ST DEFENDANT

CHARLES ODUOR WAKANDA 2ND DEFENDANT

RULING

1. I delivered judgment in this matter on September 20, 2022 in favour of the plaintiff as follows:
 - a. The defendants, their family, servants, agents or any other person claiming on their behalf, to vacate the parcel of land known as N/Wanga/Namamali/1008 within 90 (ninety) days from the date of delivery of this judgment.
 - b. In default of (a) above, the defendants, their family, servants, agents or any other person claiming on their behalf, be evicted from the parcel of land known as N/Wanga/Namamali/1008.
 - c. Upon, the defendants, their family, servants, agents or any other person claiming on their behalf vacating or being evicted from the parcel of land known as N/Wanga/Namamali/1008, they shall stand restrained from trespassing upon or encroaching on the parcel of land known as N/Wanga/Namamali/1008 or interfering with the plaintiff's and the erstwhile minors' use, occupation or enjoyment of the parcel of land known as N/Wanga/Namamali/1008.
 - d. The defendants' counterclaim is dismissed.
 - e. The plaintiff shall have costs of the suit.



2. Aggrieved by the outcome, the defendants filed notice of appeal on September 27, 2022 and wrote to the Deputy Registrar a letter dated September 27, 2022, seeking typed and certified proceedings for purposes of the appeal. Subsequently, the defendants filed notice of motion dated September 29, 2022, which is the subject of this ruling.
3. The following orders are sought in the application:
 1. That the honourable court be pleased to order for stay of execution in the case herein pending the hearing and determination of the applicants/defendants' intended appeal to the court of appeal at Kisumu.
 2. That the *status quo* on land parcel No North Wanga/Namamali/1008 be maintained pending the hearing and determination of the applicants/defendants' intended appeal of the court of appeal at Kisumu.
 3. That the costs of this application be provided for.
4. The application is supported by an affidavit sworn by the first defendant. He deposed that there is substantial development on the suit property including a four-bedroom permanent house, old trees, two semipermanent houses, maize plantation, a gravesite with remains of four ancestors and that he will therefore suffer irreparable loss if stay is not granted. He added that he is ready to provide any security which may be ordered by the court as condition for stay and that the plaintiff will not suffer any loss if stay of execution is granted since he doesn't reside on the suit property.
5. In response, the plaintiff filed a replying affidavit in which he deposed that he has been waiting for justice for 12 years since the cause of action arose in the year 2012 and that granting stay will be a denial of justice to him. That the defendants have been in illegal occupation of the suit property and constructed the houses during pendency of this suit. He denied that there are four graves on the land and added that that the defendants have another parcel of land which shares a common boundary with the suit property, to which the defendants can move and settle pending determination of the appeal.
6. The application was canvassed through written submissions. The defendants argued that they would be evicted if stay is not granted hence rendering the appeal of no purpose and occasioning the substantial loss. That they have filed the application without unreasonable delay and that they will abide by the court's directions as to security.
7. On his part, the plaintiff argued that the defendants have not fulfilled the conditions for stay pending appeal and that the 90 days given to the defendants in the judgment is sufficient for them to move. Adding that the defendants have not offered any security, he urged the court to dismiss the application.
8. I have considered the application, the affidavits, and the submissions. This court's jurisdiction to grant stay of execution pending appeal is guided by order 42 rule 6 (1) and (2) of the [Civil Procedure Rules, 2010](#) which provides as follows:

"6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from



whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

- (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."

9. The essence of the foregoing is that an applicant seeking stay of execution pending hearing and determination of an appeal must demonstrate that substantial loss will result to him if stay is not granted, and that the application has been made without unreasonable delay. As Platt Ag JA (as he then was) stated in *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR, substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. It is virtually impossible for such an application to succeed if an applicant fails to demonstrate that he will suffer substantial loss if stay is not granted. Further, the applicant is required to give such security as the court may order for the due performance of the decree.
10. In the judgment delivered in this matter, the defendants as well as their families, servants and agents were ordered to vacate the suite property within ninety days from September 20, 2022 and in default they be evicted. I am persuaded that eviction from the suit property will constitute substantial loss. I do not agree with the plaintiff that granting stay pending appeal will be a denial of justice to him. He already has a decree in his favour, the fruit of the judicial process. An appeal is as much a part of the judicial process and fair hearing as the trial that yielded the judgment.
11. As regards the requirement that an application such as the present one be brought without unreasonable delay, I note that the judgment delivered on September 20, 2022 and that the application was filed nine days later on September 29, 2022. There was thus no unreasonable delay.
12. On the requirement of security for due performance of the decree, the applicants have expressed readiness to comply with the court's orders on security. Even though they have not offered any security, the court always retains the power to order such security as is appropriate. Since the plaintiff was awarded costs of the suit, I consider it appropriate that the security be that the applicants deposit in court such sum as will be determined as the party and party costs of the suit. I will also limit the life of the stay orders to ensure that the appeal is prosecuted timeously. In doing all the foregoing, I have striven to strike a balance between the rights of the plaintiff to enjoy the fruit of his litigation and the defendants' right to pursue an appeal.
13. In view of the foregoing, I find merit in notice of appeal on September 27, 2022. I therefore make the following orders:
 - a. I grant stay of execution of the judgment and decree herein pending hearing and determination of the defendants' appeal to the Court of Appeal.
 - b. Costs of this application are awarded to the plaintiff.
 - c. The stay is conditional on the defendants depositing in court such sum as will be determined to be the party and party costs of this suit.



- d. The deposit to be made within 21 (twenty-one) days of the costs being taxed. In default, the stay orders shall automatically lapse, and notice of motion dated September 29, 2022 shall stand dismissed with costs to the plaintiff.
- e. The stay orders shall, if the defendants comply with the conditions in (c) and (d) above, remain in force for a period of only 2 (two) years from the date of delivery of this ruling, unless otherwise extended in the appellate court.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 22ND DAY OF NOVEMBER 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Masakhwe for the plaintiff

Ms Wilunda for the defendants

Court Assistant: E. Juma

