



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Otieno & 2 others v Aoko (Sued on his own and as the legal administrator
of the Estate of Elizafan Aoko Gumbo) (Environment & Land Case
15 of 2021) [2022] KEELC 14824 (KLR) (15 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14824 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 15 OF 2021
GMA ONGONDO, J
NOVEMBER 15, 2022
(FORMERLY MIGORI ELCC NO. 660 OF 2017
CONSOLIDATED WITH MIGORI ELCC NO. 146 OF 2017)**

BETWEEN

**ELISHA OKOTH OTIENO 1ST PLAINTIFF
FANUEL ACHOLA OTIENO 2ND PLAINTIFF
ISAIAH OTIENO 3RD PLAINTIFF**

AND

**JARED OTIENO AOKO RESPONDENT
SUED ON HIS OWN AND AS THE LEGAL ADMINISTRATOR OF THE
ESTATE OF ELIZAFAN AOKO GUMBO**

RULING

1. The instant ruling is in respect of two applications namely;
 - a. A notice of motion dated May 23, 2022 and lodged in court on May 26, 2022 by the defendant/applicant, Jared Otieno Aoko through the firm of OM Otieno and Company Advocates (the 1st application herein).
 - b. A notice of motion dated May 27, 2022 and filed in court on May 30, 2022 by the three plaintiffs/applicants through the firm of Oguttu Mboya, Ochwal and Partners Advocates (the 2nd application herein).
2. In the 1st application, the defendant is seeking the following orders ;



- i. The honourable court be pleased to review limb (b) of the judgment/ decree *vide* paragraph 42 of the judgment/decree dated the 28th day of April 2022, by substituting the prayers *vide* the plaint dated the 1st day of November 2011, and substitute the same with the prayers amended plaint dated the 19th day of January 2017, annexed to in the notice of motion application dated the 19th day of January 2017, and deemed as duly filed and served pursuant to the court order of 5th day April 2018.
 - ii. That upon variation of the judgment, the court be pleased to issue eviction orders against the respondents from LR No Kamagambo/kongundi/1111 (hereinafter referred to as the suit property), as prayed *vide* the amended plaint *vide* prayer (a), thereof.
 - iii. Consequent to prayer (3) above being granted, the honourable court be pleased to order and/or direct the OCS in charge, of Homa-Bay Police Station to enforce the order of this court and/or provide necessary security to any licensed court bailiff/auctioneer to facilitate the execution, enforcement and/or implementation of the eviction order of the 1st respondent from the suit property.
 - iv. Costs of this application be borne by the plaintiff/respondents.
 - v. Such other and/or further orders as this honourable court may deem just and expedient be granted.
3. The 1st application is anchored on the defendant’s supporting affidavit of 19 paragraphs sworn on even date together with copies of documents marked as “exhibits 1 to 5” annexed thereto and grounds (a) to (k) set out on the face of the application. In a nutshell, the defendant’s complaint is that on April 28, 2022, this court entered judgment in his favour against the plaintiffs pursuant to the plaint dated November 1, 2011 in lieu of the amended plaint of January 19, 2017 annexed to the application of even date. That therefore, failure to grant an eviction order sought in the amended plaint, was inadvertent in the judgment and that it is in the interest of justice that the 1st application be granted.
4. The plaintiffs opposed the 1st application by way of grounds of opposition dated June 3, 2022, *inter alia*;
- a. The instant application offends mandatory of sections 152B and 152G of the Land Act No 6 of 2012 which requires that for an eviction to be carried out, proper notice must be given to the plaintiffs/respondents.
 - b. The available remedy for the defendant/applicant is to seek an order of review of the judgment/ decree herein but same cannot seek an order for eviction against the plaintiffs/respondents in the manner sought herein.
 - c. The order for eviction having not been granted in the judgment and/or decree of April 28, 2022, it behooves the defendant/applicant to deal with the issue of review of the decree therein first and then after lodge a formal application in regards to eviction as required by the Land Act No 6 of 2012.
5. In the 2nd application, the plaintiffs have sought the orders *infra*;
- i. The honorable court be pleased to grant an order of stay of execution and/or implementation of the judgment and/or decree dated 28th day of April 2022, together with all consequential orders and in particular, the limbs thereof issuing orders of permanent injunction restraining the 1st plaintiff/applicant from trespassing, alienating and encroaching onto the suit



property which has now been various subdivided into land reference numbers Kamagambo/kongudi/2128-2143, pending the hearing and determination of the intended appeal to the Honourable Court of Appeal.

- ii. The honourable court be pleased to grant such further and/or others as may be deemed just, appropriate and/or expedient be granted.
 - iii. Costs of this application do abide the intended appeal.
6. The 2nd application is premised upon the 1st plaintiff's supporting affidavit of 30 paragraphs sworn on even date and the annexed documents marked as "EOO 1" to "EOO 4" which include; a copy of this court's judgment rendered on April 28, 2022 (EOO 1) and a copy of notice of appeal (EOO 3). Also, the same is anchored on grounds (a) to (gg) as stated on the face of the application. Briefly, the plaintiffs' lamentation is that they are dissatisfied with this court's judgment thus, lodged the notice of appeal and that the intended appeal raises serious and pertinent issues which require to be addressed by the Court of Appeal. That the defendant is desirous to execute the judgment which include an order of permanent injunction which is bound to deprive of the 1st plaintiff the suit property.
 7. The defendant opposed the 2nd application by his replying affidavit of 21 paragraphs sworn on July 5, 2022 and filed in court on July 6, 2022. He deposed in part that the plaintiffs have not demonstrated substantial loss they are likely to suffer as the costs of the suit is yet to be taxed to pave way for extraction of decree. That the plaintiffs have erected an illegal new house at the entrance of the suit property as depicted in the photograph (JOA 1) attached to the affidavit. He termed the application devoid of merit, clothed with dishonest intention and ought to be dismissed with costs
 8. The 1st and 2nd applications were heard by way of written submissions further to the orders and directions of this court made on June 2, 2022 and June 13, 2022; see order 51 rule 16 of the [Civil Procedure Rules, 2010](#) and practice direction number 33 of the Environment and Land Court Practice Directions, 2014.
 9. In the submissions dated July 5, 2022 and filed in court on July 6, 2022 regarding the 1st application, learned counsel for the defendant referred to the plaint dated November 1, 2011, the application dated January 19, 2017 together with the amended plaint attached thereto, the court orders of April 5, 2017, section 80 of the [Civil Procedure Act](#) chapter 21 laws of Kenya and order 45 of the [Civil Procedure Rules, 2010](#). Further, counsel cited the case of [Zablon Mokuva-vs-Solomon M Choti and 3 others](#) (2016) eKLR, among others, in support of the submissions. Counsel hence urged the court to disregard the plaintiffs' grounds of opposition and allow the 1st application.
 10. On the other hand, learned counsel for plaintiffs filed submissions dated July 18, 2022 on July 20, 2022 concerning the 1st application, and set out brief background of the matter including this court's judgment delivered on April 28, 2022 and the 1st and 2nd applications. Counsel framed two issues for determination namely whether the 1st application amounts to an abuse of the process of the court and whether an order of eviction can issue as sought in the 1st application. In analyzing the issues, counsel urged this court to dismiss the 1st application with costs and relied on, *inter alia*, [IEBC and another-vs-Stephen Mutinda Mule and 3 others](#) (2014) eKLR and [John Gilbert Ouma-vs-Kenya Ferry Services](#) (2021) eKLR, to fortify the submissions.
 11. In respect of the 2nd application, learned counsel for the plaintiffs, filed submissions also dated July 18, 2022 on July 20, 2022 providing the background of the case inclusive of this court's judgment duly rendered herein. Counsel framed triple issues for determination in terms of the conditions under order 42 rule 6 (2) of the [Civil Procedure Rules, 2010](#) and discussed the same in favour of the grant of stay of execution of the judgment as sought in the 2nd application. To reinforce the submissions, counsel



cited the case of *Bonface Kariuki Wabome-vs-Peter Nziki Nyamai and another* (2019) eKLR as well as the case of *Butt-vs-Rent Restriction Tribunal* (1979) eKLR, among other authorities.

12. By the submissions dated June 28, 2022 and filed in court on July 6, 2022 as regards the 2nd application, learned counsel for the defendant stated brief facts of the case and identified two issues for determination including whether the plaintiffs have satisfied the conditions governing the grant of stay of execution. Counsel relied on various authorities including the case of *Kenya Shell Ltd-vs-Kibiru and another* (1986) eKLR as well as *Nairobi Women's Hospital-vs-Purity Kemunto* (2018) eKLR, termed the 2nd application baseless and implored upon the court to dismiss the same
13. I have duly considered the parties' respective applications, the responses and the submissions herein. Therefore, the issues for determination boil down to whether the defendant and plaintiffs have satisfied the conditions for the grant of the orders sought in the 1st application and 2nd application respectively.
14. The defendant has sought review of paragraph 42 (b) of this court's judgment delivered on April 28, 2022. He contends that on April 5, 2017 the court allowed an application dated 19th January 2017 for amendment of a plaint dated November 1, 2011. That eviction order sought in the amended plaint, was inadvertently omitted in the judgment herein.
15. The orders granted in the judgment are borne in mind. Eviction order sought in the amended plaint is targeted at section 152 A of the *Land Act*, 2016 (2012) which provides for prohibition to unlawful occupation of private, public and community land.
16. Review of court's judgment, decree or order is anchored on section 80 of the *Civil Procedure Act* chapter 21 laws of Kenya which stipulates;

“ Any person who considers himself aggrieved –

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. by a decree or order from which an appeal is allowed by this Act,
- may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

17. Similarly, order 45(1) of the *Civil Procedure Rules* provides for review and the same states thus;

"1. Any person considering himself aggrieved-

- a. By decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter of evidence which , after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record , or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay."



18. In the *Concise Oxford English Dictionary* 12th edition at page 1652, the term “prefer” means;
“Submit (charge or information) for consideration.”
19. Section 75 of the *Civil Procedure Act* (cap 21) relates to orders from which appeal lies. Section 76 of the same Act governs other orders.
20. Amendment of judgment, decree or orders and general power to amend any defect or error in any proceedings in a suit are provided for under sections 99 and 100 of the *Civil Procedure Act* chapter 21 laws of Kenya (cap 21) respectively. Indeed, the court has power to correct any apparent errors in its’ judgment, ruling or orders; see *Charles Karathe Kiarie and 2 others-vs-Administrator of the estate of Waliace Mathare (deceased) and 2 others* 2020 KLR.
21. Besides, it must be noted that the plaintiffs have lodged an appeal from this court’s judgment. Order 42 rule 6 (4) (*supra*) reads;
“For the purposes of this rule an appeal to the Court of Appeal be deemed to have been filed when under the Rules of that court notice of appeal has been given.”
22. In that regard, the plaintiffs are entitled to pursue the appeal as enshrined under articles 48 and 50 (1) of the *Constitution of Kenya, 2010*.
23. In Butt case (*supra*) the court remarked;
“.....The appellant has undoubted right of appeal,,,,,,,”
24. Order 42 rule 6 (2) (*supra*) sets out triple conditions for stay of execution. The conditions are cumulative in nature as held in *Trust Bank Limited –versus Ajay Shab and 3 others* (2012) eKLR.
25. Since the appeal has been preferred , if stay of execution of judgment herein is not granted, the plaintiff may suffer substantial loss as noted in *Kenya Shell Limited case(supra)* Taking into account, order 50 rules 2, 3 and 8 of the *Civil Procedure Rules 2010*, thirty (30) days delay to mount the 2nd application, is reasonable in the circumstances. On security, I subscribe to the decision in the case of *Doshi Iron Mongers Ltd-vs-Kenya Revenue Authority and another* (2020) KLR that no party is exempt from providing security for the due performance of Judgment and or decree in a matter
26. In *Butt case (supra)*, the Court of Appeal also stated that grant of stay of execution is discretionary. That the same depends on particular circumstances of the case.
27. Moreover. this court is mandated to grant interim preservation orders, inter alia, stay of execution of the judgment herein pursuant to sections 3 and 13 (7) (a) of the *ELC Act, 2015* (2011).
28. To that end, I find no merit in the 1st application while the 2nd application is meritorious.
29. Wherefore, the 1st and 2nd applications are determined thus;
 - a. The 1st application dated May 23, 2022 and filed on May 26, 2022 by defendant, is hereby dismissed.
 - b. Prayer 3 sought in the 2nd application dated May 27, 2022 and filed in court on May 30, 2022 by the plaintiffs and as stated in paragraph 5(i) herein above, be and is hereby granted.
 - c. The plaintiff shall deposit security in court in the form of Kshs 30,000/- (thirty thousand only) within the next 30 days from this date for the due performance of the judgment and decree



failure of which the stay of execution order herein shall lapse automatically with no further orders of this court being necessary.

- d. Costs of the 1st and 2nd applications to abide the appeal deemed duly lodged at the Court of Appeal.

30. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 15TH DAY OF NOVEMBER 2022.

G.M.A ONG'ONDO

JUDGE

Present

1. Mr. J. Kiseru holding brief for O.M Otieno learned Counsel for the defendant
2. Ms. Ochieng holding brief for Ms. Ochwal learned Counsel for the plaintiffs.
3. Angela and Fiona-Court Assistants.

