



REPUBLIC OF KENYA



**KENYA LAW**  
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**Were v Mbori (Suing as the Legal Representative of the Estate of the Late Isaac Mbori Oyugi-Deceased) (Environment and Land Appeal E008 of 2022) [2022] KEELC 15555 (KLR) (19 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15555 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY**  
**ENVIRONMENT AND LAND APPEAL E008 OF 2022**  
**GMA ONGONDO, J**  
**DECEMBER 19, 2022**

**BETWEEN**

**JOSEPH OCHILO WERE ..... APPELLANT**

**AND**

**EDWARD OGANGA MBORI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE ISAAC MBORI OYUGI-DECEASED) ..... RESPONDENT**

**RULING**

1. By a notice of motion dated February 17, 2022 and filed in court on April 5, 2022 under order 42 rule 6 (1) and 2 and order 50 rules 1 and 3 of the *Civil Procedure Rules, 2010* (the application herein) through Odhiambo Ogutu and Company Advocates, the applicant, Joseph Ochilo Were is seeking the following orders;
  - a. Spent
  - b. Spent
  - c. That pending the hearing and determination of the applicant's intended appeal, this honourable court do grant a stay of execution of the subordinate court's judgment and orders issued on February 10, 2022, by honourable Celesa Okore, senior principal magistrate in Oyugis SPM's Court ELC No 33 of 2020.
  - d. That the costs of this application be provided for.
2. The application is founded upon the applicant's supporting affidavit of ten paragraphs of even date and the accompanying copy of the trial court's judgment and a memorandum of appeal marked as



'JWO 1' and 'JWO 2' respectively annexed thereto. Also, the application is premised on grounds 1 to 7 set out on the face of the same.

3. Briefly, the applicant's lamentation is that he is aggrieved by the trial court's judgment rendered on February 10, 2022 and has filed a memorandum of appeal (JWO 2). That the appeal may be rendered nugatory since the respondent shall have executed the judgment if the orders sought in the application are not allowed.
4. In a replying affidavit of eleven paragraphs sworn on April 1, 2022 and filed on even date, the respondent through the firm of Kisaka and Associates Advocates opposed the application. He deposed, inter alia, the application does not comply with the provisions of section 79 G of the Civil Procedure Act Chapter 21 Laws of Kenya. That the application has been filed un-procedurally and the same is an act in futility.
5. Further, the respondent deposed the application is defective, frivolous and a waste of the court's time. That the appeal and the application are an afterthought and an abuse of the court process thus, should be curtailed by this court.
6. Following the court's directions made on October 6, 2022, the application was heard by written submissions; see also order 51 rule 16 of the Civil Procedure Rules, 2010 and practice direction number 33 of the Environment and Land Court Practice Directions, 2014.
7. Interestingly, the applicant's counsel failed to file submissions herein.
8. On the other hand, the respondent's counsel filed submissions dated November 4, 2022 on November 8, 2022 identifying triple issues for determination including whether the appeal and the application are an abuse of the court process. Counsel submitted against the grant of orders sought in the application, relied on section 79 G (Supra) and urged the court to dismiss the application as well as the appeal for being defective.
9. I have carefully considered the entire application, the replying affidavit and the respondent's submissions. In that regard, has the applicant met the legal requirements for the grant of the orders sought in the application?
10. Order 42 rule 6 (1) and (2) (supra) under which the application is commenced, provides for triple requirements for stay of execution of judgment namely -
  - a. Substantial loss likely to be occasioned on the applicant
  - b. Delay in mounting the application
  - c. Security for the due performance of decree
11. Regarding substantial loss, the applicant asserted that he is apprehensive that this appeal may be rendered nugatory if the respondent executes the judgment against him. The respondent termed the application and the appeal an afterthought and abuse of the court process, among other things as stated in paragraphs 4 and 5 hereinabove.
12. In the case of Kenya Shell Ltd-vs-Benjamin Karuga Kibiru and another (1986) eKLR, the Court of Appeal held thus;

' Substantial loss is the cornerstone of both jurisdictions of granting a stay. That is what has to be prevented.'



13. In the instant case, the appeal is likely to be rendered nugatory if the application is not allowed as the applicant has an undoubted right of appeal; see *Butt-vs-Rent Restriction Tribunal (1979) eKLR*.
14. More importantly, the right to access to justice and the right to fair hearing are stipulated under articles 48 and 50 (1) of the *Constitution* of Kenya, 2010 respectively. Moreover, article 25 ( c) of the same Constitution provides for unlimited right to fair trial of cases including this appeal.
15. On delay, the same defeats equity as per the principles of equity anchored under article 10 (2)(b) of the *Constitution* of Kenya, 2010. The application was originated hardly seven days after the delivery of the trial court's judgment. In the obtaining scenerio, the delay is not unreasonable.
16. As regards security, no party is exempt therefrom as I subscribe to the decision in the case of *Doshi Iron Mongers Ltd-vs-Kenya Revenue Authority (2020) eKLR*. However, this is within the absolute discretion of the court.
17. To that end, I find merit in the application. I therefore, proceed to allow the same in the manner set out at paragraph 1(c) hereinabove.
18. Costs of the application to abide this appeal.

Orders accordingly.

**DATED, DELIVERED AND SIGNED THIS DAY OF 19TH DECEMBER 2022**

**G M A ONGONDO**

**JUDGE**

**PRESENT**

- a. Ms Ochieng instructed by Kisaka and Associates Advocates for the appellant/applicant
- b. Okello, court assistant

