



**Oturu (Suing as the Administrator of the Estate of Samwel Oturu
Adwogo) v Aduogo (Environment and Land Case Civil Suit
830 of 2015) [2025] KEELC 465 (KLR) (11 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 465 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 830 OF 2015
SO OKONG'O, J
FEBRUARY 11, 2025**

BETWEEN

**FRANCIS ODHIAMBO OTURU (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF SAMWEL OTURU ADWOGO) PLAINTIFF**

AND

JACTON OKULA ADUOGO DEFENDANT

RULING

1. On 22nd November 2017, the court entered judgment herein for the Plaintiff against the Defendant and ordered among others that the Defendant be evicted from all those parcels of land known as Kisumu/Bar/1762 and Kisumu/Bar/2139 (the suit properties). The Defendant applied for a stay of execution of the said judgment before this court which application was dismissed with costs on 11th October 2018. The Defendant applied for a stay of execution in the Court of Appeal through an application dated 24th October 2018. The application was conditionally allowed by the Court of Appeal on 19th June 2019. The Court of Appeal granted the order of stay pending appeal on condition that the Defendant would file a memorandum of appeal and a record of appeal within 60 days of the date of the order in default of which the stay was to lapse. The Defendant filed a record of appeal within the period that was fixed by the Court of Appeal but failed to serve the same upon the Plaintiff herein who is the Respondent in the appeal within the period prescribed by the Court of Appeal rules.
2. On application by the Plaintiff in the Court of Appeal, the Court of Appeal struck out the Defendant's record of appeal on 22nd March 2023 for the reason that the same was served out of time. The Defendant filed another application in the Court of Appeal dated 24th February 2023 for an extension of time to file and serve a record of appeal and for the record of appeal that was served upon the Plaintiff on 5th September 2019 to be deemed as having been filed within time. The application was allowed as prayed on 27th October 2023. What this means is that the Defendant's appeal against the judgment of



this court delivered on 22nd November 2017 is still pending hearing and determination in the Court of Appeal.

3. What is now before the court is the Plaintiff's application brought by way of a Notice of Motion dated 15th July 2024 seeking an order that the O.C.S Dago Police Station be directed to evict the Defendant from the parcel of land known as Kisumu/Bar/1762. The application was brought on the ground that in the judgment delivered on 22nd November 2017, the Defendant was ordered to give the Plaintiff vacant possession of among others the parcel of land known as Kisumu/Bar/1762 within 90 days from the order and that the Defendant had refused to comply making it necessary to the Police to be called in to assist with his eviction from the property.
4. The application was opposed by the Defendant through a replying affidavit sworn on 6th August 2024. The Defendant averred that he was granted a stay of execution of the judgment of this court by the Court of Appeal but he filed and served a record of appeal out of time that resulted in his record of appeal being struck out. The Defendant averred that he subsequently applied for an extension of time to file a record of appeal. The Defendant averred that his application for an extension of time was allowed and his record of appeal was deemed as having been filed within time. The Defendant averred that his appeal was pending in the Court of Appeal and the order for stay of execution that was granted by the Court of Appeal was still in force. The Defendant averred that in the circumstances, the Plaintiff's application for his eviction from the parcel of land Kisumu/Bar/ 1762 was brought in bad faith to cause him embarrassment.
5. I have considered the Plaintiff's application together with the affidavit filed in support thereof. I have also considered the replying affidavit by the Defendant filed in opposition to the application. The Plaintiff is seeking execution of the judgment delivered herein on 22nd November 2017. It is not disputed by the Plaintiff that the Defendant was granted a stay of execution of the said judgment by the Court of Appeal on 19th June 2019. It is common ground that the stay was granted by the Court of Appeal on condition that the Defendant would file a memorandum and a record of appeal within 60 days. It is common ground that the Defendant filed a record of appeal within the specified period but served the same out of time with the consequence that the memorandum and record of appeal filed by the Defendant were struck out on 22nd March 2023. It is also common ground that the Defendant applied to the Court of Appeal for an extension of time to file the record of appeal and for the record of appeal that he had filed and served upon the Plaintiff to be deemed as having been filed within time. It is common ground that the Defendant's application was allowed on 27th October 2023.
6. What I have been called upon to determine by the parties is whether by deeming the Defendant's record of appeal to have been filed within time, the Court of Appeal reinstated or not the order of stay of execution that it had granted to the Defendant on 19th June 2019 which lapsed when the said record of appeal was struck out on 22nd March 2023. I am of the view that I have no power in the circumstances to interpret the ruling of the Court of Appeal when the matter is still pending before that court. The stay may or may not have been reinstated. The Court of Appeal before which the matter is pending is better placed to determine that. I am of the view that the parties should move the Court of Appeal for the determination of the issue.
7. For now, I am not persuaded by the Plaintiff that the order of stay of execution granted by the Court of Appeal on 19th June 2019 is not in force. I will therefore dismiss the Plaintiff's application dated 15th July 2024 with costs to be in the cause. The Plaintiff shall be at liberty to bring afresh application should the Court of Appeal determine if moved by the parties that the order of stay of execution granted on 19th June 2019 lapsed and was never reinstated. It is so ordered.

DELIVERED AND DATED AT KISUMU ON THIS 11TH DAY OF FEBRUARY 2025



S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Odeny for the Plaintiff

Mr. Onsongo for the Defendant

Ms. J.Omondi-Court Assistant

