



Opiyo v Odhialo (Suing through Daniel Jaoko Odhialo) (Environment and Land Appeal E018 of 2024) [2025] KEELC 1112 (KLR) (6 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1112 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E018 OF 2024
SO OKONG'O, J
MARCH 6, 2025**

BETWEEN

JEREMIAH ODIWUOR OPIYO APPELLANT

AND

DENNIS FRANCIS ODHALO (SUING THROUGH DANIEL JAOKO ODHALO) RESPONDENT

RULING

1. On 4th April 2024, a judgment was entered for the respondent against the appellant in Nyando PMELC No. 38 of 2020 (hereinafter referred to only as “the lower court”). In the lower court suit, the respondent had averred that he was the registered owner of all that parcel of land known as Kisumu/Wangaya I /5542 (hereinafter referred to as “the suit property”) and that the appellant had without his permission entered and occupied the same. The appellant filed a defence and a counter-claim against the respondent in which he sought among other orders, a declaration that the registration of the suit property in the name of the respondent was fraudulent, illegal, null and void. The appellant averred that he was occupying the suit property as of right and that the title held by the respondent in respect of the suit property was acquired fraudulently. In its judgment, the lower court found that the respondent was the registered proprietor of all that parcel of land known as Kisumu/Wangaya I /5542 (hereinafter referred to as “the suit property”) and that the appellant did not prove his allegation that the respondent acquired the suit property fraudulently. The lower court dismissed the appellant’s counter-claim and issued a permanent injunction restraining the appellant from entering or interfering in any manner whatsoever with the suit property, and an order for the eviction of the appellant from the suit property. The appellant was also condemned to pay the costs of the suit. The appellant was aggrieved by the said judgment and filed the present appeal to challenge the same on 15th April 2024 through a memorandum of appeal dated 11th April 2024.



2. What is before this court for determination is the appellant's Notice of Motion application dated 11th November 2024 in which the appellant has sought an order of stay of execution of the lower court's judgment delivered on 4th April 2024, an order of injunction restraining the respondent from interfering with the suit property pending the hearing and determination of the appeal and an order that the appellant be allowed to continue carrying out his agricultural activities on the suit property. The appellant also prayed for the costs of this application. The application has been brought on the grounds set out on the face thereof and on the supporting affidavit and further affidavit of the appellant sworn on 11th November 2024 and 23rd December 2024 respectively. The appellant has averred that after the pronouncement of the judgment of the lower court and the issuance of the decree by the court, the respondent entered the suit property and harvested the appellant's sugarcane planted thereon and used the proceeds of sale hence denying the appellant his rights. The appellant has averred that the respondent has prevented the appellant from entering and cultivating and/or carrying on his usual farming activities on the property. The appellant has averred that the respondent never cultivated the suit property because the same belonged to the appellant's grandfathers and therefore he will not suffer any loss in the event that the application is allowed, and instead it is the appellant who will suffer irreparable loss if the application is not allowed. The appellant has averred that the sugarcane harvested by the respondent has started growing and the respondent can at any time uproot them an act which can cause harm to the applicant.
3. The application is opposed by the respondent through a replying affidavit sworn on 3rd February 2025. The respondent has averred that the appellant is in contempt of court and/or has tried to sell the suit property to a third party. The respondent has averred that the appellant tilled the land despite there being a court order stopping the same. The respondent has averred that the appellant was the first to breach the status quo which he now seeks to maintain, when he planted sugarcane on the suit property despite a court order issued on 21st August 2020 stopping the same. The respondent has averred that the appellant has already been evicted from the suit property and that it is the respondent who is cultivating the land. The respondent has averred that it is in the interest of justice that that status quo be maintained and the suit property remains vacant and uncultivated pending the hearing of the appeal so that no party is unjustly enriched at the expense of the other. The respondent has contended that the appellant does not stand to suffer any substantial loss and has not stated the alleged loss that he will incur should the orders sought not be granted.
4. The application was heard on 4th February 2025. The appellant relied on his affidavits in support of the application and argued that he would suffer irreparable loss unless the stay sought is granted. The appellant prayed that the status quo be maintained to avoid his appeal being rendered nugatory. On his part, the respondent submitted that the appellant had not established that he would suffer irreparable loss if the orders sought were not granted. The respondent submitted that he had no objection to the land remaining as it was pending the hearing of the appeal.

Analysis and Determination

5. I have considered the appellant's application together with the affidavits filed in support thereof. I have also considered the affidavit in reply and the submissions by counsel. The appellant's application has three limbs. The first limb is seeking a stay of execution. The second limb of the application is seeking injunction pending appeal while the third limb is seeking leave to continue using the suit property. Order 42 Rule 6 of the Civil Procedure Rules provides as follows:

- “6. No appeal or second appeal shall operate as a stay of execution or proceedings
(1) 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 subrule (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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

6. In *Kenya Shell Limited v. Karuga* (1982 – 1988) I KAR 1018 the court stated that:

“It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”

7. In *RWW v. EKW* [2019] eKLR, the court stated as follows on the purpose of an order of stay of execution pending appeal:

“8. The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should



weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”
8. The judgment of the lower court was delivered on 4th April 2024. The present application was not brought until 12th November 2024. The appellant has not explained the reasons for the delay in filing the application for stay of execution pending appeal which I find inordinate. The lower court found that the respondent is the lawful registered proprietor of the suit property and it issued orders restraining the appellant from interfering with the suit property and an order of eviction of the appellant from the suit property. From the affidavits in support of the application, the appellant has already been evicted from the suit property and the respondent has taken possession. I am of the view that a judgment that has been executed cannot be stayed. An order for stay of execution is therefore not available to the appellant.
9. On the limb of the application seeking an injunction pending appeal, the following is my view: The principles that this court applies on applications for injunction pending appeal are not different from those applied by the Court of Appeal on applications for an injunction pending the hearing of appeals to that court under Rule 5(2)(b) of the former Court of Appeal Rules and Rule 43 of the Court of Appeal Rules 2022. The jurisdiction to grant an injunction pending appeal is discretionary and is guided by the interests of justice. In the exercise of this discretion, the court must be satisfied that the appeal before it is arguable and that if the order sought is not granted and the appeal succeeds, the appeal will be rendered nugatory.
10. In *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others* [2000] eKLR, the Court of Appeal stated that:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”
11. In *Stanley Kang’ethe Kinyanjui v. Tony Ketter & 5 others* [2013] eKLR, the same court stated as follows:
 - “vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
 - vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.”
12. As I have mentioned earlier in the ruling, the respondent has already taken possession of the suit property. The appellant has sought an injunction to restrain the respondent from interfering with the



suit property pending the hearing of the appeal. I have perused the grounds of appeal put forward against the judgment of the lower court. I am persuaded that the appeal is arguable. I am however not convinced that the appeal would be rendered nugatory if the injunction sought is not granted. A case has therefore not been made for the grant of an injunction pending appeal.

13. The last order that was sought by the appellant is for leave to continue using the suit property pending appeal. This order is also not available to the appellant since the respondent has already taken possession of the suit property. The court cannot take away from the respondent possession of the suit property which he took lawfully.

Conclusion

14. It is my finding that a case has not been made by the appellant for any of the orders sought. However, I am of the view that it would serve the wider interest of justice if the suit property is preserved pending the hearing of the appeal. I have noted that the appellant has already filed a record of appeal and what remains is the admission of the appeal and directions on the hearing of the same. I therefore make the following orders in the matter;

1. Pending the hearing and determination of the appeal herein, neither the appellant nor the respondent shall cultivate all that parcel of land known as Kisumu/Wangaya I /5542 but possession of the property shall remain with the respondent.
2. Pending the hearing and determination of the appeal herein, there shall be an inhibition inhibiting the registration of any other or further dealings with all that parcel of land known as Kisumu/Wangaya I /5542.
3. The costs of the application dated 11th November 2024 shall be in the cause.

DELIVERED AND DATED AT KISUMU ON THIS 6TH DAY OF MARCH 2025

S. OKONG'O

JUDGE

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

Mr. Achungo for the Appellant

Ms. Mawinda for the Respondent

Ms. J. Omondi-Court Assistant

