



**Khaliango & another v Osodo (Environment & Land Case
E037 of 2021) [2024] KEELC 5066 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5066 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E037 OF 2021**

**BN OLAO, J
JULY 4, 2024**

BETWEEN

SIMON JUMA KHALIANGO 1ST PLAINTIFF

MAGDALINE KANU OBUOLO 2ND PLAINTIFF

AND

LIONEL MINDE OSODO DEFENDANT

RULING

1. While this file was in my custody pending a ruling on the Notice of Motion dated 5th December 2023 by Simon Juma Khaliango (the 1st Plaintiff herein) and scheduled for 4th July 2024, Leonard Otieno Okanda, an Advocate of this Court filed a Notice of Motion vide certificate of urgency dated 2nd May 2024. The application is premised on the provisions of Section 1A and 3A of the [Civil Procedure Act](#) as well as Order 9 Rule 9 of the Civil Procedure Rules. Counsel sought the following orders:
 1. Spent.
 2. The firm of Otieno Okanda Advocates be granted leave to come on record for the Defendant/Applicant.
 3. That pending the hearing and determination of this application inter-parte, an order of stay do issue staying delivery of the ruling on the application dated 5th December 2023 scheduled for 2nd July 2024.
 4. That this Court be pleased to dismiss the application dated 5th December 2023 for offending Order 9 Rule 9 of the Civil Procedure Rules.
 5. That costs of the application be provided for.



When that application was placed before me in chambers on 6th May 2024 and having perused it, I did not see the need for giving any directions as to its disposal. Guided by Article 159 (2) (b) of *the Constitution*, I was persuaded that that was an application which I could put out of the way without further ado for the following reasons.

2. With regard to prayer No 2, I saw no impediment in granting the firm of Otieno Okanda Advocates leave to come on record for Leonel Ninde Osudo (the Defendant herein). That prayer was granted.
3. With regard to prayer No 4, I opined that that prayer citing the alleged reach of the provision of the provisions of Order 9 Rule 9 of the Civil Procedure Rules could adequately be determined in the pending ruling on the 1st Plaintiff's Notice of Motion dated 5th December 2023 and which ruling was scheduled for delivery on 2nd July 2024 I was being asked to stay. That prayer will therefore shortly be determined in this ruling.
4. The 1st Plaintiff Magdaline Kanu Obuolo and 2nd Plaintiff, through the firm of B. M. Ouma & Company Advocates first approached this Court vide their Originating Summons dated 2nd July 2021 seeking against Lionel Ninde Osodo (the Defendant), the main remedy that he had acquired by way of adverse possession the land parcel No Bunyala/bulemia/851 (the suit land) or any other title derived therefrom. The Defendant opposed the Originating Summons by way of two replying affidavits filed by his brother Christian Simigini Osodo to whom he had donated a Power of Attorney.
5. Having heard all the parties herein, this Court delivered a judgement on 15th November 2023 dismissing the claim by the 1st Plaintiff and his co-Plaintiff Magdaline Kanu Obuolo who was the 2nd Plaintiff.
6. Both Plaintiffs were aggrieved by that judgment and filed a Notice of appeal at this Court's registry on 30th November 2023.
7. The 1st Plaintiff decided to drop his previous counsel B. M. Ouma Advocate and has now, acting in person, approached this Court vide his Notice of Motion dated 5th December 2023 and which is the subject of this ruling. He seeks the following orders:
 1. Spent.
 2. Spent.
 3. That there be a stay of execution of the decree delivered on 15th November 2023 pending the hearing and determination of the appeal.
 4. That the costs of this application be provided for.
8. The application is premised on Section 3A of the *Civil Procedure Act* and Order 42 Rule 6 of the Civil Procedure Rules. It is founded on the grounds set out therein and supported by the affidavit of the 1st Plaintiff.
9. The gist of the application is that the 1st and 2nd Plaintiffs have been in possession of the suit land for over 20 years which is the only place they call home. That the Defendant has never questioned their stay on the suit land which has been open, quiet and notorious since 2001. That the 1st Plaintiff has buried his wife and the 2nd Plaintiff her husband on the suit land. The dismissal of their claim to the suit land by way of adverse possession means that they will have to vacate the same. They have filed a Notice of Appeal dated 29th November 2023 and unless the order of stay of execution is granted, their appeal will be rendered nugatory. On the other hand, the Defendant has nothing to lose since he does



not occupy the suit land and he will dispose of the same. Annexed to the application is the Notice of Appeal lodged herein on 30th November 2023.

10. The application is opposed and by his replying affidavit dated 22nd December 2023, the Defendant has deposed, inter alia, that the Plaintiffs had not proved their claim in adverse possession and so their suit was dismissed. That there is nobody occupying the suit land and the Plaintiffs' claim to have occupied it for 20 years is false. That according to the surveyor's report, what the Plaintiffs occupy is the land parcel No Bunyala/bulemia/2237 although they have recently encroached onto the suit land No Bunyala/bulemia/851 by erecting thereon a pit latrine and pillars which are barely three (3) years old. Since the Plaintiffs do not occupy the suit land, they will not suffer any irreparable loss or damage. That the appeal has no chances of success and the Plaintiffs have not come to Court with clean hands. The application should be dismissed with costs.

11. The following documents are annexed:

1. Copy of title deed to the land parcel No Bunyala/bulemia/851.
2. Copy of certificate of search for the land parcel No Bunyala/bulemia/851.
3. Copy of the report of the Land Registrar Busia dated 27th April 2023.

Only the Plaintiffs acting in person filed their submissions.

12. I have considered the application, the rival affidavits and annexures thereto as well as the Plaintiffs' submissions.

13. Before I delve into the merits or otherwise of the 1st Plaintiff's Notice of Motion dated 5th December 2023, this is the right time to consider prayer No 4 of the Defendant's Notice of Motion dated 2nd May 2024 as filed by his counsel Leonard Okanda seeking an order that the 1st Plaintiff's application be dismissed for offending Order 9 Rule 9 of the Civil Procedure Rules. That provision reads:

9: "Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court -

- a. upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

Although there are a number of decisions of the High Court which have strictly applied the above provision and taken the route that a party who wishes to change counsel or act in person must file a Notice of Change of Advocate or notice to act in person when pursuing an appeal following a judgment, I think it would amount to an unfair curtailment of litigants' freedom of choice to place such hurdles in the path of parties whom may wish to change Advocates or who elect to act in person while pursuing an appeal in the Superior Court. That provision has now been considered and settled by the Court of Appeal in the cases of [*TOBIAS M. WAFUBWA -V- BISHOP BEN BUTALI C.A. CIVIL APPEAL NO 3 of 2016*](#) [2017 eKLR] and also Boniface Kiragu Waweru -v- James K. Mulinge 2015 eKLR in which it took the view that non-compliance with the provisions of Order 9 Rule 9 of the Civil Procedure Rules is procedural, does not go to the root of the proceedings and neither does it



cause any prejudice to the other party. Indeed in the case of Tobias M. Wafubwa -v- Bishop Ben Butali (supra) the Court said:

“We would go further to add that, provided that where the failure to comply with the Rule 9 did not undermine the jurisdiction of the Court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then Article 159 of *the Constitution* and the overriding principles could be called upon to aid the Court to dispense substantive justice through just, efficient and timely disposal of proceedings.”

It was on the basis of the above binding precedents that this Court did not see the need to belabour itself on the non-compliance by the Plaintiff with the provisions of Order 9 Rule 9 of the Civil Procedure Rules. I rule that the Notice of Motion dated 5th December 2023 is properly before this Court.

14. Having said so, the substantive remedy which the Plaintiff seeks is an order for stay of execution of the judgment of this Court delivered on 15th November 2023 pending the hearing and determination of the Plaintiff's intended appeal. This Court's power to grant such an order is donated by Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules 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 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.”
Emphasis mine.

It is therefore clear from the above that in order to justify the grant of an order of stay of execution pending appeal, the Plaintiffs' were required to satisfy the following conditions:

1. Show sufficient cause.
2. Demonstrate that unless the order is granted, they will suffer substantial loss.
3. File the application without unreasonable delay.
4. Offer security.



The above was also reiterated by the Court of Appeal in the case of Vishram Ravji Halai & Another -v- Thornton & Turpin (1963) Ltd 1990 KLR 365 [c.a Civil Application No Nai 15 of 1990) 1990 eKLR where it said:

“ Thus, the Superior Court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay.”

Substantial loss, as was held by Platt Ag. J.a (as He Then Was) In The Case Of Kenya Shell Ltd - V- Benjamin Kibiru & Another 1986 KLR 410, is “the cornerstone of both jurisdiction for granting a stay.”

15. The Plaintiffs filed a Notice of Appeal on 30th November 2023 although the same is dated 29th November 2023.
16. The application is supported by the 1st Plaintiff’s affidavit dated 5th December 2023 in which he basically reiterates how he purchased the land parcel No Bunyala/bulemia/851 (the suit land) in 2001 and which both he and the 2nd Plaintiff have occupied for 23 years. That he has buried his wife thereon while the 2nd Plaintiff has buried her husband. That their occupation of the suit land has never been interrupted and even their neighbours considers the suit land as their property. That being dissatisfied with the judgment herein, the intend to file an appeal at the Court of Appeal and unless the order of stay of execution is granted, their appeal will be rendered nugatory and it is very likely that if the Defendant gets the title to the suit land, he will dispose of the same since he does not occupy or utilize the same. That the Defendant will not lose anything as he is not in occupation of the suit land.
17. The application has been canvassed by way of written submissions. These have been filed by only the 1st Plaintiff. When the parties appeared before the Deputy Registrar on 6th March 2024, it became clear that the Defendant had not filed any submissions.
18. It is clear from the provisions of Order 4 Rule 6 (1) that a party seeking the remedy of stay of execution pending appeal must first signify the intention to appeal the judgment by lodging a Notice of Appeal. The record shows that the Plaintiffs dated their Notice of Appeal on 29th November 2023 but only lodged it in this Court’s registry on 30th November 2023 signifying their intention to appeal the judgment delivered on 15th November 2023. Rule 75 of the [Appellate Jurisdiction Act](#) requires that such Notice of Appeal be lodged within 14 days of the date of the Judgment sought to be appealed. It reads:

75: (1) “Any persons who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the Superior Court.

- (2) Every such notice shall, subject to Rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”

The Notice of Appeal herein having been lodged on 30th November 2023 was in contravention of the law as it was lodged 15 days from the date of the judgment being appealed. That may be one day late but this Court is not considering an application to lodge such Notice of Appeal out of time.

19. A Notice of Appeal is a jurisdictional matter and without it, there can be no valid Appeal – Nicholas Kiptoo Arap Korir Salat -v- Independent Electoral And Boundaries Commission & 7 Others 2014 eKLR. It is instructive to note also that whereas the 1st Plaintiff has submitted in paragraph 5 of his submissions that he has “already filed the Record of Appeal”, this Court would have expected the



appeal case number to be cited. That has not been done and the only conclusion which this Court can arrive at is that no appeal has been filed. Therefore, since the Plaintiff have not instituted the process of filing any appeal from the judgment herein, it follows that there is no sufficient cause to warrant the order sought.

20. With regard to the issue of substantial loss which is the “cornerstone” of such an application, nowhere in his supporting affidavit has the 1st Plaintiff alluded to what substantial loss the Plaintiffs will suffer if the order of stay of execution pending appeal is not granted. Instead, he has averred that by this Court dismissing their claim, they will have to vacate the suit land anytime and have nowhere to call home (paragraph 9), that their appeal will be rendered nugatory (paragraph 10) and that the Defendant is likely to dispose of the suit land once he gets his title (paragraph 11). The fact, however, is that the Defendant has since 7th July 2013 been the registered proprietor of the suit land as was shown on the certificate of official search filed herein. So the Defendant is not about to obtain the title to the suit land as a result of this judgment. And the Plaintiffs cannot claim that if they move from the suit land they will have nowhere to call home because from the evidence of the Land Registrar as per his report is that the Plaintiffs’ structures are entirely inside the land parcel No Bunyala/bulemia/2237 and not on the suit land. The Plaintiffs therefore have their abode elsewhere and in any event, there is nothing to suggest that the Defendant is desirous of evicting them. Indeed, the Defendant filed no counter-claim of his own. The Plaintiffs have therefore not also surmounted the hurdle of demonstrating “substantial loss”.
21. There is no doubt that the 1st Plaintiff filed this application without unreasonable delay. The judgment sought to be appealed was delivered on 15th November 2023 and this application was filed on 5th December 2023. I do not consider a delay of 20 days to be unreasonable.
22. However, the Plaintiffs were also required to offer security. None has been offered and neither have the Plaintiffs indicated their willingness to abide by any conditions which this Court may impose as a term for the grant of the orders sought. As was held in the case of Machira -v- Mohamed 2022 Keel 2376 KLR;

“The offer for security must come from the Defendant himself and is a demonstration of the fact that the application for stay of execution is not being pursued in order to advance the course of justice and is not simply a knee-jerk reaction only intended to delay and scuttle a lawful execution process”.

In this case, the Plaintiffs as the Applicants, ought to have made that offer which they have not. And as will soon become clear, there is actually no pending execution process which is capable of being stayed.

23. The Plaintiffs have also pleaded in paragraph (f) of their grounds of the application thus:

(f): “That the intended appeal has a high chance of success as it raises arguable grounds on both law and fact.”

The judgment sought to be appealed was delivered by this Court. It is not a judgment of a subordinate Court and therefore, this Court is not sitting as an appellate Court. It is not within the province of this Court to determine the arguability or otherwise of the intended appeal. To do so will amount to sitting on appeal against my own judgment. That is a ground which can only be raised in the Court of Appeal.
24. Finally, and most importantly, in the judgment sought to be appealed, this Court only issued an order dismissing the Plaintiffs’ suit with costs. Other than on the issue of costs, therefore, this Court’s



judgment was not a positive order. Rather, it was a negative order. As was held in the case of Co-operative Bank Of Kenya Ltd -v- Banking Insurance & Finance Union (kenya) 2015 eKLR:

“An order for stay of execution is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in the decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a ‘positive order’ – either an order that has not been complied with or has partly been complied with.”
Emphasis mine.

Similarly, in the case of Western College Of Arts And Applied Sciences -v- Oranga & Others 1976 – 80 I KLR 78 [1976 eKLR], the then Court of Appeal for Eastern Africa addressed the same issue in the following terms:

“But what is there to be executed under the judgment the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In Wilson -v- Church, the High Court had ordered the trustees of a Church to make a payment out of that fund. In the instant case, the High Court has not ordered any parties to do anything or refrain from doing anything or to pay any sum.”

See also the case of Kanwal Sarjit Singh Dhiman -v- Keshavji Jivraj Shah 2008 eKLR. Similarly in this case, neither the Plaintiffs nor the Defendant were ordered to do or not to do anything. All that the Court did was to dismiss the Plaintiffs’ suit with costs. An order of stay of execution pending appeal is therefore not available to the plaintiffs given those circumstances.

25. Ultimately therefore, and having considered all the matters herein, this Court makes the following disposal orders:
1. The Notice of Motion dated 5th December 2023 is devoid of merit. It is accordingly dismissed.
 2. The Plaintiffs shall meet the Defendant’s costs thereof.

BOAZ N. OLAO

JUDGE

4TH JULY 2024

RULING DATED, SIGNED AND DELIVERED ON THIS 4TH DAY OF JULY 2024 BY WAY OF ELECTRONIC MAIL.

Right of Appeal

BOAZ N. OLAO

JUDGE

4TH JULY 2024

