



Mubwek & another v Barasa & another (Suing as the personal representatives of the Estate of Leonard Onweni Barasa - Deceased) (Environment & Land Case 127 of 2015) [2024] KEELC 5171 (KLR) (9 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5171 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 127 OF 2015**

**BN OLAO, J
JULY 9, 2024**

BETWEEN

WANJALA ODHIAMBO MUBWEK 1ST PLAINTIFF

OJAMBO PETER ROGERS 2ND PLAINTIFF

AND

FRANCIS OTIENO BARASA 1ST DEFENDANT

VITALIS OMONDI ONGWENI 2ND DEFENDANT

**SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF
LEONARD ONWENI BARASA - DECEASED**

RULING

1. This ruling was due to be delivered by way of electronic mail on 29th February 2024. However, I was out of the station attending to my ailing step mother who subsequently passed away on 14th March 2024. Thereafter, I proceeded on a pre-scheduled annual leave upto 1st July 2024. That explains the delay in delivering the same which is regretted.
2. On 2nd November 2023, I delivered a ruling in which I issued the substantive order vacating the orders issued by Omollo J on 6th February 2020 and removing the restrictions placed on the land parcels No Bukhayo/bugengI/9224 and 9225 (the suit land). I also directed the Land Registrar to comply with the decree issued by this Court on 25th July 2022.
3. I now have for my determination the Defendant's Notice of Motion dated 6th November 2023 and premised under the provisions of Order 22 Rule 22 of the [Civil Procedure Rules](#) in which he seeks the following orders:
 1. Spent



- 2 Spent
3. That this Honourable Court be pleased to grant a stay of execution of the ruling of Hon. Boaz N. Olao dated 2nd November 2023 in Busia ELC No 127 of 2015 pending hearing and determination of this (sic) appeal.
4. That this Honourable Court be pleased to grant a stay of further proceedings in Busia ELC No 127 of 2015 pending the hearing and determination of the application.
5. That this Honourable Court be pleased to grant a stay of further proceedings in Busia ELC No 127 of 2015 pending the hearing and determination of the application.
6. That costs of this application be provided for.

The application is premised on the grounds set out therein and is also supported by the affidavit of Francis Otieno Barasa the Applicant/Defendant herein.

4. The gist of the application is that the Applicant being dissatisfied with the entire ruling delivered herein on 2nd November 2023 intends to appeal and has filed a Notice of appeal dated 3rd November 2023. That the said ruling has the effect of distorting the *status quo* of this case being the land parcel No Bukhayo/bugengi/9224 and unless this Court intervenes and stays the execution of the ruling delivered on 2nd November 2023, the Applicant will suffer irreparable loss and his appeal will be rendered nugatory.
5. That through Civil Appeal No E107 of 2020, he lodged the record of appeal on 8th December 2020 although the same was delayed due to the demise of Leonard Ongweni Barasa whose Estate he now represents. That he faced a myriad of challenges in an attempt to serve the record of appeal upon the firm of Obura-obwatinya & Company Advocates who were previously on record for the Respondent before the firm of B. M. Ouma & Company Advocates came on record for the Respondent and filed a Notice of Motion dated 6th May 2021 seeking to strike out the Notice of Appeal filed in CA. Civil Appeal No E107 of 2020. However, his counsel M/s Ashiruma & Company Advocates were not served with that Notice of Motion dated 6th May 2021 and did not therefore respond to the same. That the Respondent impersonated the firm of Obura-obwatinya & Company Advocates and the Notice of Appeal was struck out. He is now in the process of registering CA. Civil Appeal No. E107 of 2020 as consolidated with Civil Appeal No E073 of 2021. That the Respondents are trying to subvert justice by using every trick to alienate the suit land from the family of the deceased yet they have used it since the 1970s. Therefore, unless this Court intervenes and stays the execution of the ruling delivered on 2nd November 2023 pending the hearing and determination of the appeal, he will suffer irreparable loss and his appeal will be rendered nugatory.
6. The following documents have been annexed to the application:
 1. Notice of Appeal dated 3rd November 2023.
 2. Record of Appeal in CA. Civil Appeal No E073 of 2021.
 3. Limited Grant of Letters of Administration *Ad Litem* issued to the Applicant and Vitalis Omondi Ongweni in respect to the Estate of Leonard Ongwen Barasa in Busia HC. Misc Succession Cause No E010 of 2020.
 4. Receipt for Kshs.10,000 being Court fees.
 5. Affidavit of service by Stephen Otaget Ofula.



6. Notice of Appeal in CA. Civil Appeal No E073 of 2021.
7. Receipt for Kshs.150.00 being Court fees.
8. Email dated 13th April 2022 addressed to Court of Appeal Kisumu by Ashiruma & Co. Advocates.

When the application was placed before me on 8th November 2023, I did not certify it as urgent. I directed that it be canvassed by way of written submissions. The Applicant was granted 14 days in which to serve the Respondent with the application and submissions and to file an affidavit of service. The Respondent would then have 14 days from the date of service and submissions by the Applicant to file their responses and submissions.

7. I have looked at the record and there is no evidence of service of the application and submissions upon the Respondent. There is therefore no response nor submissions by the Respondent although the Applicant filed his submissions.
8. I have considered the application, the annexures thereto as well as the submissions by counsel for the Applicant.
9. The Applicant basically seeks the order that the execution of this Court's ruling dated 2nd November 2023 as well as further proceedings herein be stayed pending the hearing and determination of the Applicant's appeal. The jurisdiction to grant such a remedy is donated by Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules* which provides that:

- (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 clear from the above that a party seeking an order of stay of execution pending appeal must prove the following:

1. Show sufficient cause.
2. Demonstrate that he will suffer substantial loss unless the order is granted.
3. Approach the Court without unreasonable delay.
4. Offer security for the due performance of any decree or order that may ultimately be binding on him.



The jurisdiction of this Court while considering such an application was circumscribed by the Court of Appeal in the case of *Visbram Ravji Halai & Another -v- Thornton & Turpin (1963) Ltd* 1990 KLR 365 as follows:

“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.”

The marginal notes to Order 42 Rule 6 of the *Civil Procedure Rules* read:

“Stay in case of appeal.”

And Order 42 Rule 6 (1) commences thus:

“No appeal or second appeal shall operate as a stay of execution or proceedings...”

That means that before seeking an order of stay of execution of a judgment or order, the Applicant should first demonstrate sufficient cause by proving that he has already filed or commenced the process of filing an appeal against the judgment or order. It is the filing of the Notice of Appeal which confers on this Court the jurisdiction to grant the order of stay of execution or proceedings. Order 42 Rule 6 (4) of the *Civil Procedure Rules* provides that:

“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.”

The record shows that following the delivery of the ruling on 2nd November 2023, the Applicant filed a Notice of Appeal on 7th November 2023. Although the date when it was lodged in this Court’s register is neither indicated nor the Notice of Appeal signed by the Deputy Registrar as would be expected, the same was endorsed with this Court’s stamp as having been received in the registry on 7th November 2023. I therefore do not consider the lapse of failure to sign the Notice of Appeal by the Deputy Registrar to be fatal. It is curable under the provisions of Article 159 (2) (d) of *the Constitution*. The Registry staff are however reminded to always place such notices before the Deputy Registrar for endorsement as that may be an issue should there be a dispute as to whether the Notice of Appeal was filed within the stipulated 14 days.

10. In the circumstances of this case, the Applicant filed his Notice of Appeal within the 14 days as required. That is sufficient cause.
11. The Applicant was also required to file this application without unreasonable delay. The ruling sought to be appealed was delivered on 2nd November 2023 and this application was filed on 6th November 2023 a period of four (4) days later. There was no unreasonable delay.
12. The Applicant was further required to satisfy this Court that unless the order for stay of execution and further proceedings is granted, he will suffer substantial loss. Such loss, as was held by Platt Ag. JA. (as he then was) in the case of *Kenya Shell Ltd -v- Kibiru & Another* 1986 KLR 410,

“is the cornerstone of both jurisdictions for granting 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.”



In an attempt to demonstrate such loss, the Applicant has deposed in paragraph 32 of his supporting affidavit as follows:

32.

“That this Honourable Court intervenes at the earliest time possible to stay execution of the ruling delivered by Honourable Boaz N. Olao J delivered in Busia ELE No 127 of 2015 on 2nd November 2023 and any further proceedings in Busia ELC No 127 of 2015 until this application and appeal is determined. I will suffer irreparable loss and the appeal will be rendered nugatory.”

Other than pleading that he will suffer irreparable loss, the Applicant has not demonstrated what irreparable loss he will suffer. In paragraphs 29 and 31 of the same affidavit, he deposes “that the Respondents herein are trying to subvert justice by using every trick to alienate the suit land from the family of the deceased”, and that the Applicants family “will be very prejudiced if evicted out of the land and rendered homeless without an opportunity to have his day in the appellate Court”. However, no evidence has been placed before this Court to substantiate those allegations. Where a party is seeking to execute a judgment of a Court, he cannot be said to be “trying to subvert justice by using every trick.” Further, the judgment by Kaniaru J was delivered some five (5) years ago on 21st May 2019. This Court has not been shown any evidence of imminent eviction of the Applicants from the suit land. As was held in the case of *Machira ¹/a Machira & Co. Advocates -v- East African Standard (No 2)* 2002 2 KLR 63;

“Where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay.”

A Court considering such an application will not act on mere conjecture. There must be cogent evidence of the substantial loss which the Applicant may suffer.

13. The Applicant’s counsel has submitted at length on the reasons why there was a delay in filing the record of appeal. He states that this was necessitated by the fact that he had to petition for the Grant of letters of Administration Ad Litem to allow him to represent the Estate of Leonard Ongweni Barasa now deceased. He has also submitted, citing the case of Job Kwach -v- Nation Media Group (I think counsel meant Job *Kilach -v- Nation Media Group & Others* CA Civil Application No 168 of 2005 – [2006 eKLR]) that his appeal raises *bona fide* triable issues. However, whether or not the appeal raises triable issues cannot be a consideration when this Court is determining an application for stay of execution pending an appeal from its own judgment or ruling, or where, like in this case, the Court is considering an application arising out of a judgment or ruling of a Court of co-ordinate jurisdiction. It can only be relevant if this Court is considering an application arising from a judgment or ruling of a subordinate Court. The applicant has not been able to surmount the hurdle of demonstrating substantial loss.
14. Finally, the Applicant was required to offer security for the due performance of such decree or order as may ultimately be binding on him. No such security has been offered and neither has the Applicant deposed that he is ready and willing to abide by any terms which this Court may impose as a condition for the order of stay. As was held in the case of *Machiri -v- Mohamed* 2022 KEELC 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 being pursued in order to advance the cause



of justice and is not simply a knee-jerk reaction only intended to delay and scuttle a lawful execution process.”

The Applicant has also not been able to satisfy that condition.

15. The result of all the above is that although the Applicant has shown sufficient cause by filing a Notice of Appeal and also by approaching this Court without unreasonable delay, he has not satisfied the two other conditions which are the offer of security and proof that he will suffer substantial loss if the order of stay of execution and proceedings is not granted. He was required to satisfy all the four (4) conditions set out in Order 42 Rule 6 (1) and (2) and not only some of them as he has done.
16. On the issue of costs, the Respondent did not file any response to the application but as I stated earlier, he appears not to have been served.
17. The up-shot of all the above is that the Notice of Motion dated 6th November 2023 is devoid of merit. It is dismissed with no orders as to costs.

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 9TH DAY OF JULY 2024 WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE

