



**Rapemo v Orech (Environment and Land Appeal E015 of 2024)
[2024] KEELC 5033 (KLR) (2 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5033 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E015 OF 2024
GMA ONGONDO, J
JULY 2, 2024**

BETWEEN

FLERIA OPIYO RAPEMO APPELLANT

AND

KENNETH OUKO ORECH RESPONDENT

RULING

1. By a Notice of Motion Application dated 25th April 2024 (the application herein), the applicant, Fleria Opiyo Rapemo, through O. H. Bunde and Company Advocates, is seeking the following orders;
 - a. Moot
 - b. Moot
 - c. Pending inter partes hearing and determination of the instant appeal, the Honourable Court be pleased to issue orders staying the execution of the trial court's judgment and decree in Oyugis MCELC 55 of 2019.
 - d. The Honourable Court be pleased to order that costs of this application abide the outcome of the appeal.
2. The application is founded upon grounds (a) to (t) stated on the face of the same. It is further anchored on the applicant's supporting affidavit of fifteen paragraphs sworn on 25th April 2024 as well as the documents annexed thereto to wit; a copy of the trial court's judgment and memorandum of appeal dated 24th April 2024 (FOR-1 and 2).
3. Briefly, the applicant contends that the trial court delivered judgment on 4th April 2023 and issued an order of eviction against the applicant, having found that that the applicant had encroached upon the respondent's land parcel number East Kasipul/Kokelo Dudi/356. That should the stay order sought



- herein not be granted, the applicant stands to suffer irreparable loss and the appeal will be rendered nugatory. That the respondent will not suffer any prejudice if the instant application is allowed.
4. The respondent through D. O. E Anyul and Company Advocates, opposed the application by way of grounds of opposition dated 23rd May 2024 and filed herein on even date and deponed that the application does not meet the threshold set down for grant of stay of execution orders. Thus, he prayed that the same be dismissed with costs.
 5. The application was heard by way of written submissions further to the court's directions of 2nd May 2024; see Order 51 Rule 16 of the *Civil Procedure Rules, 2010* and Practice Direction number 33 of the *Environment and Land Court (ELC) Practice Directions, 2014*.
 6. Accordingly, the applicant's counsel filed submissions dated 8th May 2024 and submitted that the applicant stands to be rendered destitute and homeless thus, suffer irreparable loss which would not be adequately compensated by way of damages. That the instant appeal would also be rendered nugatory as the substratum of the same would have been extinguished. That further, this application was brought without unreasonable delay as it was lodged twenty-one days after the date of delivery of the trial court's judgment. That the applicant is willing to furnish such reasonable security as directed by court. That therefore, the same is merited as it meets the conditions as prescribed under Order 42 Rule 6(2) of the *Civil Procedure Rules, 2010*. Counsel cited various authoritative pronouncements including the case of *Nicholas Stephen Okaka and another v Alfred Waga Wesonga* (2022) eKLR, to buttress the submissions.
 7. The respondent's learned counsel filed submissions dated 23rd May 2024 and identified a single issue for determination thus: whether the applicant satisfies the defined principles to warrant the orders of stay of execution to issue in the present circumstances. Counsel submitted that the applicant failed to annex the draft intended memorandum of appeal and that the instant application does not meet the threshold for grant of orders of stay under Order 42 Rule 6(2) of the *Civil Procedure Rules, 2010*. Reliance was placed on the case of *Charles Wabome Getbi vs Angela Wairimu Getbi*; Civil Application No. 302 of 2007.
 8. I have duly considered the application, the grounds of opposition and the rival submissions in their entirety. The principal issues for determination are:
 - a. Whether the court should order a stay of execution of the judgment in Oyugis Senior Principal Magistrate's Court in Environment and Land Case No. 55 of 2019, pending the hearing and determination of the appeal; and
 - b. Who should bear the costs of this application?
 9. The applicant's counsel submitted that there is a likelihood of the respondent executing the trial court's judgment thereby occasioning the applicant irreparable loss. That such execution would also render the intended appeal nugatory. He averred that no prejudice will be suffered by the respondent should the instant application be allowed.
 10. The conditions concerning grant of an order for stay of execution are stipulated under Order 42 Rule 6(2) (*supra*), which provides in part thus:
 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 supplied)
11. Sections 75 and 79G of the *Civil Procedure Act* Chapter 21 Laws of Kenya provide for orders from which appeal lies and the time for lodging an appeal from the subordinate courts respectively.
 12. The respondent asserts that the applicant has not preferred an appeal against the judgment of the trial court. However, I note that there is an appeal filed herein. In the memorandum of appeal dated 24th April 2024 and lodged herein on even date, the appellant seeks to appeal against the judgment delivered on 4th April 2024 in Oyugis Senior Principal Magistrate’s Court Environment and Land Case No. 55 of 2019.
 13. Clearly, Article 48 of the *Constitution* of Kenya, 2010 anchors the right of access to justice. Furthermore, the applicant is entitled to unlimited right to fair hearing of this appeal as stipulated in Articles 50(1) and 25(c) of the same *Constitution*.
 14. It is established law that the right to be heard before an adverse decision is taken against a person is fundamental and permeates the entire justice system: see *James Kanyiita Nderitu and another v Marios Philotas Gbikas and another* (2016) eKLR and *Onyango Oloo v Attorney General* (1986-89) EA 456.
 15. In the instant case, there is an impending eviction of the applicant from the suit land which may occasion her substantial loss as disclosed in the application. Indeed, those are special circumstances that attract the stay order sought in the application.
 16. Further, I subscribe to the Court of Appeal decision in *Butt v Rent Restriction Tribunal* (supra), where it was observed that;

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise it’s best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church (No. 2)* 12 Ch D (1879) 454 at p 459...

....and the appellant has an undoubted right of appeal.” (Emphasis added)
 17. In the foregone, I find that the application has met the requirements for the grant of stay of execution sought therein. The application is merited.
 18. Security for costs is at the discretion of this court as stipulated in Order 42 (*supra*). So, the applicant is hereby directed to deposit in court within thirty (30) days from this date, the sum of Kshs.30,000 (Thirty thousand only) as security for the due performance of such decree or order as may ultimately be binding upon him, failing which the stay so granted shall automatically lapse without further order(s) herein.
 19. Wherefore, the stay order sought in the application dated 25th April 2024 as set out in paragraph 1(c) hereinabove, be and is hereby granted pending the hearing and determination of the instant appeal and subject to the condition as stated in paragraph 18 hereinabove.
 20. Costs of this application be the costs in the appeal.
 21. Mention on 30th September 2024 to confirm compliance and for directions.
 22. It is so ordered.



VIRTUALLY DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 2ND DAY OF JULY 2024.

G.M.A ONGONDO

JUDGE

PRESENT;

Florence Okongo instructed by O H Bunde learned counsel for the applicant/appellant

D O E Anyul learned counsel for the respondent

T. Luanga, court assistant

