



REPUBLIC OF KENYA



**Ouko v Adundo & 2 others (Enviromental and Land Originating Summons
61 of 2021) [2024] KEELC 6803 (KLR) (15 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6803 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 61 OF 2021
GMA ONGONDO, J
OCTOBER 15, 2024**

BETWEEN

MARTIN GUYA OUKO APPLICANT

AND

AGUNGA ADUNDO 1ST RESPONDENT

RICHARD OTIENO NDIGA 2ND RESPONDENT

ABAYO MIRIAM OCHIENG 3RD RESPONDENT

RULING

1. By a Notice of motion dated 4th July 2024 commenced under, inter alia, Articles 40, 48 and 50 of *the Constitution* of Kenya 2010 as well as sections 1A, 1B and 3A of the *Civil Procedure Act* Chapter 21 Laws of Kenya (The application herein), the applicant, Martin Guya Ouko through L K Obwanda and Company Advocates, is seeking the following orders;
 - a. Spent
 - b. Thatthe Honourable court herein be pleased to grant leave for the firm of L K Obwanda and Company Advocates to come on record for applicant herein in place of the firm of Okenye and Company Advocates.
 - c. Thatthis Honourable Court be pleased to issue break-in orders to the OCS Oyugis Police Station to enable them remove and evict the Respondents and their agents from the suit parcel number Kasipul/KoderaKarabach/390 and being the applicant’s parcel of land.
 - d. Thatthe O C S Oyugis Police Station and the County Commander together with their officers to provide security during the execution of the order sought herein above and ensure compliance with the said orders.



- e. That the County Commander to serve the Inspector General (IG) with the said orders
 - f. Costs of the application be provided for.
2. The foundation of the application is the applicant's supporting affidavit containing seventeen paragraphs of even date together with the accompanying copy of this Honourable court's judgment and a copy of the bill of costs herein alongside grounds 1 to 10 stated on the face of the application. In summary, the applicant's lamentation is that this court rendered judgment herein on 27th September 2022 that the applicant is entitled to the suit land reference number Kasipul/Kodera Karabach/390 based on adverse possession. That the court granted a mandatory injunction restraining the respondents by themselves, agents, workers or employees from interfering the applicant's quiet possession and occupation of the suit land.
 3. Further, that the applicant gave the respondents six months to vacate the suit land but the respondents continue to cultivate it. That the court granted the respondents stay orders on 30th January 2023. That no notice of appeal has been served on the applicant hence, generating the application.
 4. By a consent dated 16th May 2024 signed by S N Otinga and Company Advocates and Olel, Onyango, Ingutiah Company Advocates, the latter firm of Advocates in lieu of the former firm of Advocates, came on record for the 3rd respondent.
 5. Therefore, in a replying affidavit sworn on 22nd July 2024 by the 3rd respondent termed the application misconceived, an abuse of the process of the court, not considering the true position of the case and the orders so far issued by the court. That the 3rd respondent preferred an appeal to the Court of Appeal at Kisumu and awaiting issue of date as discerned in the memorandum of appeal marked as 'AMO1' annexed to the affidavit.
 6. Furthermore, the 3rd respondent averred in part that the court granted stay orders and the applicant deposited Kshs.15, 000/= security for due performance of decree as per this court's ruling (AMO2) and deposit receipt (AMO3) which are annexed to the replying affidavit. That the application is untenable as execution is a function of the Deputy Registrar and not this court. That thus, the application be dismissed.
 7. Hearing of the application was by written submissions further to this court's orders given on 22nd July 2024.
 8. The Applicant's counsel filed submissions dated 30th August 2024 where reference is made to the notice of motion, the judgment and that no notice of appeal or memorandum of appeal was served herein hence, the applicant is entitled to the prayers in the application. Counsel identified issues for determination including whether L K Obwanda and Company Advocates are properly on record for the applicant and whether there is merit in the application. In the analysis of the issues in favour of the applicant, counsel also referred to Order 9 Rule 9 of the Civil Procedure Rules 2010, sections 1A and 1B (Supra) and the case of Stephen Mwadime Ndighila-vs-Steel Makers Ltd (2022) eKLR.
 9. Moreover, counsel submitted that the application suffers from prolonged and inordinate delay of ten months. That stay order was granted by this court and that no memorandum of appeal was filed and served herein. That litigation has to come to an end as there is a valid judgment in place and the applicant is entitled to the fruit of his judgment and right to property.
 10. The applicant's counsel served submissions upon the respondents on 3rd August 2024 as revealed in the affidavit sworn by learned counsel Kimberly Ashley and uploaded on 5th September 2024 at 17.27 hours. However, there is no submission duly filed and served by the respondents.



11. In that regard, is the present application meritorious?
12. Notably, judgment was delivered herein on 27th September 2022. By a ruling rendered on 30th January 2023, the 3rd defendant's application by way of Notice of Motion dated 6th October 2022 for stay of execution of the judgment and subsequent decree, was allowed. Also, the 3rd defendant was ordered to deposit Kshs. 15,000/= being security for the due performance of decree or order. The deposit was made as discerned in the deposit receipt (AMO3) annexed to the 3rd defendant's replying affidavit to the application as stated in paragraph 6 hereinabove.
13. Indeed, there was delay of ten months to initiate the application. Article 10 (2) (b) of *the Constitution* of Kenya 2010 anchors the principles of equity which include: delay defeats equity.
14. The applicant has a vested right to the judgment which ought to be effectual; see *Shahmad -vs-Shamji Bros and another* (1957) EA 438.
15. Besides, a fair opportunity to be heard is a fundamental principle of justice; as stated in *Halsbury's Laws of England* 5th Edition 2010 Volume 61 paragraph 639. So, the applicant has a right access to justice and unlimited right to fair hearing including being represented by his counsel on record in this application as enshrined in Articles 48, 50 (1) and 25 (c) of *the Constitution* of Kenya 2010.
16. The firm of L K Obwanda Advocates is on record for the applicant in this application. By dint of Order 9 Rule 9 of the Civil Procedure Rules 2010, the said firm is properly on record for the applicant in the application.
17. Indeed, it is acknowledged by the applicant in his submissions that;

‘.....It is therefore clear that this application has triggered the respondent herein to move with haste and prosecuting the appeal which was filed eight months ago and nothing as much as direction were issued and served upon the applicant who has been under the impression that there was no appeal in the superior court.....’
18. As disclosed in paragraph 6 and 11 hereinabove, this court granted a stay of execution of the judgment and decree herein. There is an appeal lodged in the Court of Appeal at Kisumu. Ms. F. Owino for 3rd respondent/defendant told the court that the appeal is Kisumu Court of Appeal Civil Appeal No. E277 of 2023.
19. In the obtaining circumstances, it would not be right for this matter to be heard simultaneously by the Court of Appeal and this court; see also *Commission of Inquiry into Goldenberg Affair-vs-Kilach* (2003) KLR 249 at 265 and 266.
20. To that end, there is partial merit in the application only in terms of legal representation of the applicant in the present application. The other part of the application is unmeritorious.
21. Thus, the application is hereby partially disallowed with no orders as to costs.
22. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 15TH DAY OF OCTOBER 2024.

G.M. A ONGONDO

JUDGE

Present;

1. L. K Obwanda learned counsel for the applicant/plaintiff.



2. Ms. Owino F. instructed by Charles Onyango learned counsel for the 3rd respondent/defendant.
3. T. Luanga, court assistant.

