



**Ademba v Nalwenge (Land Case Appeal E015 of 2024)  
[2024] KEELC 7335 (KLR) (6 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7335 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
LAND CASE APPEAL E015 OF 2024  
BN OLAO, J  
NOVEMBER 6, 2024**

**BETWEEN**

**ANTONY ONYANGO ADEMBA ..... APPELLANT**

**AND**

**KENNETH ODHIAMBO NALWENGE ..... RESPONDENT**

***(Arising out of the ruling of HON. P. A. OLENGO SENIOR  
PRINCIPAL MAGISTRATE delivered on 20th August 2024 in  
BUSIA CHIEF MAGISTRATES COURT ELC CASE NO 67 of 2021)***

**RULING**

1. Kenneth Odhiambo Nalwenge (the Respondent herein) was the plaintiff in Busia Chief Magistrate's Court Elc Case No 67 of 2021 where he impleaded Antony Onyango Ademba (the Appellant herein) and one Wilmina Nechesa (who is not a party to this application) seeking the main remedy that the titles to the land parcels No Marachi/Bujumba/1264, 1265 and 1266 had been fraudulently obtained and the same should be cancelled and revert to the original title No Marachi/Bujumba/444. Having heard the parties, the trial Magistrate Hon P. A. Olengo delivered a judgment on 11<sup>th</sup> September 2023 dismissing the Respondent's suit. The trial magistrate did not make any orders as to costs.
2. The Respondent was aggrieved by that judgment and filed a Notice of Motion dated 6<sup>th</sup> February 2024 seeking, inter alia, to have the said judgment set aside on the grounds that there was an error on the face of the record, that costs were not awarded yet they have been assessed and a notice to show cause has been issued against him and further, he was not even notified about the judgment.
3. That application came up for hearing before Hon. P. A. Olengo Senior Principal Magistrate who reviewed the judgment and vide a ruling dated 20<sup>th</sup> August 2024 agreed that he had inadvertently forgotten to award costs and further, that in his judgment, he had only dealt with the case against Wilmina Nechesa and not against the Appellant. The trial magistrate went on to order that the land



parcel No Marachi/Bujumba/1266 revert to one Joseph Otieno who was not even a party in the dispute. That prompted the Appellant to move to Court and file this appeal on 30<sup>th</sup> August 2024 seeking to set aside the ruling delivered on 20<sup>th</sup> August 2024.

4. Simultaneously, with that appeal, the Appellant filed a Notice of Motion dated 2<sup>nd</sup> September 2024 premised under the provisions of Order 42 Rule 6 of the Civil Procedure Rules. He seeks the following orders:
  - a. Spent
  - b. There be a stay of execution of the ruling and order issued on 20<sup>th</sup> August 2024 in Busia Chief Magistrate's Court Elc Case No 67 of 2021 pending the hearing and determination of this application inter parties and thereafter pending the hearing and determination of the appeal.
  - c. Costs be provided for.

The application is based on the grounds set out therein and is also supported by the Appellant's affidavit of even date.

5. The gravamen of the application is that the Respondent had filed a suit seeking the cancellation of three (3) titles among them the title to the land parcel No Marachi/Bujumba/1266. The suit was dismissed with costs and the Respondent filed an application for review and stay of execution on the grounds that the trial Court had not awarded any costs yet a Bill of costs had been taxed and a Notice to Show Cause had been issued. That no mention of costs was made when the judgment was read in Court.
6. Upon hearing that application, the trial Court made the following findings:
  1. Failure to award costs was an error. It then awarded costs to the Appellants co-defendant.
  2. That the judgment had not dealt with the Appellant's case.
  3. That the land parcel No Marachi/Bujumba/1266 should revert to Joseph Otieno.
  4. The Respondent to file a Succession Cause where the Appellant can object to the proceedings.Those findings are far reaching and were not founded on the application for review. That the Court was clearly sitting on appeal against its own judgment and a title acquired following probate proceedings could not be cancelled in a Land Court. That he and Joseph Otieno are one and the same person. That the issue that the trial Court failed to deal with the case against him could only be decided upon an appeal and the Respondent has moved with speed to cancel his title which will result in substantial loss.
7. Annexed to the application are the following documents:
  1. Complaint and documents filed in Busia Chief Magistrate's Court Elc Case No 67 of 2021.
  2. Judgment delivered on 11<sup>th</sup> September 2024 in Busia Chief Magistrate's Court Elc Case No 67 of 2021.
  3. Certificate of Costs filed in Busia Chief Magistrate's Court Elc Case No 67 of 2021.
  4. Notice to Show Cause filed in Busia Chief Magistrate's Court Elc Case No 67 of 2021.
  5. Notice of Motion dated 6<sup>th</sup> February 2024 and filed in Busia Chief Magistrate's Court Elc Case No 67 of 2021.



6. Ruling delivered on 20<sup>th</sup> August 2024 in Busia Chief Magistrate’s Court Elc Case No 67 of 2021.

The application is opposed and the Respondent filed a replying affidavit dated 13<sup>th</sup> September 2024. He deponed, inter alia, that having filed Busia Chief Magistrate’s Court Elc Case No 67 of 2021 seeking the cancellation of the titles No Marachi/Bujumba/1265 and 1266, both he and the Appellant testified and judgment was deferred to 9<sup>th</sup> June 2023. That he waited and attended the Court over 12 times and it was only on 1<sup>st</sup> January 2024 that he learnt that the judgment had in fact been delivered on 11<sup>th</sup> September 2024. When he eventually obtained the judgment, he noticed that there were errors apparent on the face of the record since the trial Court had only dealt with the case against his co-defendant Wilmina Nechesa but not against him. Further, the Court had not awarded any costs.

8. The Respondent therefore filed an application to review the said judgment because the Appellant had lied that he (Appellant) is also known as Joseph Otieno who was in fact the Respondent’s father who had died on 28<sup>th</sup> January 1981. The Applicant is called Antony Onyango Ademba as per his Identity Card and he had gone to the Lands Office to change his names purportedly from Joseph Otieno to read Antony Onyango Ademba which is not true since he has never been called Joseph Otieno. The Respondent was not informed about the date of the judgment nor served with any notice about the delivery of the same. The application for review was considered and the trial Court made a verdict.

9. The Appellant cannot now claim that the trial Court sat on an appeal over its own judgment. Further, the Appellant has not met the threshold for an order of stay of execution pending appeal.

10. The following documents are annexed to the replying affidavit:

1. Copy of a letter dated 25<sup>th</sup> January 2024 addressed to the Chief Magistrate Busia complaining that the judgment had been delivered without his knowledge.
2. Copy of a death certificate of Joseph Otieno Osuru.
3. Copy of letter dated 4<sup>th</sup> April 2020 addressed to the Chief Marachi West Location from the Chief Mautuma Location.
4. Copy of ruling delivered on 20<sup>th</sup> August 2024 in Busia Chief Magistrate’s Court Elc Case No 67 of 2021.
5. Copy of identity Card of Kenneth Odhiambo Nalwenge.
6. Copy of review order issued on 20<sup>th</sup> August 2024 in Busia Chief Magistrate’s Court Elc Case No 67 of 2021.
7. Application for correction of names.
8. Notice of Appointment of Advocate.
9. Copy of Memorandum of Appeal filed herein.
10. Copy of orders issued herein on 4<sup>th</sup> September 2024.

When the application was placed before me on 4<sup>th</sup> September 2024, I directed that it be canvassed by way of written submissions. The same were subsequently filed by Mr Omondi instructed by the firm of Omondi & Company Advocates for the Appellant and by Mr Ouma instructed by the firm of B. M. Ouma & Company Advocates for the Respondent.



11. I have considered the application, the rival affidavits and the submissions by counsel.
12. The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is granted at the discretion of the Court and, as is usually said, such discretion must be exercised judicially, that is to say, upon defined principles of law. It is not to be exercised capriciously or whimsically but on sufficient cause and other grounds set out in Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules which provides that:
  - 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.”

The above was reiterated by the Court of Appeal in the case of *Vishram Ravji Halai & Another -v- Thornton & Turpin* (1963) LTD 1990 KLR 365 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.”

This Court is considering an application for stay of execution of a judgment of a subordinate Court and not of its own decision. This being an interlocutory application over a pending appeal, this Court must be careful not to stray into the appeal itself. I must therefore balance between the competing interests of a party who has a judgment whose fruits he is entitled to enjoy and another who has an appeal that should not be rendered nugatory.

13. The Appellant has approached this Court without unreasonable delay. The ruling sought to be appealed was delivered on 20<sup>th</sup> August 2024 and this application was filed on 2<sup>nd</sup> September 2024.
14. On the issue of sufficient cause, the Appellant filed the appeal on 30<sup>th</sup> August 2024.
15. Substantial loss, as was held in the case of *Kenya Shell Ltd -v- Kibiru* 1986 KLR 410, “is the cornerstone of both jurisdictions for granting a stay.” In paragraph 22 of his supporting affidavit, the Appellant has deposed thus:
  - 22: “That I stand to suffer substantial loss unless the orders of 20<sup>th</sup> August 2024 are stayed pending the hearing and determination of this appeal.”



No such substantial loss has been disclosed in that supporting affidavit. In the case of Machira T/a Machira & Company Advocates -v- East African Standard (NO 2) 2002 KLR 63, it was held that:

“In this kind of application for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars ... where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay.”

What the Appellant has done is to submit as follows in paragraph 9 of his counsel’s submissions:

- 9: “It is clear beyond argument that execution of the orders of 20<sup>th</sup> August 20204 will result in the Applicant losing his land and home. That constitutes substantial loss. Annexure AOA3 show the Applicant is the owner of the land.”

It is of course correct that loss of land and home may be substantial loss. However, this should have been averred in the Appellant’s affidavit and not in submissions which, as is now well settled, are not evidence. In the case of Daniel Toroitich Arap Moi -v- Mwangi Stephen Muriithi & Another 2014 eKLR, it was held that submissions are not evidence on which a dispute can be determined.

16. The Appellant has been unable to surmount the ground of proving substantial loss.
17. The Appellant was required to prove all the requirements of Order 42 Rule 6 (1) and (2) conjunctively and not only some of them. Having failed to prove substantial loss, it is clear that the Appellant is not deserving of the remedy sought.
18. The up-shot of all the above is that the Notice of Motion dated 2<sup>nd</sup> September 2024 is devoid of any merit. It is accordingly dismissed. Costs shall be in the appeal.

**BOAZ N. OLAO**

**JUDGE**

**6<sup>TH</sup> NOVEMBER 2024**

**RULING DATED, SIGNED AND DELIVERED ON THIS 6<sup>TH</sup> DAY OF NOVEMBER 2024 BY WAY OF ELECTRONIC MAIL.**

