



**Otieno v Odhiambo & 3 others (Environment and Land Appeal
E017 of 2024) [2024] KEELC 13588 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13588 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E017 OF 2024
AY KOROSS, J
DECEMBER 5, 2024**

BETWEEN

FLORENCE NYADERA OTIENO APPELLANT

AND

GEORGE OCHIENG ODHIAMBO 1ST RESPONDENT

**DISTRICT LAND REGISTRAR, BONDO-RARIEDA REGION 2ND
RESPONDENT**

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

NORRAH LINDA WASIKE 4TH RESPONDENT

RULING

Appellant's case

1. The notice of motion that is the subject of this ruling is dated 23/07/2024. The appellant seeks several reliefs from this court some of which are spent and the main prayers pending determination are: -
 - a. Pending the hearing and determination of the appeal, the Hon. Court grants an order of stay of execution of the judgment delivered on 31/05/2024 in Bondo MCELIC No. E019 of 2021.
 - b. The Hon. Court does issue such other directions and/or orders as the court may deem just and expedient to grant in the circumstances of this case.
 - c. That the costs of the motion be provided for.
2. The motion is predicated on grounds particularised on its face and on the appellant's affidavit that she was deposed on 26/07/2024. This affidavit has several annexures attached to it.



3. She made several averments some of which touched on the merits of the substantive appeal. But concerning grounds in support of the prayers sought in the body of the motion, she averred she was aggrieved against the decision of the trial court and she risked losing proprietary rights over land parcel nos. Siaya/Omia Diere/3737 and 3738 (suit properties).
4. She further averred if execution proceeds, the appeal will be rendered nugatory and she will suffer irreparable loss as she will lose her home. She stated she had an arguable appeal with chances of success and the motion was not filed inordinately late.

1st respondents' case

5. In rejoinder, the 1st respondent who is represented by the law firm of M/s. Onyatta & Co. Advocates filed a replying affidavit sworn on 29/08/2024.
6. In summary, he averred inter alia; he was the plaintiff in the lower court, and some of the grounds of appeal were on the substance of rulings rendered by the trial court on 15/12/2023 and 15/04/2024 yet those decisions were never appealed against, he had a right to enjoy the fruits of the judgment, the threshold of stay of execution had not been met, the orders issued by the lower court were negative and the motion should be dismissed with costs.

2nd -4th respondents' case

7. These parties did not file any documents in opposition to the motion.

Parties' submissions

8. On 14/10/2024, the appellant's and 1st respondent's counsels canvassed the motion by oral submissions. It is noteworthy that the 2nd to 4th respondents' counsel did not attend court during the hearing date.
9. Mr. Barrack, counsel for the appellant rehashed the averments contained in the grounds contained in the motion and dispositions contained in the appellant's affidavit. Counsel submitted the respondent had left it to the court's discretion to determine the nature of security it could grant. Counsel urged this court to allow the motion as prayed.
10. In opposing the motion, counsel for the 1st respondent Mr. Onyatta submitted the appellant had not fulfilled the principles of stay of execution. Counsel submitted the 1st respondent was yet to commence execution and the appellant had failed to demonstrate loss and security for the due performance of the decree. Counsel relied on the decision of *Kenya Shell Limited v Benjamin Karuga Kibiru & Ruth Wairimu Karuga* [1986] KECA 94 (KLR).

Issues for Analysis, and Determination

11. Having carefully considered the motion, affidavits as well as the rival submissions, and cited provisions of law and precedents, the issue for determination is whether the appellant has met the legal threshold to warrant the grant of stay of execution.
12. When dealing with applications for a stay of execution pending appeal, this court has to satisfy itself with the 3 principles enunciated in Order 42 Rule 6 (2) of the Civil Procedure Rules which provides as follows:

“No order for stay of execution shall be made under sub rule (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 added.
13. Being an appellate court and as was held in the decision of *Fakir Mohammed v. Joseph Mugambi & 2 others [2005] eKLR (Civil Application No. Nai. 332 of 2004* (Nyr. 32/04), this court exercises judicious discretion and the principles were summarised thus: -

“...As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factor.”
14. As stated by Mr. Onyatta, the Court of Appeal decision of *Kenya Shell Limited (Supra)* stated the element of the appeal being rendered nugatory if the appeal is successful is significant. In this decision, the court had this to say: -

‘It is also true to say that, in consideration an application for a stay, the court doing so must address its collective mind to the question of whether to refuse it would, as Mr Kwach, urges, render the appeal nugatory.’
15. The purpose of a stay of execution is to preserve the substratum of the case so that the rights of the appellant who is exercising her undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.
16. Now, as to the circumstances of this case, it is undoubted this motion is filed without unreasonable delay as it was filed close to 2 months after the judgment of the lower court was rendered. In addition, the appellant has left this court with the discretion to determine the nature of the security she should furnish. She has therefore satisfied 2 limbs.
17. In the instant case, the appellant contends that she will suffer substantial loss if the judgment of the lower court is executed. She contends she is in occupation of the suit properties. The 1st respondent did not rebut this and the court has noted that she is probably the registered owner of the suit properties.
18. Mr. Onyatta argues the memorandum of appeal on record raises grounds that have been overtaken by events as they touch on rulings that were never appealed against.
19. That may be so and is a good ground for challenging the arguability of the appeal. Nonetheless, grounds 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17 challenge the substance of the judgment and in my opinion, have raised arguable grounds of appeal.
20. In the decision of *Kenya Shell Limited (Supra)*, the court was dealing with a monetary decree which is distinguishable from this case. In this case, the trial court ordered positive orders of the cancellation of the suit properties’ title and their reversion to Siaya/Omia/139 and that they be registered in the names of John Mboga Ocholla (deceased).



21. In my humble opinion if a stay is not granted the appeal will be rendered nugatory. I find that the respondents will not suffer substantial prejudice if the motion herein is allowed.
22. The upshot is that I find merit in this motion, and allow it. Costs shall abide by the outcome of the appeal. I hereby issue the following disposal orders: -
 - a. That stay of the execution of the judgment rendered on 31/05/2024 in Bondo MCELC No. E019 of 2021 is granted subject to the appellant depositing in court a letter of guarantee from a reputable financial institution for the amount of Kshs. 200,000/= within 30 days from the date hereof in default of which the respondents shall be at liberty to execute the decree of the trial court.
 - b. That pending the determination of the appeal, the respondents are hereby restricted from transacting on land parcel nos. Siaya/Omia Diere/3737 and 3738 or interfering with their respective registers.
 - c. That The appellant shall serve the record of appeal within 30 days from the date hereof.
 - d. That this matter shall be mentioned before the deputy registrar on 4/03/2025 to confirm compliance and issue further directions.
 - e. That the appeal is hereby admitted and the lower court record to be called for.
 - f. That costs shall abide by the outcome of the appeal.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 5TH DAY OF DECEMBER 2024.

HON. A. Y. KOROSS

JUDGE

5/12/2024

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

Mr. Orieyo for the appellant

Mr. Onyatta for the 1st respondent

N/A for the 2nd to 4th respondents

Court assistant: Ishmael Orwa

