



**Oduor v Ondhonwe (Environment and Land Appeal E003 of 2023)  
[2024] KEELC 13549 (KLR) (3 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13549 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT AND LAND APPEAL E003 OF 2023**

**BN OLAO, J**

**DECEMBER 3, 2024**

**BETWEEN**

**CHARLES OUMA ODUOR ..... APPELLANT**

**AND**

**ROBERET ONDHONWE ..... RESPONDENT**

*(Arising from the Judgment of Hon. P. Olengo Senior Principal Magistrate  
delivered on 11th September 2023 in Busia ELC CM Case No 86 of 2018)*

**RULING**

1. The dispute between Charles Ouma Oduor (the Appellant) and Robert Ondhonwe (the Respondent) with regard to the land parcel No Marachi/bumala/1962 (herein the suit land) was determined in favour of the Respondent. Aggrieved by that judgment, the Appellant filed this appeal on 22<sup>nd</sup> September 2023.
2. The Appellant has now moved to this Court vide his Notice of Motion dated 27<sup>th</sup> March 2024 premised under the provisions of Sections 1, 1A, 1B, 3, 3A and 63 of the Civil Procedure Act, Order 42 Rule 6(1) and (2) and Order 51 Rules 1, 4, 6, 10 (1) and (2) of the Civil Procedure Rules. He seeks the following orders:
  1. Spent.
  2. Spent.
  3. That the Honourable Court do issue an order of stay of judgment herein, the decree and all consequential orders pending the hearing and determination of the intended appeal.
  4. That costs of this application abide the result of the intended appeal.



3. The application is based on the grounds set out therein and supported by the Appellant's affidavit of even date.
4. The gravamen of the application is that the Appellant is the Head teacher and Director of Bumala Mercy Education Centre which is built on the suit land and caters for over 200 orphans, destitutes and children from disadvantaged families. If they are evicted, their children's education will be interrupted. It is in their interest that the order of stay be granted as they have a legitimate expectation to complete their education. The Respondent will not be prejudiced by the order of stay of execution.
5. The application is opposed and the Respondent filed both grounds of opposition and a replying affidavit dated 18<sup>th</sup> October 2023.
6. In the grounds of opposition, the following are raised:
  1. No substantial loss shall be occasioned.
  2. The Appellant has not offered any security.
  3. There can be no stay pending an intended appeal.
  4. The application is made in bad faith.
  5. There is no evidence that the school stands on the suit land.
  6. The intended appeal has no chances of success.
  7. It was clear in Busia Elc No 17 of 2014 as to who is entitled to the suit land.
  8. The Appellant is a trespasser.
  9. The application lacks merit.

In the replying affidavit the Respondent has deposed that he has the authority of the Trustees of Mercy Children Centre to swear this affidavit. That the Judgment in Busia CM ELC NO 86 of 2018 was delivered on 11<sup>th</sup> September 2023 and this application has been filed after six (6) months a delay which is inordinate and not accounted for. That a similar application has been filed in the subordinate Court which is yet to deliver its ruling and therefore the Appellant is guilty of non-disclosure. That the issue of ownership of the suit land was adjudicated and finalized in Busia ELC NO 17 of 2014 and the judgment has not been disturbed. That the Appellant was only a care-taker in the school which, for all purposes, is not operational and the neighbouring Bumala A. C. School which neighbours the Bumala Mercy Children Education Centre has expressed an interest in the suit land and that is what has prompted this application. The application lacks merit and should be dismissed with costs.

7. Directions were issued that the application be canvassed by way of written submissions to be filed on or before 13<sup>th</sup> May 2024. However, even though time was extended upto 29<sup>th</sup> July 2024, only MR WERE counsel for the Respondent filed his submissions.
8. I have considered the application, the grounds of objection, the rival affidavits and the submissions by MR WERE.
9. I must start with the grounds of opposition filed by the Respondent. None of the nine (9) grounds listed therein address any issues of law. Rather, they have addressed issues of fact. It is well settled that grounds of opposition must only address issue of law and not fact. The grounds of opposition herein do not therefore rebut the averments in the Appellant's supporting affidavit. There is however a replying affidavit by the Respondent and which I will consider as a response to the application.



10. The Appellant seeks the main remedy that an order of stay of execution be granted pending the hearing and determination of the “intended appeal”. That clearly means that no appeal is yet to be filed. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provides that:

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- (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 Appellant was therefore required to satisfy the following conditions to be entitled to the order sought;

1. Show sufficient cause.
2. Demonstrate that unless the order is granted, he will suffer substantial loss.
3. File the application without unreasonable delay.
4. Offer security.

The Judgment sought to be stayed pending appeal was delivered on 11<sup>th</sup> September 2023. This application was filed on 28<sup>th</sup> March 2024. That was six (6) months later a delay which is clearly unreasonable. No explanation has been advanced for that delay yet the record shows that the Judgment was delivered in the presence of Mr Omeri holding brief for Mr Ashioya for the Appellant and MR Okutta holding brief for Mr Fwaya for the Respondent. On that basis alone, this application is for dismissal.

11. On the issue of substantial loss, I am persuaded that if the children are evicted from the school, their education will be disrupted. The situation was of course more dire on 28<sup>th</sup> March 2024 when this application was filed. By the time of delivery of this ruling on 3<sup>rd</sup> December 2024, schools are on holidays so the prejudice is only minimal. If this application had been filed in time, this Court would have been minded to allow it.
12. The Appellant has neither offered any security nor stated that he is prepared to abide by all the conditions which this Court may impose for the grant of the order of stay of execution. I also notice from paragraph 19 of the replying affidavit that the school on the suit property is in fact “unoperational”.



13. The Appellant was required to meet all the conditions set out in Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules*. He has not done so.
14. On the issue of costs, they follow the event unless the Court decides otherwise for good reasons.
15. The up-shot of all the above is that having considered the Notice of Motion dated 27<sup>th</sup> March 2024, this Court makes the following disposal orders:
  1. The Notice of Motion dated 27<sup>th</sup> March 2024 is dismissed.
  2. The Respondent shall meet the costs.

**BOAZ N. OLAO**

**JUDGE**

**3<sup>RD</sup> DECEMBER 2024**

**RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 3<sup>RD</sup> DAY OF DECEMBER 2024.**

**BOAZ N. OLAO**

**JUDGE**

**3<sup>RD</sup> DECEMBER 2024**

