



REPUBLIC OF KENYA



KENYA LAW
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**Estika v Opiyo (Environment and Land Appeal E045 of 2022)
[2023] KEELC 603 (KLR) (8 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 603 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E045 OF 2022
GMA ONGONDO, J
FEBRUARY 8, 2023**

BETWEEN

BENJAMIN OKWARO ESTIKA APPELLANT

AND

JOSEPH ODONGO OPIYO RESPONDENT

RULING

1. This ruling is in regard to an application by way of a notice of motion dated October 13, 2022 by the applicant, Benjamin Okwaro Estika through the firm of Aluoch Odera and Nyauke Advocates seeking the orders *infra*:
 - a. Spent.
 - b. Spent.
 - c. Upon hearing this application *inter-partes*, the honourable court be pleased to issue an order of stay of the lower courts' Decree pending final determination of the appeal.
 - d. The costs of this application be provided for.
 - e. Such further and/or other orders be made as the court may deem fit and expedient.
2. The anchorage of application is the applicant's supporting affidavit of twelve paragraphs sworn on even date, an extract decree marked as "BOE-02" annexed thereto and grounds I to VI set out on the face of the same. In a nutshell, the applicant's complaint is that he is dissatisfied with the trial court's judgment delivered in favour of the respondent on September 28, 2020 in Ndhiwa Senior Resident Magistrate's Court Environment and Land Court case number 14 of 2020. That therefore, he has mounted this appeal which has high chances of success. That he is likely to suffer substantial loss since the respondent is set to execute it's decree duly issued against him.



3. By a replying affidavit of 34 paragraphs sworn on November 9, 2021 and filed in court on November 14, 2022, the respondent opposed the application. He termed it devoid of merits and is seeking that the same be dismissed with costs.
4. The respondent deposed, *inter alia*, that the applicant has not satisfied the requisite conditions that substantial loss is bound to occur and or accrue if the orders of stay of execution are not granted. That the applicant is merely intent on obstructing the terms of the judgment and decree of this court.
5. On October 17, 2022, this court directed that the application be heard by written submissions.
6. Clearly, the applicant's counsel failed to file submissions herein.
7. In the respondent's submissions dated November 9, 2022 and filed herein on November 14, 2022, reference is made to this appeal, the trial court's judgment, the application and the replying affidavit. Four issues for determination including whether the applicant has demonstrated the conditions set out for stay of execution of the decree, are framed and analyzed in favour of the respondent. Counsel cited the case of *Kenya Shell Ltd-vs-Benjamin Karuga Kibiru* (1986) eKLR, *Visram Halai and another-vs-Thornton & Turpin 1963* (1990) eKLR and *Jaber Mohsen Ali and Another-vs-Pricillah Boit and another* (2014) KLR, among other authoritative pronouncements, to fortify the submissions.
8. I have thoroughly considered the application, the replying affidavit and the respondent's submissions. So, the issues for determination are condensed to whether the applicant has met the requirements set out under order 42 rule 6 (2) of the [Civil Procedure Rules](#), 2010.
9. Concerning substantial loss, the applicant alleged that the respondent is likely to execute the decree (BOE-02) which may cause cancellation of his title and transfer of the suit land, Homa Bay/Kawere/Konyango/Karanding/3413. That he is likely to suffer serious substantial loss. Therefore, he has demonstrated that he is bound to suffer substantial loss of property if the stay order sought herein is not granted.
10. Furthermore, this appeal contains triable issues including adverse possession. Indeed, the applicant has an undoubted right of appeal as held in the case of *Butt-vs-Rent Restriction Tribunal* 1979 eKLR and as provided for under articles 48, 50 (1) and 25 (c) of the [Constitution](#) of Kenya, 2010 (The Constitution).
11. In regard to delay, time is captured at order 50 rules 8 and 9 of the [Civil Procedure Rules, 2010](#). This court is not unaware of equitable principles including delay defeats equity as stipulated under article 10 (b) of the [Constitution](#).
12. In this application, I apply the two weeks' delay against the ends of justice as stated in paragraph 10 hereinabove. I find the delay not unreasonable in the circumstances.
13. As regards security, the condition is not cast in stone as held in the case of Halai and another case (*supra*). The same is within the absolute discretion to be exercised judicially which I hereby do in the instant application.
14. It is important to note that in the case of *Board of Governors, Moi High School Kabarak and another vs Malcolm Bell* 2013 KLR, the Supreme Court of the Republic of Kenya was emphatic that the court has the power to grant an order of stay to preserve the subject matter of appeal, in the interim, pending the hearing and determination of an appeal; see also section 13 (7) (a) [Environment and Land Case Act](#), 2015 (2011) on interim preservation orders.
15. In conclusion, it is the finding of this court that the application has met the triple requirements for granting the order of stay sought therein. The application is meritorious.



16. In the upshot, I allow the application on terms of stay order sought therein and as stated at paragraph 1 (c) hereinabove.
17. Costs of the application to abide the outcome of this appeal
18. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 8TH DAY OF FEBRUARY 2023.

G M A ONG'ONDO,

JUDGE

Present

1. Ms Aluoch Odera, learned counsel for the appellant.
2. Ms S Wafula, learned counsel for the respondent.**
3. **Okello, Court assistant.**

