



**Otieno v Otieno (Suing as the legal representative of the Estate of Patrice Otieno Ochola (Deceased) & 2 others (Environment and Land Appeal E005 of 2022) [2023] KEELC 611 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 611 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ENVIRONMENT AND LAND APPEAL E005 OF 2022**  
**SO OKONG'O, J**  
**FEBRUARY 2, 2023**

**BETWEEN**

**MAURICE OTIENO ..... APPELLANT**

**AND**

**JAMES OKOTH OTIENO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PATRICE OTIENO OCHOLA (DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Sometime in 2018, the 1<sup>st</sup> respondent brought a suit in the lower court namely, Kisumu CMCELC No 194 of 2018 against the appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents seeking a declaration that all that parcel of land known as title No Kisumu/Nyalunya/926(hereinafter referred to only as “the suit property”) was irregularly registered in the name of the appellant and that the title in the name of the appellant be cancelled and rectified to reflect the name of the 1<sup>st</sup> respondent as the owner of the property pursuant to the findings of the land arbitration board made on October 10, 1979.
2. The 1<sup>st</sup> respondent’s claim was heard and a judgment was delivered on January 19, 2022 by Hon S.N Telewa, SRM. In the judgment that was in favour of the 1<sup>st</sup> respondent and against the appellant, the lower court made a finding that the suit property was irregularly registered in the name of the appellant and ordered the register of the property to be rectified by the cancellation of the name of the appellant and the registration of the property in the name of the 1<sup>st</sup> respondent. The lower court also awarded the costs of the suit to the 1<sup>st</sup> respondent.
3. The appellant was aggrieved by the said judgment and filed the present appeal against the same on February 16, 2022. The appellant has challenged the judgment of the lower court on several grounds.



On October 4, 2022, the appellant filed an application by way of a notice of motion dated September 14, 2022 seeking a stay of execution of the said judgment of the lower court made on January 19, 2022. That is the application before the court. The application that was supported by the affidavit of the appellant sworn on September 14, 2022 was brought on the grounds that the appellant stood to suffer great prejudice if the stay was not granted since the appellant was the first registered owner of the suit property having been so registered as such in 1978 and that the application was brought timeously and in good faith. The appellant averred that the respondents stood to suffer no prejudice if the application was allowed.

4. The application was opposed by the 1<sup>st</sup> respondent through a replying affidavit sworn on November 2, 2022. The 1<sup>st</sup> respondent averred that the appellant's application had been overtaken by events. The 1<sup>st</sup> respondent averred that the appellant had not demonstrated how he would suffer prejudice if the stay sought was not granted. The 1<sup>st</sup> respondent contended that the application did not meet the threshold for granting a stay of execution.
5. The application was argued by way of written submissions. The appellant filed his submissions on November 24, 2022 while the 1<sup>st</sup> respondent filed his submissions on December 16, 2022. I have considered the appellant's application together with the affidavits filed in support thereof. I have also considered the replying affidavit filed by the 1<sup>st</sup> respondent in opposition to the application. Finally, I have considered the submissions by the advocates for the parties and the various authorities cited in support thereof. The appellant's application falls for consideration under order 42 rule 6 of the [Civil Procedure Rules](#). It is not clear why the application was brought under order 12 rule 7 of the [Civil Procedure Rules](#) which is not relevant to the issue at hand. Order 42 rule 6(2) of the [Civil Procedure Rules](#) provides that:

- “(2) 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 ultimately be binding on him has been given by the applicant.”

6. In [Kenya Shell Limited v Karuga](#) (1982 – 1988) I KAR 1018 the court stated that:

“It is usually a good rule to see if order xli rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”

7. I am persuaded that the appellant would suffer substantial loss if the stay sought is not granted. It is not disputed that the appellant was at all material times the registered owner of the suit property having been registered as such in 1978. In the judgment delivered by the lower court on January 19, 2022, the court ordered that the appellant's title which he had held for 30 years at the time the lower court suit was filed be canceled and the suit property registered in the name of the 1<sup>st</sup> respondent. What this means is that unless the stay sought is granted, the appellant risks losing the suit property to the 1<sup>st</sup> respondent. Once the suit property is registered in the name of the 1<sup>st</sup> respondent, nothing would stop



him from disposing of the same to third parties. In the circumstances, the chances of the suit property being put completely beyond the reach of the appellant if the stay sought is not granted is real. On the issue of security, the appellant has submitted that he is willing to abide by any order on security that the court may make as a condition for granting the stay sought.

8. The upshot of the foregoing is that the appellant's application dated September 14, 2022 has merit. The application is allowed in terms of prayer 2 thereof. The appellant shall deposit in court a sum of Kshs 50,000/- as security within 60 days from the date hereof in default of which the stay granted shall stand discharged without any further reference to the court. The costs of the application shall be in the cause.

**DELIVERED AND DATED AT KISUMU ON THIS 2<sup>ND</sup> DAY OF FEBRUARY 2023.**

**S. OKONG'O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Nyanga for the Appellant

Ms. Raburu h/b for Mr. Omondi for the Respondent

**Ms. J.Omondi-Court Assistant**

