



**Wambura v Wambura & another (Environment & Land Case  
54 of 2018) [2023] KEELC 16437 (KLR) (14 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16437 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 54 OF 2018**

**BN OLAO, J  
MARCH 14, 2023**

**BETWEEN**

**ANAKLETUS WAMBURA ..... APPLICANT**

**AND**

**JOHN WAMBURA ..... 1<sup>ST</sup> RESPONDENT**

**GEOFFREY WAMBURA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Anakletus Wambura (the Applicant) moved to this Court seeking judgment against John Wambura and Geoffrey Wambura (the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively) in the following terms with respect to the land parcel No Samia/Bulemia/2692 (the suit land):
  1. An order of eviction.
  2. Costs
2. It was the Applicant's claim that he is the registered proprietor of the suit land on which the Respondents had encroached and constructed semi-permanent houses.
3. The Respondents resisted the claim pleading that the Applicant obtained the registration of the suit land fraudulently and that infact, the 1<sup>st</sup> Respondent is entitled to half a share therein.
4. Having heard the parties, Omollo J delivered a judgment on 20<sup>th</sup> July 2022 in which she decreed as follows:-
  1. The Applicant's title to L.R No Bunyala/Bulemia/2692 is hereby cancelled.



2. The said L.R. No Bunyala/BulemiA/2692 shall be surveyed and sub-divided between the Applicant and the 1<sup>st</sup> Respondent putting into consideration their current residences and separate titles issued.
  3. The Applicant shall sign the requisite forms and avail the necessary documents to facilitate the sub-division and transfer of the suit portion to the 1<sup>st</sup> Respondent's name or his nominee. In default, the Deputy Registrar of the Court to execute the said documents in execution of this decree.
  4. The surveyor's costs to be borne by the Respondents.
  5. This being a case between family members, there shall be no orders as to costs.
5. The Applicant was aggrieved by that judgment and lodged a Notice of Appeal on 29<sup>th</sup> July 2022 signifying his intention to appeal.
  6. The Applicant thereafter filed a Notice of Motion dated 23<sup>rd</sup> August 2022 and citing the provisions of Section 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules seeking the following remedies:-
    1. Spent
    2. Spent
    3. Spent
    4. That this Honourable Court be pleased to order for a stay of execution of all consequential orders pending the hearing and determination of Court Of Appeal Civil Appeal No 199 of 2022.
  7. The application which is the subject of this ruling is premised on the grounds set at therein and is supported by the Applicant's affidavit also dated 23<sup>rd</sup> August 2022.
  8. The gist of the application is that the Applicant has filed an appeal against the judgment herein but meanwhile, he has received a letter from the County Land Registrar dated 17<sup>th</sup> August 2022 conveying his intention to execute the decree. That his appeal has high chances of success and if the execution proceeds, it will disturb a situation which has existed on the land for 40 years and the Applicant will suffer substantial loss whereas the Respondents will not suffer any prejudice. That the application has been made without delay and the Applicant is ready to deposit security and abide by any conditions which this Court may impose.
  9. Annexed to the application are the following documents:
    1. Decree issued on 27<sup>th</sup> July 2022.
    2. Notice of Appeal.
    3. Memorandum of Appeal.
    4. Letter dated 17<sup>th</sup> August 2022 addressed to the Applicant and others by the County Surveyor Busia.
  10. The application is opposed and the Respondents' counsel Mr. J. V. Juma filed a replying affidavit dated 20<sup>th</sup> December 2022 in which he deposed, *inter alia*, that the Applicant and the 1<sup>st</sup> Respondent are



brothers while the 2<sup>nd</sup> Respondent is the son to the 1<sup>st</sup> Respondent. That the 1<sup>st</sup> Respondent used to send money to the Applicant to acquire the suit land while both were employed by the then East African Community. The dispute was heard by the Budalangi Land Tribunal which ruled that the Applicant had a share in the suit land. The Applicant then filed this case. That the 1<sup>st</sup> Respondent is old and sick and cannot attend Court and the Applicant has failed to provide him with alternative land. That filing an appeal in itself is not a ground for stay of execution and the issues being raised in the appeal were dealt with both in the Tribunal and this Court. That the Applicant has subjected the Respondents to a life of squatters and this application should be dismissed for lack of merit.

11. The application has been canvassed by way of written submissions. The same have been filed by Mr Jumba instructed by the firm of Balongo & Company Advocates for the Applicant and by Mr J. V. Juma instructed by the firm of J. V Juma & Company Advocates for the Respondents.
12. I have considered the application, the rival affidavits and the submissions by counsel.
13. I must, before delving into the merits or otherwise of the application address one issue which though not raised by counsel for the Applicant, is important. The Respondents' counsel Mr J. V. Juma has sworn a replying affidavit on their behalf. And although it is deposed in paragraph 10 thereof that the 1<sup>st</sup> Respondent "is old and very sick to the extent that he could not attend Court", it is not clear why the 2<sup>nd</sup> Respondent did not swear the replying affidavit. Rule 9 of the *Advocates (Practice) Rules* provides that:

"No advocate may appear as such before any Court or tribunal in any matter in which he has reason to believe that he may be required as unless to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear: Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration of affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears."

14. The Court of Appeal addressed itself on this issue in *Hakika Transporters Services Ltd -v- Albert Chulah Wamimitaire* 2016 eKLR citing its decision in *Salama Beach Ltd -v- Mario Ross* C.A. Civil Appeal No 10 of 2015:

"As regards the appellant's objection regarding the affidavit supporting the application, it is clear that Mr Munyithya has deposed only to matters within his personal knowledge as counsel acting into his matter both in the High Court and in this Court. Ordinarily, Counsel is obliged to refrain from swearing affidavits on contentious issues particularly where he may have to be subjected to cross-examination (see *Pattni -v- Ali & 2 Others* C.A. No 354 of 2004 UR 183/4. Rule 9 of the advocates (Practise) Rules however permits an advocate to swear an affidavit on formal or non-contentious matters."

15. While the law does not bar an Advocate from swearing an affidavit in a matter in which he is appearing as counsel, that is something that should be approached with the utmost circumspect. The reason is that it could expose the advocate to unpleasant consequences such having to submit himself to cross-examination. In the circumstances of this case and having perused the replying affidavit by Mr. J. V. Juma, I find that many of the issues deposed therein are matters which came to this knowledge as he prosecuted the Respondents' case. They are therefore not contentious. However, unless it is absolutely unavoidable, swearing an affidavit in which an advocate is acting should be avoided at all costs so as to protect the image of counsel as an officer of the Court.



16. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provides that:

- (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.”  
Emphasis mine.

17. It is therefore clear from the above that a party seeking an order for stay of execution pending appeal must satisfy the following conditions:

- a. Show sufficient cause
- b. Demonstrate that he will suffer substantial loss unless the order is granted.
- c. Approach the Court without unreasonable delay.
- d. Offer security.

18. In the case of *Visharam Ravji Halai & Another -v- Thornton & Turpin* (1963) LTD 1990 KLR 365, the Court of Appeal circumscribed the jurisdiction of this court in such an application as follows:

“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.”

19. In *Kenya Shell Ltd -v- Benjamin Kibiru & Another* 1986 KLR 410, Platt Ag. J.A. (as he then was) said:

“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 form is the cornerstone of both jurisdiction 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”. Emphasis mine.

20. In the same case, Gachuhi Ag. J. A (as he then was) added:

“It is not sufficient by merely stating that the sum of Kshs.20,380 is a lot of money and the Applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the Applicant should show the damages it would suffer if the order for stay is not granted.” Emphasis mine.

21. Finally, on the issue of substantial loss, Kuloba J captured it well in the case of *Machira T/a Machira & Company Advocates -v- East African Standard* (no 2) 2002 2 KLR as follows:

“If the Applicant cites as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given and the conscience of the Court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of any awarded decree or order before disposal of the applicant’s business (e.g. appeal or intended appeal).”

22. The Judge went on to add:

“Moreover, a Court will not order a stay upon a mere vague speculation, there must be the clearest ground of necessity disclosed on evidence .... Another common factor in favour of the Applicant is whether to proceed further or to execute may destroy the subject matter of the action and deprive the appellant or intended appellant of the means of prosecuting the appeal or intended appeal. So really, stay is normally not granted save in exceptional circumstances.”

23. The Applicant filed a Notice of Appeal on 29<sup>th</sup> July 2022 just over a week after the delivery of the judgment sought to be appealed. That is sufficient cause in terms of Order 42 Rule 6(1) of the *Civil Procedure Rules*.

24. The Applicant also filed this application a month after the delivery of the said judgment. I do not consider that delay to be inordinate taking into account the fact that the record does not show if in fact the parties were present when the judgment was delivered.

25. The Applicant has also deposed that he is ready to abide by any conditions on security which this Court may impose.

26. However, the cornerstone of such an application, as Platt Ag. J.A (as he then was) held in *Kenya Shell Ltd -v- Benjamin Kibiru* (*supra*) is substantial loss. On the face of his application, the Applicant has stated among the grounds in paragraph (1) that:

“The Applicant shall suffer substantial loss if execution was to proceed.”



27. Other than that mere assertion, the Applicant has not demonstrated what substantial loss he will suffer if execution proceeds. In paragraph 7 of his supporting affidavit, the Applicant avers as follows:

“That the execution herein if allowed shall upend and disturb a situation which has been in existence for a period exceeding 40 years.”

28. What was decreed by the judgment of Omollo J was that the Applicant’s title to the suit land was cancelled and the said land is to be surveyed and shared equally between the Applicant and the 1<sup>st</sup> Respondent taking into account their current residences and separate titles issued. That means that the 1<sup>st</sup> Respondent has always been in occupation and possession of the portion of the land which the judgment decreed to be registered in his names. This is how Omollo J addressed that issue at paragraph 19 of her judgment:

“I am satisfied by the evidence adduced by the defendants that the 1<sup>st</sup> defendant contributed to the purchase of the land. Therefore, it was unlawful for the plaintiff to register himself only as the owner thereof. The evidence of contribution is supported by the fact the plaintiff allowed the 1<sup>st</sup> defendant together with his family to live on and work the land. The defendants are not trespassing and for this reason alone, the plaintiff is not entitled to the orders of eviction being sort (sic).”

29. From the statement of the 1<sup>st</sup> Respondent dated 18<sup>th</sup> August 2015 and which was admitted as his evidence during the plenary hearing on 25<sup>th</sup> November 2021, the 1<sup>st</sup> Respondent, his brother the Applicant and their mother moved into the suit land in 1975. The 1<sup>st</sup> Respondent has remained thereon with his family to date. It is therefore not clear what will be disturbed if the execution proceeds. There is no evidence to suggest that the 1<sup>st</sup> Respondent intends to dispose of his portion once he obtains a title in his names. The Applicant also depones that his appeal has high chances of succeeding. That cannot be a consideration when this Court is considering an application for stay of execution pending appeal from a Court of co-ordinate jurisdiction. It can only be a consideration if this Court was considering an application for stay of execution pending the hearing of an appeal from a subordinate court to itself.

30. It is clear from all the above that whereas the Applicant moved to this Court without unreasonable delay and also by filing a notice of appeal and offering security, he has been unable to surmount the hurdle of demonstrating substantial loss which is the cornerstone of such an application. His application is therefore for dismissal.

31. With regard to costs, the parties are family. This Court would not want to further estrange them with an award of costs. Each shall therefore meet their own costs.

32. Ultimately therefore and having considered the Notice of Motion dated 23<sup>rd</sup> August 2022, this Court makes the following disposal orders:

1. The Notice of Motion dated 23<sup>rd</sup> August 2022 is hereby dismissed.
2. Each party shall meet their own costs.

**RULING DATED, SIGNED AND DELIVERED AT BUSIA ELC ON THIS 14<sup>TH</sup> DAY OF MARCH 2023 BY WAY OF ELECTRONIC MAIL AS WAS ADVISED TO THE PARTIES ON 6<sup>TH</sup> FEBRUARY 2023.**

**BOAZ N. OLAO**



**JUDGE**

