



**Opero v Musumba (Environment and Land Appeal E005 of 2023)  
[2023] KEELC 19823 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19823 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT AND LAND APPEAL E005 OF 2023  
BN OLAO, J  
SEPTEMBER 20, 2023**

**BETWEEN**

**VINCENT WABWIRE OPERO ..... APPELLANT**

**AND**

**KELESENZIA ANYANGO MUSUMBA ..... RESPONDENT**

*(Being an application for stay of execution of the judgment and decree  
of **HON. EDNA NYALOTI CHIEF MAGISTRATE** in **BUSIA CMC  
ELC CASE NO E19** of **2021** pending determination of the appeal)*

**RULING**

1. Kelesenzia Anyango Musumba (the respondent herein) moved to the subordinate court seeking the main relief that Vincent Wabwire Opero (the applicant herein) and one Lawrence Wanjala Wawire be evicted from the land parcel No Bukhayo/Mundika/5124 (the suit land).
2. The hearing proceeded ex-parte because, as is clear from paragraph 5 of the judgment of Hon Lucy Ambasi (Chief Magistrate) delivered on November 22, 2022, the Applicant and his co-defendant did not file any defence nor enter appearance. By that judgment, the applicant was directed to surrender vacant possession of the suit land forthwith failure to which he would be evicted.
3. The applicant then approached the trial court *vide* a notice of motion dated January 19, 2023 seeking inter alia, an order of stay of execution of the judgment and decree issued on November 22, 2022 as well as the setting aside of the *ex-parte* proceedings and all consequential orders and leave to file a defence. He also sought the order that one Jacob Nyongesa Musumba be enjoined in these proceedings as the 2<sup>nd</sup> plaintiff.
4. The application came up for hearing before Hon Edna Nyaloti Chief Magistrate who after considering the submission by counsel, delivered a ruling on March 9, 2023 dismissing the same with costs.



5. Aggrieved by that ruling, the applicant moved to this court *vide* his memorandum of appeal dated May 8, 2023 and filed on March 9, 2023 in which he sought to set aside the ruling delivered on April 18, 2023 (the ruling was actually delivered in open court on March 9, 2023) but was certified on April 18, 2023 by Hon Edna Nyaloti.
6. In seeking to set aside that ruling, the applicant raised the following three (3) grounds in his memorandum of appeal:
  1. The trial magistrate erred in law and fact in failing to address the issue of setting aside the ex-parte judgment.
  2. The trial magistrate erred in law and fact in concentrating and addressing on the issue of stay of execution.
  3. The ruling was against the weight of the evidence on record.
7. Simultaneously with that memorandum of appeal, the applicant filed a notice of motion dated May 8, 2023 predicated under the provisions of orders 22 and 42 of the *Civil Procedure Rules* as well as sections 1B, 3A, 63(e) and other enabling provisions of the law. He seeks the following orders:
  1. Spent
  2. Spent
  3. That there be a stay of execution of the judgment and decree of Busia CMC ELC case No E19 of 2021 pending determination of the appeal herein.
  4. That any other order this court may deem just and expedient to grant.
8. The application which is the subject of this ruling is premised on the grounds set out therein and supported by the applicant's affidavit dated May 8, 2023.
9. The basis of the application is that the applicant has lodged an appeal against the judgment and stands to suffer irreparable loss and damage should execution proceed. That the appeal raises triable issues and no prejudice will be caused to the respondent.
10. In the supporting affidavit, the applicant refers to the ruling dated April 18, 2023 which dismissed his application for stay of execution of the judgment. He adds that the case against him proceeded ex-parte and he was not given an opportunity to be heard yet this dispute involves land on which he has developed residential houses. That the respondent has instructed auctioneers to evict him from the suit land yet he was not served with the proceedings in this matter. That the application has been made in good faith and without undue delay.
11. Annexed to the application are the following documents:
  1. Notice of motion dated January 19, 2023 and filed in Busia CMC ELC case No E19 of 2021.
  2. Affidavits filed by the applicant and the respondent in Busia CMC ELC case No E19 of 2021.
  3. Applicant's submissions filed in Busia CMC ELC case No E19 of 2021.
  4. Respondent's submissions filed in Busia CMC ELC case No E19 of 2021.
  5. Ruling of Hon Edna Nyaloti delivered on March 9, 2023 in Busia CMC ELC case No E19 of 2021.
  6. Order issued in Busia CMC ELC case No E19 of 2021.



7. Judgment of Hon Lucy Ambasi delivered on November 22, 2022.
8. Order issued on December 14, 2022 in Busia CMC ELC case No E19 of 2022.
12. The application is opposed and respondent filed a replying affidavit dated June 8, 2023 in which she deposed, *inter alia*, that the applicants seeks to stay an execution which has already been carried out. That the applicant was in fact given an opportunity to file his defence but did not do so and this application is bereft of any merit and is for dismissal.
13. Annexed to the application are the following documents:
  1. Eviction order addressed to Dasemy Auctioneers in reference to the land parcel No Bukhayo/Mundika/5124 directing the removal therefrom of the defendant.
  2. Report dated May 16, 2023 by Dasemy Auctioneers confirming that the applicant was evicted on May 12, 2023.
14. When the application was placed before me on May 10, 2023, I did not grant any *ex-parte* orders but directed that the same be canvassed by way of written submissions.
15. Submissions were subsequently filed by the firm of Marision Luchivya & Company Advocates for the applicant and by the respondent acting in person.
16. I have considered the application, the rival affidavits and submissions filed.
17. I must start by stating that I found the application rather incoherent, convoluted and difficult to comprehend. The memorandum of appeal dated May 8, 2023 and filed on May 9, 2023 makes it clear that the appeal is in respect to the ruling delivered by Hon Edna Nyaloti Chief Magistrate on April 18, 2023. A copy of the ruling shows that it was in fact “dated, signed and pronounced in open court at Busia Law Court this March 9, 2023 in the presence of the parties” though it was signed by the magistrate on April 18, 2023. This court must take it that it was actually delivered on March 9, 2023.
18. Notwithstanding the fact that the appeal is against the ruling of Hon Edna Nyaloti, the notice of motion dated May 8, 2023 states in paragraph 3 as follows:
  - 3: “That there be a stay of execution of judgment and decree of Busia CMC MELC No E19 of 2021 pending determination of the appeal herein.”

That suggests that what is sought to be stayed is the judgment of Hon Lucy Ambasi delivered on November 22, 2022. In paragraphs 2, 4 and 5 of his supporting affidavit, the applicant has deposed as follows:
  - 2: “That a ruling was delivered on April 18, 2023 where the Court dismissed my application dated January 19, 2023 where I sought to stay execution of *ex-parte* judgment against me in Busia CMC MELC No E19 of 2021. Annexed herein are copies of the application dated January 19, 2023, replying affidavit of respondent dated March 8, 2023. Submissions by the applicant dated March 30, 2023, submissions by the respondent dated March 29, 2023, ruling dated April 18, 2023 and order marked as VWO-1A, VWO-1B, VWO-1C, VWO-1D, VWO-1E and VWO-1F.”
  - 4: “That I have filed an appeal against the ruling dated April 18, 2023 and it raises triable issues. Annexed herein is a copy of the appeal marked as VWO-3.”
  - 5: “That there be a stay of Busia CMC MELC No E19 of 2021 pending the hearing of my appeal.”



19. It is not clear whether the applicant is seeking a stay of the execution of the judgment of Hon Lucy Ambasi delivered on November 22, 2022 or a stay of execution of the ruling delivered by Hon Edna Nyaloti on March 9, 2023. Either way, whether what he seeks to stay is the judgment delivered on November 22, 2022 or the ruling delivered on March 9, 2023 (not April 18, 2023 as indicated in his memorandum of appeal), the notice of motion dated May 8, 2023 was bound to collapse for the following reasons:

20. Order 42 rule 6(1) and (2) of the [Civil Procedure Rules](#) upon which the application is predicated provides as follows:

6 (1) “No appeal or second appeal shall operate as a stay of execution or proceeding 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 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 has been given by the applicant.” emphasis mine.

It is clear from the above that the applicant was required to satisfy the following conditions to warrant the grant of the order for stay of execution pending appeal:

1. Show sufficient cause.
2. Demonstrate that if the order is not granted, he will suffer substantial loss.
3. Make the application without unreasonable delay.
4. Offer security.

21. As I have already stated above, it is not clear from the applicant’s own pleadings whether what he seeks stayed pending appeal is the judgment delivered by Hon Lucy Ambasi on November 22, 2022 or the ruling delivered by Hon Edna Nyaloti on March 9, 2023. I shall therefore consider both.

#### **Stay of execution of the Judgment dated November 2022:**

22. As is clear from the provisions of order 42 rule 6(1) of the [Civil Procedure Rules](#), what empowers the court to grant an order of stay of execution pending appeal is an intended or already filed and pending appeal. That is why rule 6(1) of the [Civil Procedure Rules](#) reads:

“No appeal or second appeal ...”Therefore if what the applicant seeks is a stay of execution of the judgment delivered on November 22, 2022, that order can only be granted on the basis of an appeal from that judgment. What the applicant has filed, however, is a memorandum of appeal arising out of the ruling of Hon Edna Nyaloti and not the judgment of Hon Lucy Ambasi. It follows therefore that there is no pending appeal from that judgment to warrant the order of stay of execution. Such an



order cannot be granted in a vacuum. A memorandum of appeal filed against a ruling can certainly not support an application to stay the execution of a judgment.

23. Secondly, the applicant was required to file this application “without unreasonable delay”. In paragraph 10 of his supporting affidavit, he deposes as follows:

10: “That this application has been made with good faith and without undue delay.”

The judgment sought to be appealed was delivered on November 22, 2022. It is of course correct that the case against him proceeded *ex-parte* and therefore he was not in court on November 22, 2022 when the said judgment was delivered. He has not told the court when he eventually learnt about the judgment. It is however clear from paragraph 7 of his supporting affidavit that at least by January 26, 2023, he became aware about his impending eviction because that was when he was notified by the firm of Odhiambo B. F. Advocates that instructions had been issued to the auctioneers to evict him from the suit land. Yet it took him another four (4) months to file this application. The delay of four (4) months is clearly not only unreasonable but has also not been explained.

24. Finally, the respondent has deposed that the applicant was infact evicted from the suit land by the firm of Dasemy Auctioneers on May 12, 2023. In paragraph 5(b) of his replying affidavit, the respondent has deposed that:

5(b): “The appellant’s motion seeks to stay execution order which has already been executed see copy of the auctioneers report annexed hereto and marked KM1.”

The above averment was not rebutted and the auctioneers report dated May 16, 2023 confirms that the applicant has infact already been evicted from the suit land. A stay order cannot be issued where what is sought to be stayed has already occurred. Courts do not act in vain. Therefore, if what is sought is a stay of execution of the judgment dated November 22, 2022, then the application has been overtaken by events. It is for dismissal without much ado.

#### **Stay Of Execution Of The Ruling Dated March 9, 2023:**

25. If what the applicant seeks is a stay of the ruling by Hon Edna Nyaloti delivered on March 9, 2023 (not April 19, 2023 as per his memorandum of appeal), then that ruling is incapable of being stayed since it was a negative order. In the said ruling, Hon Edna Nyaloti simply declined to stay execution of the judgment of Hon Lucy Ambasi or to enjoin one Jacob Nyongesa Musumba as a 2<sup>nd</sup> plaintiff in the suit. She stated that the applicant had not met the threshold set out in order 42 rule 6(1) and (2) of the [Civil Procedure Rules](#). That was not an order capable of being executed. In [Western College of Arts and Applied Sciences Oranga & others](#) 1976 – 80 1 KLR it was held:

“But what is there to be executed under the judgment the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In Wilson Church, the High Court had ordered the trustees of a church to make a payment out of that fund. in the instant case, the High Court has not ordered any parties to do anything or refrain from doing anything or to pay any sum.”



See also *Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union Kenya* 2015 eKLR. And in the case of *Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah* 2008 eKLR, the Court of Appeal while considering an application for stay of a negative order held:

“The 2<sup>nd</sup> prayer in the application for stay (of execution) of the order of the superior court made on December 18, 2006 merely dismissed the application for settling aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or to pay any sum. It was thus a negative order which is incapable of execution save in respect of costs only.”

That is the same scenario in this application. The ruling delivered on March 9, 2023 by Hon Edna Nyaloti simply dismissed with costs an application similar to this one. That was a negative order which, from the above precedents, cannot be stayed.

26. The up-shot of all the above is that the notice of motion dated May 8, 2023 is devoid of any merit. It is accordingly dismissed with costs.

**BOAZ N. OLAO**

**JUDGE**

**20<sup>TH</sup> SEPTEMBER 2023**

Ruling dated, signed and delivered on this 20<sup>th</sup> day of September 2023 by way of electronic mail.

**BOAZ N. OLAO**

**JUDGE**

**20<sup>TH</sup> SEPTEMBER 2023**

