



**Omwaka & 2 others v Atemba (Environment and Land Appeal
E016 of 2023) [2023] KEELC 19819 (KLR) (18 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19819 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E016 OF 2023
DO OHUNGO, J
SEPTEMBER 18, 2023**

BETWEEN

FRIDA ONYANGO OMWAKA 1ST APPELLANT

PATRICK BOYI MAKARI 2ND APPELLANT

DENIS KENNEDY MASANGA 3RD APPELLANT

AND

HEZRON MASAKHA ATEMBA RESPONDENT

*(Being an appeal from the ruling and order of the Chief Magistrate's
Court at Kakamega (Hon. J R Ndururi, Principal Magistrate)
delivered on 23rd March 2023 in Kakamega MCELC No. E002 of 2023)*

RULING

1. Being dissatisfied with the ruling and order of the Chief Magistrate's Court at Kakamega (Hon J R Ndururi, Principal Magistrate) delivered on March 23, 2023 in Kakamega MCELC No E002 of 2023, pursuant to which the learned magistrate granted the respondent an interlocutory injunction, the appellants filed this appeal on April 3, 2023. Shortly thereafter, they also filed notice of motion dated April 24, 2023. This ruling is in respect of the said application.
2. The following orders are sought in the application:
 - i. [Spent]
 - ii. [Spent]
 - iii. [Spent]



- iv. That the Honourable court be pleased to stay the Orders of the lower court issued in Kakamega Chief Magistrate Court Case No CMCL & E No 002 of 2023 pending the Hearing and Determination of the Appeal herein.
 - v. That the Honourable court be pleased to grant leave to the 2nd and 3rd Appellant/Applicants to cultivate and weed for (sic) the sugar cane crop on their land parcel number Butsotso/Esumeyia/5912 and 5913 pending the hearing and determination of the Appellants/Applicant's appeal herein.
 - vi. That the costs of this application be provided for.
3. The application is supported by an affidavit sworn by the second appellant. He deposed that he is the registered proprietor of the parcel of land known as Butsotso/Esumeyia/5912 while the third appellant is the registered proprietor of the parcel of land known as Butsotso/Esumeyia/5913 and that by the time the respondent filed the suit in the Subordinate Court, they had planted sugar cane on some portions of the said parcels while other portions had been ploughed, ready for planting sugar cane. He contended that the respondent was thus not entitled to any injunction and that the injunction granted by the Subordinate Court has stopped them from cultivating and weeding the sugar cane. He added that they stand to suffer irreparable loss and that it would be uneconomical to leave the crop to go to waste.
 4. The respondent opposed the application through a replying affidavit in which he deposed that his claim before the Subordinate Court is one of adverse possession and that the said court properly exercised its discretion in granting the injunction based on the evidence that was presented before it. He added that after the injunction was granted and before filing this appeal, the appellants filed another case being Kakamega MCL & E No 22 of 2023 together with a similar application seeking to be allowed to cultivate the suit land. That the said suit has since been struck out.
 5. In oral submissions, counsel for the applicants argued that the applicants have made a case for the orders sought and urged the court to allow the application. On his part, the respondent relied entirely on the replying affidavit.
 6. I have considered the application, the affidavits, and the submissions. The principles that guide this court's exercise of jurisdiction to grant stay of execution pending hearing and determination of an appeal are outlined at order 42 rule 6 (1) and (2) of the [*Civil Procedure Rules, 2010*](#) which provide as follows:

"6.

- (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 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 on him has been given by the applicant."
7. Consequently, the applicants herein must demonstrate that substantial loss will result to them if stay is not granted, and that the application has been made without unreasonable delay. The applicants are further required to give such security as the court may order for the due performance of the decree. See *Kenya Power & Lighting Co Ltd v Kigaita Ngare Unduthu & 36 others* [2020] eKLR and *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR.
8. As Platt Ag JA (as he then was) stated in *Kenya Shell Limited v Benjamin Karuga Kibiru & another* (*supra*), substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. It is virtually impossible for such an application to succeed if an applicant fails to demonstrate that he will suffer substantial loss if stay is not granted.
9. The applicants contend that they have sugar cane crop on some portions of the suit parcels while other portions have been ploughed in readiness for planting sugarcane and that they will suffer irreparable loss if stay is not granted. I note that the effect of stay of execution will be that the injunction granted by the subordinate court will be suspended pending determination of the appeal herein. The appeal itself is squarely on whether the injunction should remain in force. The appellants claim that they will suffer loss if they don't get a chance to cultivate and tend the crop. Without going into merit of the appeal, I am not persuaded that failure to cultivate and tend the crop amounts to substantial loss. I find no merit in the application. Parties should expedite the hearing and determination of the appeal. I will give directions towards that end, upon delivery of this ruling.
10. In the result, I dismiss notice of motion dated April 24, 2023. Costs shall abide the outcome of the appeal.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 18TH DAY OF SEPTEMBER 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Kombwayo holding brief for Mr Manyoni for the appellants/applicants

Mr Ligare holding brief for Mr Indimuli for the respondent/respondent

Court Assistant: E. Juma

