



**Lore v Ojwaka & 2 others (Environment and Land Appeal E026 of 2022)  
[2023] KEELC 21232 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21232 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL E026 OF 2022  
AY KOROSS, J  
NOVEMBER 2, 2023**

**BETWEEN**

**OMONDI LORE ..... APPELLANT**

**AND**

**JAMES ZADOCK NYADA OJWAKA ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR- BONDO ..... 2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Appellant's Case**

1. In consonance with Sections 1A, 1B and 3A of the *Civil Procedure Act* and Orders 42 Rule 6, 22 Rule 22 and 51 Rule 1 of the *Civil Procedure Rules*, the appellant filed a notice of motion dated 25/07/2023 seeking the following orders:
  - a. Spent.
  - b. Spent.
  - c. That the honourable court be pleased to issue orders for stay of execution of the judgment/decree in this matter pursuant to the judgment delivered by the honourable court on 25/05/2023 pending the hearing and determination of the Kisumu Court of Appeal case number E180 of 2023.
  - d. That costs of the motion be provided for.
2. The motion is predicated on the grounds particularised on its face and on the annexed affidavit of the appellant Omondi Lore sworn on 25/07/2023.



3. The appellant contended he had appealed against the decision of this court to the Court of Appeal. He was apprehensive the 1<sup>st</sup> respondent would proceed with execution thus rendering the appeal nugatory and he would suffer substantial and irreparable loss. The suit property had been his home since birth and he stood to lose it if the 1<sup>st</sup> respondent proceeded with execution of the decree.
4. Further, the 1<sup>st</sup> respondent would not be prejudiced if stay of execution was granted pending the appeal, he had furnished security by depositing a bank guarantee no. MDR230300001R of Ksh 200,000/- and the appeal had overwhelming chances of success.

#### **1<sup>st</sup> respondent's case**

5. In response to the appellant's motion, the 1<sup>st</sup> respondent filed a replying affidavit deposed on 08/09/2023 stating that the 1<sup>st</sup> respondent had his own piece of land thus would not be rendered homeless. The current appeal had no merit and he would be prejudiced since he had been denied access to land parcel no. Siaya/Ramba/1538 (suit property) since 1992.
6. The damage he had suffered could not be compensated by way of security. The appellant had not satisfied the ingredients for stay of execution and the motion ought to be dismissed with costs.

#### **2<sup>nd</sup> and 3<sup>rd</sup> respondents' case.**

7. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not participate in these proceedings.

#### **Parties' submissions**

8. Despite court's directions, the appellant did not file written submissions and if at all they will be filed, this court will disregard them. The 1<sup>st</sup> respondent filed his undated written submissions on 11/09/2023. They rehashed the history of the suit and averments made in his replying affidavit and this court need not repeat them. In addition, he submitted the appellant was not acting in good faith and the motion was a delaying tactic.

#### **Analysis and determination**

9. I have carefully considered the motion, affidavits and annexures tendered and the issues for determination are;
  - a. Whether the motion was incompetent.
  - b. If the answer to (a) is in the negative, whether the appellant had met the threshold to warrant grant for stay of execution pending appeal.
  - c. What orders should this court issue.

#### **Whether the motion was incompetent.**

10. Grant for stay of execution finds its basis in Order 42 Rule 6 (1) and (2) of the [Civil Procedure Rules](#) which states 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.’ Emphasis added

11. A reading of this provision of law demonstrates the existence of an appeal from the decision of this court was a jurisdictional prerequisite for the court to entertain the motion for stay. An appeal comes into existence by lodging a notice of appeal in writing within 14 days from the date of the decision. A copy is usually lodged with the registrar of the superior court. See Rule 75 (a) and (b) of the Court of Appeal Rules.
12. However, in the event of delay, an appeal can come into existence upon issuance of an order for extension of time to appeal against the decision of this court to the Court of Appeal. See Rule 4 of the Court of Appeal Rules.
13. Although the appellant filed a notice of appeal to this court dated 05/06/2023, he was silent on when it was filed. This court was forced to check its records through the E filing portal and it established the notice of appeal was filed on 22/06/2023.
14. Judgment in this matter was rendered on 25/05/2023 and therefore, the last date a notice of appeal was capable of being filed was 08/06/2023. It follows the notice of appeal on record was filed outside the statutory timelines. Consequently, it is improperly on record.
15. There is no evidence the appellant has been granted leave to appeal out of time and as it is, there is no appeal or intention to appeal against the decision of this court.
16. In the case of Wilfrida Armodah Itolondo v Attorney General & 9 others [2021] eKLR, the apex court in paragraph 39 of its ruling held:-

‘Therefore, in the absence of a substantive appeal on record, we are unable to grant the orders of stay of execution of the Order on costs in Civil Appeal No.120 as sought.’
17. I have not been persuaded to depart from the decision of the Supreme Court and consequently, this court finds and holds that it has no jurisdiction to entertain the motion before it since there is no substantive appeal against its decision. I need not say more. Consequently, I hereby strike out the notice of motion dated 25/07/2023. Because costs follow the event, I award costs to the 1<sup>st</sup> respondent.
18. It is ordered.

**DELIVERED AND DATED AT SIAYA THIS 2<sup>ND</sup> DAY OF NOVEMBER 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

**02/11/2023**

Ruling delivered virtually through Microsoft Teams Video

**Conferencing Platform in the Presence of:**

Mr. Ochieng for the appellant

N/A for the 1<sup>st</sup> respondent

N/A for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents



Court assistant: Ishmael Orwa

