



REPUBLIC OF KENYA



**Mubweka & another v Barasa (Environment & Land Case 127 of 2015)
[2023] KEELC 21179 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21179 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 127 OF 2015
BN OLAO, J
NOVEMBER 2, 2023**

BETWEEN

WANJALA OJIAMBO MUBWEKA 1ST PLAINTIFF

OJIAMBO PETER RODGERS 2ND PLAINTIFF

AND

LEONARD ONGWENI BARASA DEFENDANT

RULING

1. The judgment in respect to the ownership of the land parcels No Bukhayo/Bugengi/9224 and 9225 was delivered by Kaniaru J on 21st May 2019. The judge made the following disposal orders:
 - a. Title to parcel No Bukhayo/Bugengi/9224 is to be cancelled. There will be no cancellation of title to parcel No Bukhayo/Bugengi/9225.
 - b. This prayer is granted but only in respect of parcel No 9224.
 - c. This prayer is not granted as prayed. Instead, each side should bear it's own costs.Prayer No (b) was in respect to an order of injunction.
2. An application by the Defendants to stay execution of the judgment pending appeal was allowed by Omollo J vide a ruling delivered on 6th February 2020. Meanwhile, there is a caution registered on the land parcels No Bukhayo/Bugengi/9224 and 9225 (the suit land) and which the Judge, in her ruling, directed should remain in place until the Defendants' appeal, of which he had filed a Notice of Appeal on 21st May 2019 was heard and determined.
3. No record of appeal was filed and on 12th April 2022 Kiage, Mumbi Ngungi and F. Tuiyott Judges of Appeal allowed the application by the Plaintiffs to strike out the Defendant's Notice of Appeal. It



follows therefore that there is no pending appeal against the judgment of Kaniaru J delivered on 21st May 2019.

4. I now have before me for my determination the Defendants' Notice of Motion dated 1st July 2022 seeking the following orders:
 1. Spent
 2. That leave be granted to the firm of A. N. Moruri & Company Advocates to be allowed to come on record for the Plaintiffs in place of the firm of Obura-obwatinya & Company Advocates.
 3. That the restrictions left in place to preserve the suit property pending the determination of the appeal before the Court of Appeal be and is hereby vacated and the orders made on 6th February 2020 be set aside and/or reviewed.
 4. That this Honourable Court do hereby issue an order directed to the Land Registrar to comply with the decree issued on February 2020 thereto a vesting order to issue in favour of the Plaintiffs jointly and severally to facilitate fresh registration of the land parcel No Bukhayo/Bugengi/9224.
 5. That costs be provided for.
5. The application is predicated on the grounds set out therein and is supported by the affidavit of Ojiambo Peter Rogders the 2nd Plaintiff herein.
6. The gist of the application is that a stay of execution had been issued on the premises of the Notice of Appeal filed herein. However, the Court of Appeal in Kisumu Civil Application No E073 of 2021 struck out the Notice of Appeal with costs. There is therefore no reason for the restriction placed on the suit land to remain in place as litigation has to come to an end.
7. Annexed to the application are the following documents:
 1. Notice of Appeal dated 21st May 2019.
 2. Order of the Court of Appeal dated 12th April 2022 striking out the Notice of Appeal.
 3. Decree dated 6th February 2020.
8. The application is opposed and Vitalis Omondi Ongweni has filed a replying affidavit dated 27th September 2022 in which he has deposed, inter alia, that there exists an appeal being Court Of Appeal Civil Appeal No E107 of 2020 of which the record of appeal was filed on 7th December 2020. That the Plaintiffs, through deceit, moved to the Court of Appeal and had the Notice of Appeal struck out without disclosing that the record of appeal had been filed by the Defendants. That there is therefore an appeal which is pending at the Court of Appeal.
9. The Defendants further aver that the Plaintiffs impersonated the person of Obwatinya Advocate of the firm of Obura-obwatinya & Company Advocates in filing the Notice of Motion dated 6th May 2021 yet that firm has never been on record for them and this is a matter which amounts to criminal activity of forgery and uttering false documents. That the Defendants are now in the process of regularizing their two appeals being Court of Appeal Civil Appeals E073 of 2021 and E107 of 2020 consolidated. That the stay orders issued on 6th February 2020 were premised on the final hearing and determination of their appeal and the Plaintiffs are attempting to subvert justice by using every trick to alienate the suit land from the family of the deceased Leonard Ongweni Barasa. That allowing the firm of A. N. Moruri & Company Advocates to come on record will be beneficial as it will remove the confusion which has existed as to the firm properly on record for the Plaintiffs. That the land from which the



Plaintiffs seek to evict them has been their family land since the 1970's and where they live as a family and on which their father was buried in November 2019.

10. The following documents are annexed to the replying affidavit:
 1. Limited Grant of Letters of Administration issued to Francis Otieno Barasa and Vitalis Omondi Ongweni in respect to the Estate of Leonard Ongweni Barasa.
 2. Receipts.
 3. Emails requesting assessment of costs at the Court of Appeal.
 4. Record of Appeal filed in Court of Appeal Civil Appeal No E017 of 2020 against the judgment of Kaniaru J delivered on 21st May 2019.
11. When the application was placed before me on 16th January 2023, I directed that it be canvassed by way of written submissions to be filed on or before 14th February 2023. However, in the course of drafting my ruling, I discovered that there were infact three (3) different decrees arising out of the judgment herein. Since it was important to set the record straight, I directed that the Deputy Registrar should, in accordance with the provisions of Order 21 of Civil Procedure Rules, confirm which of the three (3) decrees dated 6th February 2020, 29th October 2021 and 25th July 2022 was the correct one before I deliver my ruling on the application dated 1st July 2022. It was not until 18th July 2023 that the Deputy Registrar confirmed that the proper decree is the one dated 25th July 2022.
12. Meanwhile, only the Plaintiffs' counsel filed submissions as directed.
13. I have considered the application, the rival affidavits and annextures thereto as well as the Plaintiffs' submissions.
14. With regard to the prayer for leave to allow the firm of A. N. Moruri & Company Advocates to come on record for the Plaintiff, I see no reason to decline it. Indeed the Defendants aver that it is in the interest of justice to do so. In paragraph 16 of the replying affidavit by Vitalis Omondi Ongweni, it is averred as follows:

“ 16: That in response to paragraph 11 of the supporting affidavit, my advocate has advised me which advise I verily believe to be true, that allowing the firm of M/S A. N. Moruri & Co will be greatly beneficial since it will remove the confusion which has since existed as to which law firm was properly on record for the Applicants.”

That prayer is hereby allowed.

15. On the prayer seeking the lifting of the restrictions placed on the suit land pending the hearing and determination of the appeal at the Court of Appeal in Kisumu, the record shows that vide a ruling by Omollo J delivered on 6th February 2020 on an application for stay of execution pending appeal, the Judge allowed it. The Judge made the following orders:

“The Applicant submitted that there is a caution registered on the suit titles which prohibits him from transferring the same to any person. The existence of the caution which I direct remains registered on the titles until the appeal is heard and determined in my view is sufficient security to preserve the interest of the Respondent over the suit title pending the hearing and determination of the pending appeal.” Emphasis mine.



The Applicants in that motion were of course the Defendants herein who had moved to the Court of Appeal by filing a Notice of Appeal dated 21st May 2019 demonstrating their intention to appeal the Judgment of Kaniaru J delivered on the same day. The Notice of Appeal, as is now clear, was subsequently struck out by the Court Of Appeal on 12th April 2022 in Civil Application No E073 of 2021 by Judges of Appeal Kiage, Mumbi Ngungi and F. Tuiyott. That can only mean that there is no, indeed there cannot be any, pending appeal against the judgment delivered on 21st May 2019 as there is no evidence to show that the Notice of Appeal which was struck out was later reinstated and if it was, this Court has not been informed. The Defendants have averred in paragraphs 12 and 13 of the replying affidavit by Vitalis Omondi Ongweni thus:

“ 12: That my advocate on record has taken steps as in the process of registering the record of the Court of Appeal and having both files being C.A. NO E107/2020 and C.A No. E73/2021 consolidated so that the Applicants do not continue to play a further mischief to the Court.”

13: That in response to paragraphs 5 & 6 of the supporting affidavit, I aver that the orders of the Court made on 12th April 2022 in respect of Civil Application NO E073 of 2021 were made without knowledge of the existence of the Appeal being C.A No E107/2020 and therefore the said orders will be registered in due cause (sic).”

All that I can say at this point is that the veracity of the orders issued by the Court of Appeal on 12th April 2022 in Civil Application no E073 of 2021 cannot be a matter for discussion in this forum.

16. The Defendants have annexed to their application the Memorandum of Appeal dated 7th December 2020 in respect to “the ruling of the Environment and Land Court at Busia by Hon. A. K. Kaniaru delivered on 21st May 2019 in ELC NO 127 of 2015.” No ruling was delivered by Kaniaru J on 21st May 2019. Therefore no Notice of Appeal or indeed any appeal can be instituted against a non-existence order. The only valid Notice of Appeal, and which was filed on 21st May 2019 in respect to the judgment delivered on the same day, met its Waterloo when the Court of Appeal struck it out on 12th April 2022.
17. That being the position with regard to any intended appeal by the Defendants, the orders of Omollo J issued on 6th February 2020 directing that the caution placed on the suit land remain pending appeal have no basis to continue being in place. Prayer No 3 of the application must therefore be allowed. Those orders cannot remain in place in perpetuity. A party who has been granted a stay of execution pending appeal is obliged to take all the necessary steps to ensure that the appeal is prosecuted expeditiously. The email communication between the firm of Ashiruma & Company Advocates and the Court of Appeal Kisumu and which are annexed to the replying affidavit of Vitalis Omondi Ongweni are dated 7th December 2020 at 6.22pm and 8th December 2020 at 4.26pm. They can only be in relation to the Court of Appeal Civil Application No E073 of 2021 which, as is now clear, collapsed on 12th April 2022. Prayer no 3 is therefore allowed and the caution placed on the suit land on 6th February are vacated as there is no foundation upon which they should continue to remain in place.
18. Finally, with regard to the order that the Land Registrar do comply with the decree issued on February 2020, there is no reason why it should not be granted. The only clarification is that as the Deputy Registrar did confirm on 18th July 2022 and with the consent of both parties, that the proper decree is the one dated 25th July 2022.



19. On the issue of costs, they follow the event. There is no reason why the Plaintiff should be denied their costs.
20. Ultimately therefore, and having considered the Notice of Motion dated 1st July 2022, I allow it and make the following disposal orders:
 1. The firm of A. N. Moruri & Company Advocates are hereby allowed to come on record for the Plaintiffs in place of the firm of Obura-obwatinya & Company Advocates.
 2. As there is no pending appeal arising out of the judgment of A. K. Kaniaru J delivered on 21st May 2019 or indeed any other appeal, the orders issued by Omollo J on 6th February 2020 are vacated and the restrictions placed on the suit land be and are hereby removed.
 3. The Land Registrar Busia to comply with the decree of this Court dated 25th July 2022 and which is the proper decree as per the proceedings dated 18th July 2022 before the Deputy Registrar.
 4. The Defendants shall meet the Plaintiffs' costs of this application.

BOAZ N. OLAO

JUDGE

2ND NOVEMBER 2023

RULING DATED, SIGNED AND DELIVERED ON THIS 2ND DAY OF NOVEMBER 2023 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO

JUDGE

2ND NOVEMBER 2023

