



**Anyanga v Oyuga (Environment and Land Appeal 69 of 2021)
[2022] KEELC 3186 (KLR) (6 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3186 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL 69 OF 2021**

A OMBWAYO, J

MAY 6, 2022

BETWEEN

SAMUEL ODONGO ANYANGA APPELLANT

AND

WINNIE ACHIENG OYUGA RESPONDENT

(Being an appeal from the Judgment/decree of the Hon. Chief Magistrate H.M. Nyaberi in (Winam CMCC ELC case No. 14 of 2018 Winnie Achieng Oyuga vrs Samuel Odongo Anyanga) delivered on the 22nd day of September 2021)

RULING

1. Samuel Odongo Anyanga (hereinafter referred to as Appellant/applicant) has come to this court for orders that pending hearing and determination of the appeal filed herein this honorable court be pleased to issue and order of stay of execution of the Judgment/decree dated 22nd September 2021 issued in Einam Cmcc Elc Case No. 14 of 2018 Winnie Achieng Oyuga Vrs Samuel Odongo Anyanga. The costs of this application be provided for.

The application is made on grounds that:

1. By a Judgment dated 22nd September 2021 the respondent was granted eviction orders and permanent injunction as against the appellant/applicant herein.
2. The Appellant/applicant being wholly dissatisfied with the said Judgment has preferred an appeal and filed the memorandum of appeal.
3. The Appellant has his own parcel Kisumu/kasule/3202, while the respondent too has her own parcel Kisumu/kasule1858 and county surveyors report filed in the trial court does not find any act of trespass by the appellant into the respondent's title nor are the said titles conjoined as neighboring parcels.



4. Respondent has already extracted the decree and wants to demolish and evict the appellant from his property the parcel Kisumu/kasule/3202 on their basis that it is parcelKisumu/kasule/2858.
 5. The Applicant has an arguable appeal with a high probability of success.
 6. If the said stay of execution is not granted, the Applicant's appeal will be rendered nugatory and the Applicant will suffer irreparable damage.
 7. The Applicant is ready willing and able give security and abide by any order made pursuant thereto as this Honourable Court may so order.
 8. Substantial loss will result to the Applicant unless the order sought are granted.
2. The application is supported by the affidavit of Samuel Odongo Anyanga that reiterates the grounds. The Respondent filed grounds of opposition whose gist is that:
1. The application does not meet the three (3) conditions for stay of execution under order 42 of Civil Procedure Rules.
 2. Filing of an appeal does not automatically affect the respondent right to enjoy the fruits of the judgment, and entitle the Appellant to stay.
 3. The Appellant deliberately left his plot Kisumu/Kasule/3202 measuring 0.03ha, and trespassed and erected buildings into the Respondent plot Kisumu/Kasule/1858 measuring 0.08ha which is distinct and separate.
 4. No substantial loss has been demonstrated by the Appellant over a suit property that the judgment and both surveyors report shows a willful act of trespass.
 5. The Appellant conduct is wanting as he attempted to forge the acreage of his title from 0.03ha to 0.05ha and then to 0.08 ha in an attempt to achieve some ulterior motives of defeating justice.
 6. No substantial loss will be suffered by the Appellant as his plot Kisumu/Kasule/3202 measuring 0.03ha is available on the ground as vacant plot.
 7. Both surveyors are clear on the location of the two plots for each litigant which are separate and distinct.
 8. No security for due performance of the decree has been offered by the Appellant.
 9. The Appellant in event of any discretionary orders for stay of execution be directed to provide security by deposit sum of Kshs. 3 million, and also to deposit rent proceeds he is collecting on the Respondent property in a joint account of advocates.

3. The parties have filed rival submissions.

I have considered the application, grounds of opposition and rival submissions carefully and do find that it is not in dispute that the respondent owns plot number Kisumu/Kasule/1858 whereas the appellant owns plot number Kisumu/kasule/3202.

Order 42 Rule 6 provides:

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—

SUBPARA (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

SUBPARA (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.

(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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

4. The application herein has been made timeously and therefore there is no inordinate delay. However, I do find that the applicant has not satisfied the court that he will suffer substantial loss if stay is not granted because the eviction orders were issued in respect of the respondents parcel of land namely Kisumu/Kasule/1858. Moreover, the respondent is entitled to the fruits of the Judgment. I do decline to grant stay of execution pending appeal.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 6TH DAY OF MAY, 2022

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

