



**Owiti v Ogutah (Miscellaneous Civil Application 34 of 2020)  
[2022] KEELC 3092 (KLR) (6 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3092 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
MISCELLANEOUS CIVIL APPLICATION 34 OF 2020**

**A OMBWAYO, J**

**MAY 6, 2022**

**BETWEEN**

**WILLIAM OTIENO OWITI ..... APPLICANT**

**AND**

**VICTOR ONYANGO OGUTAH ..... RESPONDENT**

**RULING**

**Brief Facts**

1. William Otieno Owiti the applicant herein filed a notice of motion application dated July 2, 2021 seeking for the following orders:
  1. That the court be pleased to certify this matter as urgent and order that the same be heard during vacation.
  2. That the court be pleased to stay the orders of the Principal Magistrate granted on the August 6, 2020 ordering the applicant to vacate 5255 and 6065 Wawidha 'A' 1 Adjudication section within 45 days in ELC No 73 of 2020 (Victor Onyango Ogutah Vs William Otieno Owiti) pending the hearing and determination of this Application.
  3. That the court be pleased to stay the orders of the principal magistrate granted on the 6<sup>th</sup> August 2020 ordering the applicant to vacate land parcels No 5255 and 6065 Wawidha 'A' 1 ADjudication section within 45 days in ELC No 73 of 2020 (Victor Onyango Ogutah Vs William Otieno Owiti) pending the hearing of the applicant's intended Appeal against the ruling of the Honourable Judge on the June 11, 2021.
  4. That the court be pleased to issue an order of temporary injunction restraining the respondent his agents, servants, employees and or representatives from evicting, removing the Applicant



or trespassing on to the Applicant's from land parcel number 5255 and 6065 Wawidha 'A' 1 Adjudication Section until the application is heard and determined.

5. That the court be pleased to issue an order of temporary injunction restraining the respondent his agents, servants, employees and or representatives from evicting, removing, trespassing on the applicant's from parcel number 5255 and 6065 Wawidha 'A' 1 Adjudication section until the intended appeal against the ruling of the Honourable Judge delivered on the June 11, 2021 is heard and determined.
  6. That this honourable court be pleased to make such orders as it deems necessary to safe guard the ends of justice.
  7. That costs of and incidentals to this application be provided for.
  8. That the defendants be condemned to pays costs of the entire application.
2. The application was based on grounds that the applicant filed a notice of appeal and intends to Appeal to the Court of Appeal. That the execution process is meant to prejudice, embarrass or delay the fair trial challenging the taxed costs and that the Applicant has lived in the two parcels of land for over 50 years. That the Honourable Magistrate proceeded to hear the matter even after the Applicant brought to her attention that there is matter pending in the High Court concerning the two parcels of land that is 5255 and 6065 Wawidha 'a' 1 Adjudication section In ELC No 73 of 2020(victor Onyango Ogutah Vs William Otieno Owiti).
  3. It was stated that the Respondent was only given consent to file case on land parcel number 5255 but the Principal Magistrate went ahead and granted land parcel number 6065 for which consent was obtained on accordance with section 30 of the *Land Adjudication Act*. That the respondent will not suffer prejudice if this application is allowed and that it is in the interest of justice that this application be allowed.
  4. The application was supported by the affidavit of William Otieno Owiti who deposed and stated that he filed a suit against the Respondent being ELC No.188 of 2014 and the matter is still pending in court as it has not been heard. He stated that the Respondent filed a case against him and the matter went for hearing and judgment was delivered.
  5. That he approached the firm of Cleveland Okoth Otieno Ayayo to appeal who advised him to file an application for review which was heard and dismissed. That he is facing imminent danger of eviction in a land he has lived for over 50 years together with his family and two brothers. He stated that he filed an application for stay and extension of time which the Judge dismissed unfairly and he is aggrieved with that decision and instructed his Lawyers to challenge this Ruling in the Court of Appeal.
  6. Victor Onyango Ogutah, the respondent herein filed a replying affidavit in opposition of the application where he deposed and stated that he is the registered owner of land parcels number 5255 and 6065 Wawidhi 'A1' Adjudication section. That the applicant was sued in his capacity as a trespasser in Kisumu Chief Magistrate ELC Number 73 of 2018 with respect to land parcels number 5255 and 6065 Wawidhi 'A1' Adjudication section where he fully participated and/or was represented in the proceedings.
  7. It is the respondent's case that no suit with respect to land parcels number 5255 and 6065 Wawidhi 'A1' Adjudication section was ever brought to his attention with specific reference to Kisumu Environment and Land Court suit number 188 of 2014. That the applicant having been a party in Kisumu Chief Magistrate ELC Number 73 of 2018 and being knowledgeable of the existence of another suit would



have sought for consolidation of Kisumu Chief Magistrate ELC Number 73 of 2018 and Kisumu ELC No. 188 of 2014 but blatantly ignored to do so.

8. It was stated that the Honourable Court having considered all the facts, evidence, arguments and/or submissions from both parties, it rendered its judgment on January 23, 2020 in favour of him and the applicant was granted leave to file an appeal within 30 days which he failed to do. That the applicant sought review of the Judgment in ELC Number 73 of 2018 vide an application dated June 24, 2020 which was dismissed for lack of merit and the applicant having been granted 45 days stay of execution never preferred an appeal against the Ruling.
9. He further stated that he is a stranger to the occupancy of the suit parcels by the applicant and/or his kin for a period of 50 years. That the application is incompetent and is an abuse of the court process and ought to be dismissed with costs as the applicant seeks to bar and/or frustrate him from enjoying the fruits of litigation. It was stated that litigation has to come to an end and the instant application is brought in bad faith and if it is allowed, it would give the applicant the opportunity to delay justice and abuse judicial processes.
10. That there is unexplained and inexcusable delay on the part of the applicant and he will be prejudiced if the application is allowed as he has already executed against the applicant following the lapse of the 45 days stay granted to the applicant on August 6, 2020. That he is unable to peacefully use his parcel of land as the applicant continues to blatantly disobey court orders by cultivating the suit parcels of land.
11. On November 3, 2021 when the matter came up for hearing, parties agreed to canvass the application by way of written submissions and the court ordered parties to file and serve written submissions.
12. I have perused the file and confirm that parties did not comply with the orders issued on November 3, 2021 as the application was to be canvassed by way of written submissions. I have also looked at the pleadings filed by the parties and do find that the application lacks merit and is hereby dismissed with costs to the respondent.

**DATED AT KISUMU THIS 6<sup>TH</sup> 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 15<sup>th</sup> March 2019.

**ANTONY OMBWAYO**

**JUDGE**

