



Olak & 2 others (suing as personal representatives and administrators of the Estate of Nerea Atieno Olak- Deceased) v Ondeng & another (sued through his father David Ondeng as Guardian) (Environment & Land Case 873 of 2015) [2022] KEELC 63 (KLR) (5 May 2022) (Ruling)

Neutral citation: [2022] KEELC 63 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 873 OF 2015**

A OMBWAYO, J

MAY 5, 2022

BETWEEN

GEORGE OMONDI OLAK 1ST PLAINTIFF

DOUGLAS ONYANGO OLAK 2ND PLAINTIFF

EVANS OCHIENG OLAK 3RD PLAINTIFF

**SUING AS PERSONAL REPRESENTATIVES AND ADMINISTRATORS OF
THE ESTATE OF NEREA ATIENO OLAK- DECEASED**

AND

DAVID ONDENG 1ST DEFENDANT

BRANDON AWITI ONDENG 2ND DEFENDANT

SUED THROUGH HIS FATHER DAVID ONDENG AS GUARDIAN

RULING

Brief Facts

1. The Applicants herein filed a Notice of Motion Application under Article 48 of the *Constitution* of Kenya, 2010, section 7 of the *Appellate Jurisdiction Act*, Order 42 Rule 6(1) of the *Civil Procedure Rules* seeking for the following orders:
 1. The Honourable court be pleased to certify this Application as urgent (spent).
 2. The Honourable Court be pleased to issue an interim order of stay of execution of the decree and judgment of this court issued on the 3rd day of September 2021 against the applicants pending the hearing of this Application and in the first instance the presence of the Respondents be dispensed with.



3. The Honourable Court be pleased to issue an order of stay of execution against the Applicants pending the hearing of the pending appeal.
4. The Honourable Court be pleased to extend the stipulated time for filing and serving the Notice of Intention to Appeal and the Notice of Appeal dated 1st day of November 2021 be deemed to have been properly filed within time upon payment of requisite fees.
5. That costs of this Application do abide the result of the Intended Appeal.
2. The Application was based on grounds that the intended appeal has arguable grounds and the Applicants should be allowed to file the Appeal and that the Application has been made without undue delay as the Judgment was delivered on September 3, 2021 in the absence of the advocate for the Applicants and he was only made aware of the same on October 29, 2021.
3. That the suit involves a dispute over land parcel L.R. No. Kisumu Municipality /Block /4/362 which is emotive and the Applicants should be allowed to proceed with the Appeal. That the Defendants are the Lessees of the suit parcel ad have greatly developed the same and shall suffer irreparable loss if the execution is allowed to proceed against. The delay is inordinate and the Application should be dismissed for want of prosecution and the Respondents shall suffer no prejudice if the prayers are granted.
4. The Application was supported by the Affidavit of David Owindo Ondeng who deposed and stated that after full trial of the suit and filing of submissions by his Advocate and the Advocate for the Plaintiffs, the suit was slated for Judgment on May 4, 2021 on which date the same was differed to May 14, 2021.
5. He stated that on May 14, 2021, his Advocate appeared in court to take the Judgment but was informed that the same was not ready and the trial judge would issue a notice to the advocate for the parties when the same can be delivered. Having waited for a reasonable period, on 29th July 2021 and further on October 12, 2021 the Advocate for the Plaintiffs sent a reminder to court requesting for the Judgment which letter the court failed to respond to.
6. It was stated that on October 13, 2021, his Advocate sent a reminder to court requesting to know the status of his case and more specifically whether the judgment had been delivered in this matter which letter was not respondent to. That while still waiting for the notice from court informing his advocate to appear and take judgment, his Advocate received an email from the Advocate of the Plaintiffs forwarding the Judgment which was allegedly delivered on November 3, 2021 without their knowledge. He stated that with the Judgment in their favour the Respondents are without any delay proceeding to execute the same against the Applicants anytime now as the court did not make any order of stay of execution of the same.
7. He further stated that he is ready to deposit reasonable security for costs that the court may order him to deposit as security for the order of stay of execution of the same and that he is ready and willing to deposit reasonable security for costs that the court may order him to deposit as security for the order of stay. That the sum of money awarded to the Respondents of Kshs. 2,088,000/= is colossal and if execution is done against him to realize the same together with interests, he shall suffer substantial loss and even the intended appeal shall be rendered nugatory.
8. He stated that he is willing to defend the case to the logical end and he prayed that the court does allow him to defend his case.



9. The matter was placed before the Judge and was certified urgent and court directed that the matter shall be heard on November 17, 2021. On November 17, 2021 when the matter came up for hearing, this court ordered that prayer 4 of the Notice of Motion is granted, the Notice of Appeal is deemed to be filed and served and directed parties to file and exchange submissions.
10. I have perused the file and confirm that parties did not comply with the orders issued on November 17, 2021 as the Application was to be canvassed by way of written submissions. This Application is hereby dismissed with costs for want of prosecution.

DATED AT KISUMU THIS 5TH 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 2019.

ANTONY OMBWAYO

JUDGE

