



**Allan Sitati (Suing on behalf of the Estate of Gladys Obilika Wandabusi
– (Deceased) v Mafura & 3 others (Environment and Land Miscellaneous
Application E004 of 2021) [2022] KEELC 3763 (KLR) (7 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3763 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E004 OF 2021**

BN OLAO, J

JULY 7, 2022

BETWEEN

**ALLAN SITATI (SUING ON BEHALF OF THE ESTATE OF GLADYS OBILIKA
WANDABUSI – (DECEASED) PLAINTIFF**

AND

MARY NALIKA MAFURA 1ST RESPONDENT

JACKSON O. MWENYA 2ND RESPONDENT

PROTUS W. WEKESA 3RD RESPONDENT

ESTHER KAGAI 4TH RESPONDENT

RULING

- (1) On November 30, 2021, this court delivered a ruling dismissing with costs the notice of motion dated June 28, 2021 by Allan Sitati (the applicant) seeking the main order that leave be granted to file an appeal out of time arising from the award of the Kanduyi Land Disputes Tribunal delivered on September 3, 2009 in Tribunal Case No 7 of 2009 and which was adopted as a judgment of the court in Bungoma Chief Magistrate's Court Ldt Case No 1 of 2010. The applicant had also sought an order of execution of the decree that followed the said award.
- (2) The applicant is aggrieved by that ruling and has filed at the Court Of Appeal Kisumu Civil Appeal No 11 of 2022.
- (3) The applicant then moved to this court *vide* his notice of motion dated May 12, 2022 and filed under certificate of urgency. The application is the subject of this ruling. It is premised on the provisions of section 79G of the *Civil Procedure Act* and seeks the main prayer that there be a stay of execution pending the hearing of Court of Appeal Civil Appeal No 11 of 2022 and that costs be in the cause.



(4) The application was placed before Ohungo J on May 18, 2022. The Judge issued some *ex – parte* orders which I shall reproduce in extensor because of their relevance in this ruling. Those orders were as follows: -

1. No urgency is disclosed in the application.
2. The application be served within three (3) days from the date hereof.
3. The respondents to file and serve a response within seven (7) days of service.
4. The applicant to file and served written submissions within seven (7) days of service of the response.
5. The respondents to file and serve written submissions within seven (7) days of service of applicant’s submissions.
6. Mention on June 22, 2022 before Environment And Land Court Bungoma for further directions.

The record shows that the applicant filed his submissions on May 30, 2022 while the respondents filed their grounds of opposition and submissions on June 14, 2022. I shall revert to this later in this ruling since it was a subject of disagreement when the parties appeared before the Deputy Registrar for mention on June 23, 2022 and which necessitated the writing of a letter to Counsel for both parties dated June 27, 2022.

- (5) The notice of motion is predicated on the grounds set out therein and is also supported by the applicant’s affidavit dated May 12, 2022.
- (6) The gist of the application is that the applicant has filed at the Court Of Appeal Kisumu Registry Civil Appeal No 11 of 2022 arising out of this court’s ruling delivered on November 30, 2021 and if the orders sought are not granted, the said appeal will be rendered nugatory because the subject matter of this dispute being land parcel No East Bukusu/north Kanduyi/1997 will be sub – divided. The applicant will therefore suffer “a great deal.” That there is no delay in making this application.
- (7) The application is opposed and the respondents filed grounds of opposition dated 2nd June and filed on June 14, 2022 raising the following issues:-
 1. The application lacks merit, is *malafides* and a waste of Judicial time.
 2. The stay being sought is for costs and the law is that there can be no stay for costs.
 3. The applicant has not demonstrated any substantial or irreparable loss which he will suffer.
 4. The filing of an appeal does not act as a stay of execution.
 5. The taxed costs are not substantial.
- (8) I have considered the application, the grounds of opposition and the submissions of both MS Nanzushi instructed by the firm of Lucy Nanzushi And Company Advocates for the applicant and by Mr Sichangi instructed by the firm of J W Sichangi And Company Advocates for the respondent.
- (9) Before I delve into the merits of the application, I shall first re – visit the orders issued by Ohungo J On 18th May 2022 At Kakamega Environment And Land Court and which I have already referred to above.



- (10) It is clear from those orders that the applicant was directed to serve the application on the respondents within three (3) days after which the respondents would file their responses within seven (7) days of service. The applicant would then file and serve their submissions within seven (7) days of service of the response and the respondent was required to file and serve their submissions within seven (7) days of service. The matter was then listed for mention in Bungoma Environment And Land Court on June 22, 2022 but I was away in a three (3) Judge matter in Nairobi and so the matter came up before the Deputy Registrar to fix another convenient date.
- (11) When the matter was mentioned before the Deputy Registrar, Ms Nanzushi took issue with the submissions filed by Mr Sichangi on the ground that they had been filed late contrary to the orders issued by OhungoJ. She sought that they be expunged from the record. Mr Sichangi resisted that application stating that he had only been served on June 17, 2022 and he could not have responded before he was served. The matter was referred to me and I directed *vide* our letter dated June 27, 2022 that I would address the issue in my ruling.
- (12) It is obvious from the record that none of the parties filed any affidavits confirming when the opposite party was served. The applicant was supposed to serve the application within three (3) days from May 18, 2022 and the Respondent would thereafter file a response within seven (7) days of service. In the absence of evidence of service by either of the parties, this court is unable to conclude, with any degree of certainty, that any of them complied with the orders of Ohungo J. In the circumstances, it would be harsh to take the drastic action of expunging the submissions by the Respondent particularly in view of the conflicting oral submissions as to when Mr Sichangi was served. In any event, given the provisions of article 159(2)(d) of the Constitution, this court will treat any lapses with regard to time as mere technicalities which should not result in expunging the grounds of opposition and submissions by Mr Sichangi from the record.
- (13) Most importantly, submissions are not evidence. They will therefore not add anything in support of the respondents' case. In Daniel Toroitich Arap Moi v Mwangi Stephen Murithi & Another 2014 eKLR, the Court of Appeal stated that: -
- “Submissions cannot take the place of evidence What appeared in submissions could not come to his aid. Such course only militates against the law and we are unable to countenance it. Submissions are generally parties' 'marketing language' each side endeavouring to convince the court that it's case is the better one. Submissions, we reiterate, do not constituted evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.” Emphasis mine.
- (14) In the circumstances, there would be no basis for expunging any document from the record herein. There is no evidence showing that all or any of them complied with the directions of OhungoJ.
- (15) I shall now consider the application on its merits.
- (16) The applicant seeks the main order that there be a stay of the ruling and decree issued on November 30, 2021. And although it is premised under section 79G of the Civil Procedure Act, Counsel has atoned for that in her submissions where she correctly makes reference to the provisions of order 46 rule 6(1) and (2) of the Civil Procedure Rules which donates to this court the power to grant orders of stay of execution. It reads: -
- 6(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 sub rule (1) unless –
- (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.” Emphasis mine.

A party seeking an order of stay of execution pending appeal must therefore satisfy the following conditions: -

1. Show sufficient cause.
2. Demonstrate that unless the order for stay is granted, he will suffer substantial loss.
3. File the application without unreasonable delay.
4. Offer security for any decree or order as may ultimately be binding on him.

(17) The applicant has already filed at the Court Of Appeal Kisumu, Civil Appeal No 11 of 2022. That is sufficient cause.

(18) However, he is required to satisfy all the conditions set out in order 42 rule 6 of the *Civil Procedure Rules*. In *Visbham Ravji Halai & Another v Thornton & Turpin* [1963] Ltd1990 KLR 365, the Court of Appeal held that: -

Thus the superior court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly, the applicant must furnish security. The application must of course be made without unreasonable delay.” Emphasis mine.

(19) The ruling being appealed was delivered on November 30, 2021 and this application was filed on May 16, 2022 a delay of almost six (6) months. There is no mathematical formula to apply in determining what is or is not unreasonable delay. Each case must however be determined on the basis of its particular circumstances noting, nonetheless, that any delay must be satisfactorily explained. There is no explanation as to why it took the applicant six (6) months to file this application and although he has deponed in paragraph six (6) of his supporting affidavit “that there is no delay in making the application,” a delay of six (6) months which has not been explained is clearly unreasonable. The applicant has failed to surmount the hurdle of approaching the court “without unreasonable delay.” On that ground alone, this application must fail.

(20) The applicant was also required to offer security. He has not done so nor even offered to abide by any terms that this court may impose on him for the due performance of any decree or order that may ultimately be binding on him.



(21) Most significantly, the applicant was required to demonstrate that unless the orders sought are granted, he may suffer substantial loss. As was held in *Kenya Shell Ltd v Kibiru & Another* 1986 KLR 410; “substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.” In his supporting affidavit, the applicant has deponed in paragraphs 4 and 5 as follows: -

- 4: “That if the court do not grant me the orders sort (sic), the appeal shall be rendered nugatory since the issue is land parcel No E Bukusu/n Kanduyi/1997.”
- 5: “If it will be sub – divided No E Bukusu/n Kanduyi/1997, the Appellant will suffer a great deal.”

Every assuming that the applicant’s reference to the words “suffer a great deal” is synonymous with “substantial loss,” it is clear from the ruling sought to be appealed that the land parcel No East Bukusu/north Kanduyi/1997 is perhaps no longer in existence. This is what I stated in page nine (9) of the said ruling on the issue of leave to appeal: -

The court is also required to consider if any prejudice will be suffered by the respondents or other party if the extension is allowed. The record shows that following the adoption of the tribunal’s award as a judgment of the court, a vesting order was extracted on July 9, 2014 vesting two (2) acres out of the land parcel No East Bukusu/north Kanduyi/1997 in the names of Mary Naliaka Mafura. The certificate of search in respect of that parcel of land was not availed for perusal by the court. It may very well be that the said parcel of land has since changed ownership and is now vested in one who was not even a party to proceedings before the tribunal. An extension of time in the circumstances may very well be prejudicial to other parties.”

The purposes of an order of stay of execution pending appeal, includes, the preservation of the *status quo* pending appeal. In the circumstances of this case, there is clearly nothing left to preserve.

(22) The up – shot of all the above is that the notice of motion dated May 12, 2022 is devoid of merit. It is hereby dismissed with costs to the respondents.

BOAZ N. OLAO.

J U D G E

7th JULY 2022.

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 7TH DAY OF JULY 2022 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO.

J U D G E

7th July 2022.

