



Bubolu alias Othiambo Obubolu & another v Ouma (Environment and Land Appeal E020 of 2024) [2025] KEELC 3868 (KLR) (15 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3868 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND APPEAL E020 OF 2024**

**BN OLAO, J
MAY 15, 2025**

BETWEEN

**RAPHAEL OJIAMBO BUBOLU ALIAS OTHIAMBO OBUBOLU 1ST
APPELLANT**

SARAH OGANA 2ND APPELLANT

AND

NICHOLAS OUMA RESPONDENT

*(Arising out of the Judgment of Hon. E. A. Nyaloti Chief Magistrate In Busia
Chief Magistrate's Court Civil Case No 490 of 2014 delivered on 28th August 2024)*

RULING

1. What calls for my determination is the Notice of Motion by Raphael Ojiambo Bubolu Aka Othiambo Obubolu and Sarah Ogana (the 1st and 2nd Applicants respectively) seeking as against Nicholas Ouma (the Respondent) the following orders:
 1. Spent
 2. Spent
 3. That this Honourable Court be pleased to issue orders of stay of execution of the Decree/ Order or judgment delivered by the trial Court on 28th August 2024 in Busia Chief Magistrate's Court Civil Case No 490 of 2024 pending the hearing and determination of the appeal herein.
 4. That the costs of this application be provided for.
2. The Motion is anchored on the provisions of Sections 3A and 63(e) of the *Civil Procedure Act* and Order 51 of the Civil Procedure Rules. It is premised on the grounds set out therein and supported by the joint affidavit of the Applicants dated 16th September 2025.



3. The gravamen of the Motion is that the parties herein litigated in the trial Court over the ownership of the land parcel NO SAMIA/BUJWANGA/A980 (the suit land). That suit being Busia Chief Magistrate's Court Civil Case No 490 of 2014 was heard by HON. E. A. Nyaloti Chief Magistrate who, vide a judgment delivered on 28th August 2024, decreed that the Respondent who was the Plaintiff in the trial Court had proved that he was entitled to a refund of Kshs.480,000 and in the alternative, the 1st Applicant who was the 1st Defendant to transfer the suit land to him while the 2nd Applicant who was the 2nd Defendant would refund the Respondent the sum of Kshs.133,000. The Respondent was also awarded costs. The Applicants are aggrieved by that decision and promptly filed this appeal on 19th September 2024.
4. It is the Applicants' case that the Respondent intends to execute the Decree which would result in them suffering substantial and irreparable loss as the Respondent intends to sell the suit land to third parties. That the appeal has overwhelming chances of success and the Respondent will not suffer any prejudice at all if the order sought is granted. The Applicants add that they are willing and able to give any security which this Court may deem fit and just.
5. Annexed to the Motion are the following documents:
 1. Copy of the judgment in Busia Chief Magistrate's Court Civil Case No 490 of 2014 delivered on 28th August 2024.
 2. Copy of the Memorandum of Appeal filed on 19th September 2024.
6. In opposition to the Motion, the Respondent filed Grounds of Opposition dated 16th September 2024. He raised the following issues:
 1. The Motion has been filed by counsel who was not on record in the lower Court in contravention of Order 9 Rule 9 of the Civil Procedure Rules.
 2. The motion is devoid of any merit as it is a money Decree.
 3. The Applicants have failed to offer any security.
7. When the Motion was placed before me for directions on 23rd September 2024, I directed that it be canvassed by way of written submissions. However, only Mr Ochieng Instructed by the firm of Mulinge & Ochieng Company Advocates for the Applicants filed their submissions. MR J. V. Juma counsel for the Respondent informed the Court that he would not be filing any submissions.
8. I have considered the Motion, the supporting affidavit, the Grounds of opposition and the submissions by counsel for the Applicant. I need to correct that the case in the subordinate Court is NO 490 of 2014 not 490 of 2024 as per the Motion.
9. Although the Motion is anchored under the provisions of Sections 3A, 63(e) of the [Civil Procedure Act](#) and Order 51 Rule 1 of the Civil Procedure Rules, the remedy sought is the stay of execution of the Decree/Judgment delivered on 28th August 2024 in Busia Chief Magistrate's Court Civil Case No 490 of 2014. The power to grant such a remedy is donated by Order 42 Rule 6(1) and (2) of the Civil Procedure Rules. It provides that:

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 subrule (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.

As is clear from the above, a person seeking an order of stay of execution pending appeal must satisfy the following requirements:

1. Show sufficient cause;
2. Demonstrate that unless the order is granted, he will suffer substantial loss;
3. Approach the Court without unreasonable delay;
4. Offer Security.

The jurisdiction of this Court while considering an application for stay of execution pending appeal was circumscribed by the Court of Appeal in the case of *Vishram Ravji Halai & Another -v- Thornton & Turpin* (1963) LTD 1990 KLR 365 where it said:

“Thus the Superior Court’s discretion is fettered by three conditions; Firstly, the Applicant must establish a sufficient cause, secondly 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.”

Substantial loss, as was held by PLATT Ag. J.A (as he then was) in the case of *Kenya Shell Ltd - V- Benjamin Kibiru* 1982 – 88 1 KAR 1018 [1986 KLR 410] is the cornerstone of the jurisdiction to grant the order of stay of execution pending appeal. In paragraphs 10 and 12 of their supporting affidavit, the Applicants have deposed that:

- 10: “That there is reasonable belief and apprehension that the Respondent intends to extract a Court order/decreed and shall proceed to proclaim and attach Applicants’ property as an alternative order issued by the trial Court, implement it and unilaterally proceed to sell the suit property in disregard to Applicants’ interest.”
- 12: “That should the Respondent herein begin execution as an alternative order issued by the trial Court, the Appellants/Applicants stand to suffer substantial and irreparable loss as the Respondent has intention of unilaterally selling the all suit lands (sic) to third parties.”

The above averments were not rebutted by the Respondent through a replying affidavit. All he did was to file Grounds of Opposition which did not specifically refer to those clear averments which suggest that the Respondent intends to sell the suit land. In the absence of a rebuttal of those un-ambiguous averments, it can only mean that indeed the Respondent intends to sell the suit land which would obviously take it out of the Applicants’ reach even if their appeal succeeds and the resultant loss will be substantial. The Grounds of Opposition alone cannot



specifically refute what is contained in the Applicants' sworn affidavit. What was required of the Respondent was to file a replying affidavit rebutting the contents of the Applicants' supporting affidavit. In the case of Daniel Kibet Mutai & Others -v- Attorney General C.a. Civil Appeal No 95 of 2016, the Court emphasized on the importance of rebutting the contents of a sworn affidavit through a replying affidavit. This is what is said in paragraph 34 of the ruling delivered on 20th July 2017:

- 34: “The position before us is that the appellants averred to certain facts under oath in an affidavit. These facts were not controverted by the Respondents either through an affidavit in response or through cross examination. An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Two things flow from this. First, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavits as factual evidence is admitted. Secondly, a question arises regarding the weight or probative value of the averred factual evidence. In other words, are the facts as averred in the affidavits sufficient to prove the appellants' claims?”

In view of the above precedent, this Court must find, which I hereby do, that the Respondent intends to sell the suit land which action would result to substantial loss on the part of the Applicants. The Applicants have therefore established the first limb of what they were required to prove to warrant the grant of the order of stay of execution pending appeal.

10. The Applicants have already filed an appeal against the impugned judgment thus demonstrating sufficient cause.
11. The impugned judgment was delivered on 28th August 2024 and this Motion was filed on 19th September 2024. There has been no unreasonable delay in approaching this Court.
12. Further, the Applicants have deposed in paragraph 18 of their supporting affidavit as follows:

- 18: “That as a condition for grant of orders of stay of execution, we are willing and able to give such security as Honourable Court may deem fit, proper and just in circumstances pending the outcome of the present appeal.”

The Applicants having offered security, it is a clear indication that this application is made in good faith in the pursuit of justice and is not intended merely to prevent the Respondent from enjoying the fruits of his judgment. This Court shall therefore make appropriate orders as to what security the Applicants should provide as a condition for the order of stay of execution.

13. Finally, the Respondent has raised as ground 1 of his Grounds of Opposition that the application has been filed by counsel who was not on record in the lower Court in contravention of Order 9 Rule 9 of the Civil Procedure Rules. That provision reads:

- 9: “Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court-
- (a) upon an application with notice to all the parties; or
 - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

Other than pleading that the application has been filed by counsel who was not on record in the lower Court in contravention of the above provisions, counsel for the Respondent did not state which counsel was acting for the Respondent in the lower Court. That notwithstanding, it is now well



settled, by judicial precedent that an appeal is a new suit and not a continuation of proceedings of the subordinate Court. Therefore, no leave of the Court is mandatory for any change of advocate. That was settled by the Court of Appeal in the case of Tobias M. Wafubwa -v- Ben Butali C.a Civil Appeal No 3 of 2016 [2017 eKLR] where the Court observed that:

“Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate Court is not a continuation of proceedings in the lower Court, but a commencement of new proceedings in another Court, where different rules may be applicable, for instance, the Court of Appeal Rules 2010 or the Supreme Court Rules 2010. Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned Court to be placed on record in substitution of the previous advocate.”

The above answers the Ground of Opposition with regard to Order 9 Rule 9 of the Civil Procedure Rules and the firm of Mulinge & Ochieng Company Advocates are properly on record for the Applicants in this appeal and the Motion.

14. Having considered all the above, I find that the Notice of Motion dated 16th September 2024 is meritorious. I allow it and issue the following disposal orders:
1. An order is hereby issued staying the execution of the judgment and decree issued on 28th August 2024 in Busia Chief Magistrate’s Court Civil Case No 490 of 2024 pending the hearing and determination of this appeal.
 2. As a condition of that stay, the Applicants shall within 45 days from today deposit the sum of Kshs.150,000 in a joint account in the names of counsel for both parties to be released after the appeal or further orders of this Court.
 3. In default of (2) above, the order of stay of execution shall lapse and the Respondent shall be at liberty to execute the decree.
 4. Cost of this application shall abide by the appeal

BOAZ N. OLAO

JUDGE

15TH MAY 2025

Ruling dated, signed and delivered on this 15th day of May 2025 by way of electronic mail and with notice to the parties.

BOAZ N. OLAO

JUDGE

15TH MAY 2025

