



Omayo v Gusii Farmers Coffee Co-op Union Limited & another (Environment and Land Case 1 of 2021) [2025] KEELC 4846 (KLR) (30 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4846 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND CASE 1 OF 2021
DO OHUNGO, J
JUNE 30, 2025**

BETWEEN

PETER ONDARI OMAYO PLAINTIFF

AND

GUSII FARMERS COFFEE CO-OP UNION LIMITED 1ST DEFENDANT

ROBERT GN MAINYA 2ND DEFENDANT

RULING

1. Judgment was delivered in this matter on 15th November 2023 as follows:

In the premises the Plaintiff's claim succeeds with costs.

2. Subsequently, the Deputy Registrar issued Decree on 23rd February 2024 as follows:

Claim for.

- a) Specific performance by way of processing and issuance of certificate of title to the Plaintiff measuring ten (10) acres to be curved out of L.R No. 7487/2 Simbauti Farm as originally registered (changed to Gesima Block 1(Simbauti/167) and or specifically curved out of the farm or remainder thereof of the farm known as Simbauti Farm in Borabu Constituency Nyamira County.
- b) An order of the court to the effect that no further transaction/transactions should be undertaken on this subject property in form of sale or transfer without first recognizing and actualizing transfer of the ten (10) acres to the Plaintiff.
- c) Costs of the suit and interest.

This matter coming up for hearing on various dates and for judgement before Honourable Mugo Kamau .J. on 15th of November, 2023 and in the presence of Counsel for the Plaintiff.



It is hereby ordered.

1. That the Plaintiff's claim succeeds with costs.

3. Subsequently, the Defendants filed Notice of Motion dated 28th February 2025, which is the subject of this ruling. The following orders are sought in the application:
 1. That this Honourable court be pleased to certify this application urgent and the same be heard expeditiously on priority basis and service of the same be dispensed with in the first instance.
 2. That this Honourable court be pleased to grant a temporary stay of execution of its judgement delivered on 15th November, 2023 together with its Decree and all consequential orders pending the hearing of this application inter-partes.
 3. That this Honorable (sic) court be pleased to grant stay of execution of its judgement delivered on 15th November 2023 together with its Decree and all consequential orders pending the hearing and final determination of Kisumu Court of Appeal Civil Appeal No E033 of 2025.
 4. That the costs of this Application be provided for.
4. The application is based on the grounds listed on its face and is supported by an affidavit sworn by the Second Defendant. The long and short of the grounds and supporting affidavit is that in a ruling delivered by the Court of Appeal on 21st February 2025 in Civil Application No. E173 of 2024 (Kisumu), the Defendants were granted leave to appeal out of time against the judgment herein and their Notice of Appeal dated 21st November 2024 was deemed as duly filed and served. That they subsequently filed Kisumu Court of Appeal Civil Appeal No. E033 of 2025 and that on 27th February 2025, the Plaintiff went with the County Surveyor to survey the land, but the survey did not take off. He added that they stand to suffer irreparable loss and that they are ready to comply with any conditions set by the Court.
5. The Plaintiff opposed the application through a replying affidavit in which he deposed that the Defendants have approached the matter with unclean hands and have not demonstrated any substantial loss. He added that since there is already an appeal before the Court of Appeal, the issue of stay of execution should be canvassed before the Court of Appeal and that this Court is functus officio since the Defendants' application for stay in the Court of Appeal is yet to be determined by the said Court. The Plaintiff deposed to many other matters which I have deliberately avoided rehashing since I am persuaded that they belong to the province the Appellate Court.
6. The Plaintiff also filed a further affidavit in which he deposed that the Defendants have since filed and served Record of Appeal in the Court of Appeal thereby divesting this Court of jurisdiction.
7. The application was canvassed through written submissions. The Defendants filed submissions dated 24th March 2025 and further submissions dated 23rd May 2025. On the other hand, the Plaintiff filed submissions dated 24th April 2025.
8. I have carefully considered the application, the affidavit and the submissions. The issues that arise for determination are whether the Court has jurisdiction and whether the orders sought should issue.
9. Jurisdiction to grant stay of execution pending appeal is codified within the four walls of Order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010 which provides as follows:
 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.
10. The Plaintiff has claimed, without offering any evidence in support, that there is an application for stay of execution pending before the Court of Appeal. The Defendants have explained in their submissions, and I accept the explanation, that such an application could not have been filed in view of the timelines and the ruling delivered by the Court of Appeal on 21st February 2025 which allowed them to appeal out of time. As to the argument that an application for stay cannot be canvassed in this Court when an appeal is pending before the Court of Appeal, the ready answer is that Order 42 rule 6 (1) of the Civil Procedure Rules expressly grants this Court power to hear and determine an application for stay even when an appeal is pending before the Court of Appeal. This Court is not therefore functus officio. Needless to state, care should however be taken to ensure that any orders made by this Court do not conflict with the proceedings before the Court of Appeal. In sum, this Court has jurisdiction.
11. On the question of whether the orders sought should issue, the law is that an applicant seeking stay pending appeal must demonstrate that substantial loss will result to him if stay is not granted, and that the application has been made without unreasonable delay. Such an applicant is further required to give such security as the court may order for the due performance of the decree. See *Kenya Power & Lighting Co. Ltd v Kigaita Ngare Unduthu & 36 others* [2020] eKLR and *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR. As Platt Ag JA (as he then was) stated in *Kenya Shell Limited v Benjamin Karuga Kibiru & another* (supra), substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. It is virtually impossible for such an application to succeed if an applicant fails to demonstrate that he will suffer substantial loss if stay is not granted.
12. A perusal of the record herein shows that following the ruling delivered by the Court of Appeal on 21st February 2025, the Defendants lodged their Notice of Appeal dated 21st November 2024 in this Court on 25th February 2025. There is no dispute that they subsequently filed Kisumu Court of Appeal Civil Appeal No. E033 of 2025, and that Record of Appeal has since been filed. Thus, there exists an appeal against the judgment. Considering that the present application was filed on 3rd March 2025, there has been no unreasonable delay.
13. In the judgment appealed against, the Court ordered specific performance by way of processing and issuance of certificate of title to the Plaintiff in respect of land measuring ten (10) acres. In the event the appeal succeeds yet the decree would have been enforced, there would certainly be substantial loss to the Defendants. I am in the circumstances persuaded that Notice of Motion dated 28th February 2025 has merit.
14. In the result, I make the following orders:



- a. I grant stay of execution of the judgement delivered herein on 15th November 2023 together with the decree and all consequential orders pending the hearing and final determination of Kisumu Court of Appeal Civil Appeal No E033 of 2025.
- b. Costs of the application shall abide the outcome of the appeal.
- c. The stay order granted in (a) above shall remain in force until determination of the appeal or until the Court of Appeal makes further or other orders on the issue of stay of execution pending appeal.

DATED, SIGNED, AND DELIVERED AT NYAMIRA, THIS 30TH DAY OF JUNE 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

Ms Nyaboke for the Plaintiff

No appearance for the Defendants

Court Assistant: B Kerubo

