



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUSIA.**

**ELC. CIVIL APPEAL NO. 25 OF 2014.**

**GEORGE ODUOR OLOKO:::APPLICANT**

**=VERSUS=**

**GABRIEL SIMALI WESONGA:::RESPONDENT**

**R U L I N G.**

The Appellant, **GEORGE ODUOR OLOKO** filed the notice of motion under certificate of urgency dated 22<sup>nd</sup> September, 2014 through M/S.Wanyama & co. advocates. The application is brought under Section 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules. The Appellant prays for stay of execution of the judgment and decree in Busia CMCC. No.138 of 2012 pending the hearing and final determination of the appeal. The application is based on the four grounds on the face of the application and the Appellant's affidavit sworn on 22<sup>nd</sup> September, 2014.

The application is opposed by Gabriel Simali Omondi, the Respondent, through the replying affidavit sworn by Francis Omondi advocate on 25<sup>th</sup> September, 2014.

Mr. Wanyama and Mr. Jumba advocates for the Appellant and Respondent respectively made their verbal submissions during the hearing of the application on 29<sup>th</sup> September, 2014.

I have carefully considered the grounds on the application, submissions by both counsel, supporting and replying affidavits and their annexures and find as follows:

1. That the application seeks to stay the "execution of the judgment and decree in Busia , CMCC. No. 138 of 2012 pending the final and determination of the appeal filed herein". The Appellant has however not annexed a copy of the judgment or decree and the dates of the said judgment and decree have not been disclosed. The court has perused the memorandum of appeal filed herein and dated 19<sup>th</sup> September, 2014 and noted from the heading that the appeal relates to the ruling delivered by Hon. J.M Maragia , Resident Magistrate on 16<sup>th</sup> September, 2014 in Busia CMCC. NO. 138 of 2012. That even though the memorandum of appeal is available in the file, the copy of the ruling dated 16<sup>th</sup> September, 2014 is not annexed and this court is unable to establish at this stage what the exact terms or contents of the ruling appealed against are.
2. That noting that the memorandum of appeal dated 19<sup>th</sup> September, 2014 relates only to the ruling of 16<sup>th</sup> September, 2014 in Busia CMCC. No. 138 of 2012, this court is unable to establish whether the Appellant has filed an appeal against the judgment and decree in Busia CMCC. No. 138 of 2012 as prayer (b) and (c) of the application seems to suggest.
3. That going by the contents of the plaint filed in Busia CMCC No. 138 of 2012, which is annexed to the affidavit of George Oduor Oloko and marked "G.O. 03", the main prayers in that suit

were eviction and injunction orders from Land parcel Marachi/Kingandole/1275. The court has perused the annexures to the replying affidavit of Francis Omondi, sworn on 25<sup>th</sup> September, 2014 and noted that the notice of motion under certificate of urgency dated 6<sup>th</sup> August, 2014 in Busia CMCC. No. 138 of 2012 had a prayer ‘‘C’’ in the following terms.

**‘‘ (c). That there be stay of execution of the judgment and decree issued in the suit herein pending the hearing and determination of Busia High court ELC. No. 33 of 2012 instituted by the defendant/applicant herein against the plaintiff/respondent.’’**

That application may possibly be the one that was the subject matter of the ruling dated 16<sup>th</sup> September, 2014 from which the appeal filed herein emanates.

4. That the Appellant herein had also filed the chamber summons under certificate of urgency dated 4<sup>th</sup> February, 2014 in Busia H.C. P & A No. 397 of 2013 which had a prayer ‘‘C’’ in the following terms:

**‘‘ (c). That there be stay of execution and further proceedings in Busia CMCC. No. 138 of 2012 pending the hearing and final disposal of the objection proceedings filed herein vide the summons dated 13<sup>th</sup> November, 2013 seeking revocation of the issued grant.’’**

The Respondent’s replying affidavit has an annexure marked ‘‘FO 3’’ which is the ruling to the application dated 4<sup>th</sup> February, 2014. The ruling of 25<sup>th</sup> June, 2014 by Justice Tuiyott dismissed the application stating that **‘‘ the substance of the application is weak on merit.’’**

5. That other than the difference in the cases cited in the applications for stay filed in Busia CMCC. No. 138 of 2012 and Busia H.C. P&A No. 397 of 2013, the two applications were similar in all aspects. The two applications are also similar to the Appellant’s application dated 19<sup>th</sup> September, 2014 which is subject matter of this ruling.
6. That the subject matter of Busia CMCC. No. 138 of 2012, Busia H.C. P&A No. 397 of 2013 and this appeal is land parcel Marachi/Kingandole/1275 in one form or the other. The Appellant had filed the application for stay orders dated 4<sup>th</sup> February, 2014 in Busia H.C. P&A No. 397 of 2013. That application was dismissed with costs on 25<sup>th</sup> June, 2014 and instead of the Appellant preferring an appeal or a review of those orders of the superior court, he filed a similar application dated 6<sup>th</sup> August, 2014 in Busia CMCC. No. 138 of 2012. The Appellant lost that application through the ruling reportedly of 16<sup>th</sup> September, 2014. No leave to file an appeal was applied for and, or obtained. That being as it may, and considering the Respondent’s contention that there is nothing to stay as the execution has been completed, and further remembering that the court should not issue orders in vain, I find no merit in the Appellant’s application dated 19<sup>th</sup> September, 2014.
7. That in view of the fact that the Respondent’s title to Marachi/Kingandole/1275 emanates from the orders issued in Probate and Administration proceedings which has not been successfully challenged in accordance with the law, the damages, if any, that the Appellant has suffered or is likely to suffer in the future as a result of the execution of the orders in Busia CMCC. No. 138 of 2012 are not irreparable. The damages are capable of being quantified and appropriate orders applied for and issued, should orders in favour of Appellant be issued in relevant judicial proceedings.

From the foregoing reasons, the Appellant’s application dated 19<sup>th</sup> September, 2014 is without merit and is dismissed with costs.

**S.M. KIBUNJA,**

**JUDGE.**

**DATED AND DELIV ERED ON 9<sup>TH</sup> DAY OF OCTOBER, 2014.**

**IN THE PRESENCE OF; MR. JUMBA FOR OMONDI FOR RESPONDENT AND MR.  
WANYAMA FOR APPLICANT.**