Oita v Emaero & 2 others (Environment and Land Case 40 of 2001) [2025] KEELC 6561 (KLR) (2 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6561 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT AND LAND CASE 40 OF 2001

BN OLAO, J

OCTOBER 2, 2025

BETWEEN

NICHOLAS OTWANE OITA .... PLAINTIFF

AND

RONALD OMODING EMAERO .... 1ST DEFENDANT

JOSEPH OMOJONG EKALUGUT (SUBSITUTED BY REMIGUIS OKUBALA ELUNGATA) .... 2ND DEFENDANT

VINCENT EMAIRO EKARUGUT .... 3RD DEFENDANT

RULING

1. This Court delivered its judgment herein on 15th October 2024 and found that Nicholas Otwane Oita (the Plaintiff) had acquired the land parcel No South Teso/Amukura/1901 (the suit land) by way of adverse possession. The Court ordered Ronald Omoding Emaero, Remigus Okubala Elungata and Vincent Emairo Ekarugut (the 1st, 2nd and 3rd Defendants respectively) to surrender the title to the suit land to the Land Registrar within 45 days for cancellation as their interest therein had expired and to facilitate the registration thereof into the Plaintiff's name. The Defendants promptly filed a Notice of Appeal on 22nd October 2024 having been aggrieved by that judgment. Meanwhile, a Decree followed.

2. The 1st Defendant has now moved to this Court vide his Notice of Motion dated 30th October 2024 in which he seeks the following orders:

    1. Spent
    2. Spent
    3. That there be an interim order of stay of execution and judgment delivered on 15th October 2024 pending the hearing and determination of the intended appeal.

4. That costs of this application be provided for.

3. The Motion is founded on the provisions of Order 22 Rule 7(2) and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the *Civil Procedure Act* and Article 159(2) of *the Constitution*. It is also based on the grounds set out therein and supported by the 1st Defendant's affidavit of even date. He has deponed that he has the authority of the 2nd and 3rd Defendants to file this Motion and being aggrieved by this Court's judgment delivered on 15th October 2024, they have filed a Notice of Appeal. Further, that the orders sought will not prejudice the Plaintiff. Annexed to the Motion is a copy of the Notice of Appeal dated 18th October 2024.

4. In opposing the Motion, the Plaintiff filed a replying affidavit dated 20th November 2024, in which he deponed, inter alia, that the Motion is lacking in merit and is an abuse of the process of this Court intended only to deny him the fruits of his judgment. That the Defendants have not bothered to file a memorandum of appeal or explain what grounds they intend to raise in their appeal or even that the intended appeal raises reasonable grounds and has chances of success. That there is nothing to show that their appeal would be rendered nugatory if the Motion is declined. Further, that the Defendants have not offered any security for the due performance of the decree herein. It is in the interest of justice that the Motion be dismissed with costs.

5. When the Motion was placed before me on 6th November 2024, I directed that it be canvassed by way of written submissions. Submissions were subsequently filed by the Defendants acting in person and by Mr Mogi instructed by the firm of Manwari & Company Advocates for the Defendant.

6. I have considered the Motion, the rival affidavits and the submissions by the Defendants and those by MR MOGI.

7. Although the Defendants have approached the Court citing the provisions of Order 22 Rule 7 (2), Order 51 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the *Civil Procedure Act* and Article 159(2) of *the Constitution*, those provisions do not strictly provide for the orders sought. However, that lapse does not defeat the Motion.

8. The applicable provision is Order 42 Rule 6(1) and (2) of the Civil Procedure Rules which reads:

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(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."

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 as follows:

> "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."

It is clear from the above that a party seeking an order of stay of execution must establish the following:

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

The Defendants have already filed a Notice of Appeal. They were however required to demonstrate that unless the order is granted, they will suffer substantial loss which, as PLATT Ag J.A (as he then was) described in the case of Kenya Shell Ltd -v- Kibiru & Another 1986 KLR 410;

> "... is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondent should be kept out of their money."

In the case of Machira & Company Advocates -v- East African Standard (No 2) 2002 2 KLR 63 it was held thus:

> "In this kind of application for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars ... where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay."

I have perused the Motion and supporting affidavit. There is no mention of what substantial loss, if any, the Defendants will suffer if the order for stay of execution pending appeal is declined. Instead, in paragraph 8 of the replying affidavit, the 1st Defendant has averred as follows:

8: "That the Plaintiff/Respondent would suffer no prejudice if this application is allowed."

That, however, is not the test to be applied in such an application. The proper test is what substantial loss the Defendants will suffer if the application is not granted. Not what prejudice the Plaintiff will suffer. In any case, the Plaintiff already has a judgment in his favour and he hopes to enjoy the fruits thereof. He will therefore certainly be prejudiced if the enjoyment thereof continues to be kept on hold. The onus was on the Defendants to demonstrate what substantial loss they will suffer if the order sought is not granted. They have failed to do so.

9. The Motion was filed on 30th October 2024 barely two (2) weeks after the delivery of the judgment on 15th October 2024. There has been no unreasonable delay in approaching the Court.

10. However, the Defendants were also required to make an offer of security for the due performance of such decree as may ultimately be binding on them. In the case of Machira -v- Mohamed 2022 KEELC 2376 KLR, I stated that:

> " The offer for security must come from the Defendant himself and is a demonstration of the fact that the application for stay of execution is being pursued in order to advance the cause of justice and is not simply a knee-jerk reaction only intended to delay and scuttle a lawful execution process."

No such offer of security has been made by the Defendants. In a case such as this where the Defendants were ordered to surrender the original title deed to the land parcel No South Teso/Amukura/1901 to the Land Registrar Busia for cancellation in order to facilitate the registration of the said land in the name of the Plaintiff, this Court would have expected as a sign of good faith, that the Defendants would at least offer to deposit the title deed in this Court for safe custody even if they have no faith in the office of the Land Registrar Busia. However, no such offer, nor any other offer at all, has been made. A clear demonstration that the Defendants are not interested in advancing the cause of justice but rather, they only intend to ensure that the Plaintiff's enjoyment of the fruits of this judgment is delayed as much as possible.

11. The Defendants have only surmounted the requirements of filing the Motion without unreasonable delay and also filing a Notice of Appeal. They have however failed to demonstrate substantial loss which they will suffer if the Motion is declined and also to offer security. The Motion is therefore for dismissal.

12. The up-shot of the above is that the Notice of Motion dated 30th October 2025 is devoid of any merit. It is accordingly dismissed with costs to the Plaintiff.

BOAZ N. OLAO

JUDGE

2ND OCTOBER 2025

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT ON THIS 2ND DAY OF OCTOBER 2025.

Mr Mogi for Plaintiff – Plaintiff

1st Defendant – Present

2nd Defendant – Absent

3rd Defendant – Present

4th Defendant - Present

BOAZ N. OLAO

JUDGE

2ND OCTOBER 2025