REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC NO. 99 OF 2017

BARASA OBANGO OK956

WAKO (Substituted by)

CHARLES AJUMA OBANGO ……

PLAINTIFF

= VERSUS =

ALEX WANDERA MAKOKHA ……

DEFENDANT

R U L I N G

1. The dispute between **BARASA OBANGO OKWAKO** (the Plaintiff herein as substituted by **CHARLES AJUMA OBANGO)** and **ALEX WANDERA MAKOKHA** (the Defendant) over the land parcel **NO BUKHAYO/MATAYOS/1340** (the suit land) was determined via a judgement delivered on 1st October 2024 partly in favour of the Plaintiff and partly in favour of the Defendant. Specifically, it was decreed, inter alia, that the Defendant had acquired by way of adverse possession a portion measuring one (1) acre out of the suit land. That portion was to be registered in his favour while the

remainder of the suit land was to be registered in favour of the Plaintiff.

2. The Defendant, previously represented by counsel but now acting in person was aggrieved by that judgment and promptly filed a Notice of Appeal dated 12th October 2024. He has now approached this Court vide his Notice of Motion dated 3rd March 2025 and premised under the provisions of **Sections 1A, 1B, 3** and **3A** of the **Civil Procedure Act, Order 42 Rules 5** and **6** and **Order 45** of the **Civil Procedure Rules** and **Articles 48** and **159(2)** of the **Constitution**. It is predicated on the grounds set out therein and supported by the Defendant's affidavit of even date.

3. The gist of the application is that the Defendant is dissatisfied by the judgment delivered on 1st October 2024 and has lodged an appeal. Meanwhile, the Plaintiff is threatening to evict him and his family from the suit land and they will be greatly prejudiced hence this application.

4. The Motion is accompanied by the following annextures:

1) Copy of this Court's judgment dated 1st October 2024.

2) Copy of a letter dated 26th February 2025 from the County Surveyor Busia and addressed to the parties herein and their neighbours informing them that a visit to the suit land will be made on 5th March 2025 at 10am to implement the Court orders.

5. The Plaintiff responded to the Motion vide his replying affidavit dated 5th May 2025 in which he has deposed, inter alia, that the Defendant is guilty of laches since this judgment was delivered seven (7) months ago. That no memorandum of appeal has been annexed to the Motion. Besides, the Notice of Appeal was not lodged within 7 days stipulated within **Rule 79** of the **Court of Appeal Rules** and in any event, the application has been over-taken by events since the survey exercise took place on 26th February 2025 with the participation of the Defendant.

6. Although the Court directed that the Motion be canvassed by way of written submissions, only **MR ONSONGO** instructed by the firm of **OBWOGE ONSONGO &**

COMPANY ADVOCATES for the Plaintiff filed his submissions. The Defendant who has now appointed the firm of **OUMA OKUTTA & ASSOCIATES ADVOCATES** to act for him did not file any submissions.

7. I have considered the Motion, the rival affidavits and the submissions by **MR ONSONGO**.

8. **Order 42 Rule 6(2)** of **Civil Procedure Act** provides that:

> **(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."**

9. It is clear from the above that one of the grounds which an applicant seeking an order of stay of execution must prove

is that the application has been made **"<u>without unreasonable delay</u>".** The other ground which must be established is **"<u>substantial loss</u>"** among others. Those two grounds are enough to dispose of this application.

10. On the issue of **"<u>substantial loss</u>"** and which, is the cornerstone of such an application as was held in the case of **KENYA SHELL -V- BENJAMIN KABIRU & ANOTHER 1986 KLR 410,** the Defendant has not demonstrated what substantial loss he will suffer if the order sought is not granted. He has simply deposed that the Plaintiff has commenced execution process and will not suffer any prejudice. This Court in the judgment being appealed, did decree that the Defendant is entitled to a portion measuring one (1) acre out of the suit land being the portion where he has his home. He and his family cannot therefore be evicted from that portion. He will still retain his home. I do not therefore see what **"substantial loss",** if any, he will suffer if execution proceeds with respect to the other portion belonging to the Plaintiff. By now, the Land Registrar and Surveyor should have visited the suit land and demarcated the one (1) acre portion to

which the Defendant is entitled. The ground that the Plaintiff will not suffer prejudice has never been a reason to grant an order for stay of execution.

11. The Defendant was also required to file the application **"<u>without unreasonable delay</u>."** In paragraph (f) of the supporting affidavit, he has deposed thus:

> **(f) "That this application has been brought timeously and without delay and immediately upon delivery of the judgment."**

12. The need for approaching the Court without unreasonable delay was emphasized in the case of **VISHRAM RAVJI HALAI & ANOTHER -V- THORNTON & TURPIN (1963) LTD 1990 KLR 36** where the Court of Appeal said:

> (a) **"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. <u>The application must of course be made without unreasonable delay</u>." Emphasis mine

The judgment being appealed was delivered on 1st October 2024 and this Motion was filed on 5th March 2025 some five (5) months later. I do not consider a delay of five (5) months, and which has not even been explained, to be nothing else but an unreasonable. Indeed, it cannot be correct for the Defendant to depose, as he has done in paragraph (f) of his supporting affidavit, **"<u>That this application has been brought timeously and without delay and immediately upon delivery of judgment</u>."** A delay of five (5) months can hardly be described as timeous by any standard.

13. Finally, the Defendant has not offered any security as required by law. From the record, it appears that he only moved to this Court when confronted by the Decree issued herein on 22nd January 2025 and the Plaintiff's Bill of Costs. As was held in **WYCLIFFE SIKUKU WALUSAKA -V- PHILIP KAITA WEKESA 2020 eKLR,** such offer of security

"... must of course come from the Applicant himself as a sign of good faith to demonstrate that the application for stay of execution pending appeal is being pursued in the interest of justice and not merely as a decoy to obstruct and delay the Respondent's right to enjoy the fruits of his judgment."

14. In the circumstances of this case, the Defendant has only moved to Court when the day of reckoning caught up with him. That is not the conduct of a party who has approached the Court with clean hands yet the remedy sought is an equitable and discretionary one.

15. The up-shot of all the above is that the Defendant's Notice of Motion dated 3rd March 2025 and filed on 5th March 2025 is devoid of merits. It is dismissed with costs to the Plaintiff.

BOAZ N. OLAO

JUDGE

20TH NOVEMBER 2025

Ruling dated, signed and delivered by way of electronic mail on this 20th day of November 2025.

BOAZ N. OLAO

JUDGE

20TH NOVEMBER 2025L