

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC LA NO E022 OF 2024

PAUL OTIENO OKUMU APPELLANT

= VERSUS =

NOBERT O. ODWORY

RESPONDENT

R U L I N G

1. The dispute between **PAUL OTIENO OKUMU** (the Appellant) and **NOBERT O. OKUMU** (the Respondent) over the land parcel **NO BUKHAYO/BUGENGI/7507** (the suit land) was heard by **HON P. A. OLENGO (SENIOR PRINCIPAL MAGISTRATE)**. Having heard the parties, the trial magistrate delivered a judgement on 29th August 2024. The Appellant is aggrieved by the said judgment and has lodged an appeal to this Court seeking to set aside that judgment.
2. By Notice of Motion dated 6th January 2025, the Appellant citing the provisions of **Sections 1A, 1B, 3, 3B** of the **Civil Procedure Act, Orders 39** and **42** of the **Civil Procedure**

Rules and all other enabling provisions of the law, seeks the following orders:

1) Spent

2) That leave be granted to the Appellant/Applicant to act in person and in filing this appeal in place of the firm of OUMA-OKUTTA & ASSOCIATES ADVOCATES who represented him in BUSIA CM ELC CASE NO E1 of 2021.

3) Spent

4) That pending the hearing and determination of this appeal, there be a stay of execution of the judgment and decree issued on 29th August 2024 in BUSIA CMC ELC CASE NO E1 of 2021.

5) That this Court be pleased to issue any and all such orders as are necessary to preserve the status quo ante judgment of and decree of 29th August 2024 pending the hearing and determination of this appeal.

3. The Motion is anchored on the grounds set out therein and is supported by the Appellant's affidavit of even date.

4. The gravamen of the Motion is that the Appellant was represented by the firm of **OUMA-OKUTTA & ASSOCIATES ADVOCATES** during the trial in the subordinate Court and since judgment has already been delivered in that Court, he needs leave to act in person. Being aggrieved by the judgment in that Court, he has filed this appeal. Meanwhile, the issue at hand is land which is a very emotive issue and the Appellant has preferred an appeal against the judgment and decree issued in **BUSIA CMC ELC CASE NO E1** of **2021** and seeks a stay of execution of that judgment and decree pending the hearing and determination of this appeal. He is willing to abide by all the conditions which this Court may impose. If the order of stay is not granted, the Appellant will suffer substantial loss and no prejudice will be occasioned to the Respondent.
5. That this application has been made timeously and without inordinate delay as the Respondent has commenced acts adverse to the Appellant's use and occupation of the suit land. The following documents are annexed to the Motion:
- 1) Copy of the decree issued in **BUSIA CMC ELC CASE NO E1** of **2021**.

- 2) Copy of the Memorandum of Appeal.
- 3) Copy of the eviction notice dated 13th September 2024.

6. In opposition to the Motion, the Respondent's counsel **MOSES WANYAMA ONYANGO** swore a replying affidavit dated 27th July 2025 in which he has deposed, inter alia, that the same is frivolous, lacks merit and is aimed at blocking the Respondent from accessing and using the suit land for no good reason. That the Appellant had charged the suit land to **ECO BANK** but refused to repay the loan. The said Bank sold the suit land by public auction and the Respondent was the highest bidder and purchased the same. Faced with imminent removal from the suit land, the Appellant sought for financial assistance from the Respondent who gave him Kshs.500,000. The Appellant was to move out of the suit land on 30th November 2020 but after receiving the said sum of money, the Appellant refused to move out of the suit land thus necessitating the filing of the suit in the subordinate Court which delivered a judgment that the Appellant be evicted from the suit land.

7. The Appellant has never moved the Court to set aside the auction through which the suit land was transferred to the Respondent. The Appellant has no right to stay on the suit land and even if his appeal succeeds, he cannot gain ownership of the same without first initiating recovery proceedings against the said **ECO BANK** which he has deliberately failed to sue. The Appellant has denied the Respondent the opportunity to earn rent from the suit land and there is no reason why his illegal stay thereon should be extended.
8. Annexed to the replying affidavit are the following documents:
- 1) Copy of transfer by chargee by **ECO BANK** to the Respondent of the suit land.
 - 2) Agreement between the Appellant and the Respondent for the advance of Kshs.500,000.
 - 3) Bank slips.
9. The Motion was canvassed by way of written submissions. The same have been filed by the Appellant acting in person and by **MR WANYAMA** instructed by the firm of **WANYAMA & COMPANY ADVOCATES** for the Respondent.

10. I have considered the Motion, the rival affidavits and annexures thereto as well as the submissions by the Appellant and **MR WANYAMA**.

11. Before I delve into the Motion, there are two procedural issues which I must first determine.

12. To begin with, should this Court grant the Appellant leave to act in this matter in person having previously been represented by the firm of **OUMA-OKUTTA & ASSOCIATES ADVOCATES** during the trial in the subordinate Court. **Order 9 Rules 9 and 10** of the **Civil Procedure Rules** provide that:

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.**

**10: An application under rule 9 may be combined
with other prayers provided the question of
change of advocate or party intending to act in
person shall be determined first.”**

It is clear from this case that the Appellant has not complied with the provisions of **Order 9 Rule 9** of the **Civil Procedure Rules**. There is no consent filed between the firm of **OUMA-OKUTTA & ASSOCIATES ADVOCATES** and the Appellant to allow him act in person. Does that lapse make the Motion fatal? This issue was considered by the Court of Appeal in the case of **TOBIAS M. WAFUBWA -V- BEN BUTALI C.A. CIVIL APPEAL NO 3 of 2016 [2017 KECA 142 KLR] [2017 eKLR]** where the Court stated:

“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.

We would go further to add that, provided that where the failure to comply with rule 9 did not undermine the jurisdiction of the Court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then Article 159 of the Constitution and the overriding principles could be called upon and the Court to dispense substantive justice through just, efficient and timely disposal of proceedings.”

The Court then went on to cite the case of **BONIFACE KIRAGU WAWERU -V- JAMES K. MULINGE 2015 eKLR** where in addressing the issue of non-compliance with **Order 9 Rule 9** of the **Civil Procedure Rules**, it was held that:

“The non-compliance we may say, was procedural and not fundamental. It did not cause prejudice to the Appellant at all ...”

In the circumstances of this case, it has not been alleged that non-compliance with the provisions of **Order 9 of Rule 9** of the **Civil Procedure Rules** has prejudiced the Respondent at all. Leave is hereby granted to the Appellant to act in person although as I have already discussed above, such leave was not necessary given the above binding precedents.

13. The second issue, and which was also not canvassed, is whether it was proper for the Respondent's counsel **MR WANYAMA** to swear a replying affidavit. Under **Rule 9** of the **Advocates Practice Rules**, Advocates are not permitted to swear affidavits in contentious matters. It is not clear why the Respondent did not personally swear the replying affidavit and which was sworn by his counsel **MR WANYAMA**. However,

what **MR WANYAMA** has deposed to in the replying affidavit are basically how the Appellant charged the suit land to **ECO BANK**, how the same was sold by public auction, how Respondent advanced to the Appellant the sum of Kshs.500,000 to enable him get alternative premises and how the Appellant refused to vacate and was sued and eviction orders issued. Much of this is documented and is not contentious. And as was held in the case of **KAMLESH M. A. PATTNI -V- NASIR IBRAHIM & 2 OTHERS C.A. CIVIL APPEAL NO 354 of 2004**, there is no express prohibition against an advocate swearing on non-contentious matters within his knowledge. Indeed, the Appellant has not challenged those averments and I find that the replying affidavit is properly on record.

14. I shall now turn to the crust of the Motion and which is whether the remedy of stay of execution pending appeal should be granted.
15. The principles guiding the grant of an order of stay of execution pending appeal are set out in **Order 42 Rule 6(2)** of the **Civil Procedure Rules** which states:

“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.”**

A party seeking an order of stay of execution pending appeal must therefore satisfy the Court that the threshold set out in the law has been satisfied namely:

- 1) That substantial loss may result unless the order is granted.
- 2) That the application has been made without unreasonable delay.

3) That 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.

It must also be remembered that the remedy of stay of execution pending appeal is granted at the discretion of the Court. The Appellant must therefore also demonstrate sufficient cause as set out in **Order 42 Rule 6 (1)** of the **Civil Procedure Rules**. All the above conditions must be satisfied before the Court can grant the remedy of stay of execution pending appeal.

16. The Appellant has already filed an appeal against the judgment delivered in **BUSIA CMC ELC CASE NO E1** of **2021**. He has also averred in paragraph (g) of the grounds of the Motion thus:

(g) “That the applicant is ready and willing to comply with all conditions given by Court as regards issue of stay pending hearing of this appeal it being quick preparation of records of appeal.”

The Appellant was however also required to demonstrate that he will suffer **“substantial loss”** unless the order of stay is

granted and finally, he was required to file this Motion **“without unreasonable delay.”**

17. Unfortunately for the Appellant, he has not met the above two tests. **“Substantial loss”** as was held by **PLATT Ag JA** (as he then was) in the case of **KENYA SHELL LTD -V- BENJAMIN KARUGA KIBIRU & ANOTHER C.A. CIVIL APPEAL NO 97 of 1986 [1986 KECA 94 KLR] [1986 KLR 410];**

“... is the cornerstone of both jurisdiction for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.” Emphasis mine.

In the same case, **GACHUHI Ag J.A** (as he then was) also made it clear that it is not enough for a party seeking an order of stay of execution to merely plead that substantial loss will ensue if the order is not granted. The Judge added that such a remedy will not be granted where;

“The applicant has not given to Court sufficient materials to enable it to exercise it’s discretion in granting the order of stay”.

Similarly, in the case of **MACHIRA T/A MACHIRA & CO ADVOCATES -V- EAST AFRICAN STANDARD (NO 2) 2002 KLR 63** it was held as follow:

“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.”

Has the Appellant demonstrated that he will suffer substantial loss if the order of stay of execution is not granted? This is what he has pleaded in paragraph (h) of his supporting affidavit:

(h) “That the applicant will suffer substantial loss if temporary orders of stay is not granted pending hearing and determination of this appeal.”

The Appellant has however not stated what nature of **“substantial loss”** he will suffer if the order of stay of

execution pending appeal is not granted. As is clear from the precedents cited above, it is not sufficient for the Appellant **“to merely state that substantial loss will result.”** Such **“substantial loss”**, being the **“corner stone”** of the remedy which the Appellant seeks, he ought to have placed before this Court sufficient evidence to enable this Court make a finding in his favour. There is un-controverted documentary evidence showing that following the trial Court’s order directing that the Appellant be evicted from the suit land, he pleaded with the Respondent for financial support to enable him (Appellant) to get alternative premises and move out peacefully. The Respondent was magnanimous enough to grant the Appellant the sum of Kshs.500,000 to facilitate that relocation as is clear from the agreement filed herein as well as the Bank deposit slips (see annextures **MWO-2, MWO-3** and **MWO-4**). It is not clear why the Appellant did not relocate. What is clear is that he has not approached this Court with clean hands. He wants to steal a march over the Respondent by seeking orders which will amount to directing the Respondent to baby sit him. The remedy sought is at the discretion of the Court and in the

circumstances of this case, I see no reason to exercise that discretion in favour of the Appellant. He has failed to satisfy the threshold of “**substantial loss.**” Besides, his hands are soiled.

18. Finally, the Appellant was required to file this Motion “**without unreasonable delay**”. In ground **NO (i)** on which the Motion is based, the Appellant states:

(1) “That the application has been made timeously and without inordinate delay.”

And in paragraph 18 of his supporting affidavit, he has deponed thus:

18: “That I have made this particular application timeously and without a waste of time.”

The judgment sought to be stayed was delivered on 29th August 2024 as clearly stated in the Memorandum of Appeal. This Motion was filed on 14th February though dated 6th January 2025. The record also shows that pursuant to the impugned judgment, an eviction order was issued on 13th September 2024 and served upon both the Appellant and his then counsel

OUMA-OKUTTA & ASSOCIATES ADVOCATES. In

paragraphs 10, 11 and 12 of his supporting affidavit, the Appellant has deponed thus:

10: “That different people have been visiting my homestead claiming that they are auctioneers and issuing threats to my family of imminent eviction.”

11: that personally, I have never been served with any eviction orders and have just been hearing of rumours about the same.”

12: “That the only document I have come across is Eviction Notice (see attached copy of Eviction Notice dated 13/9/2024 marked as POO-3).”

The Appellant is being rather cagey and economical with the truth. He cannot claim to be only hearing **“rumours”** about his eviction or not having been served with the eviction order dated 13th September 2024 yet the record shows that it was served on both him and his then counsel. And even if he has only been hearing **“rumours”**, he has not said when he started hearing them and why he did not take any steps at that time. This Motion was filed some (six) 6 months after the

judgement was delivered. While there is no definition of what amounts to unreasonable delay in the statutes, a delay of six (6) months is clearly unreasonable in the circumstances of this case where the Appellant was aware about the delivery of the impugned judgment and even filed his memorandum of appeal on 26th September 2024. He did not have to wait until 14th February 2025 to file this Motion which was dated a month earlier. The delay is not only unreasonable but has also not been explained at all. It must be remembered that an order of stay of execution interrupts the rights of the Respondent who is entitled to enjoy the fruits of his judgment. The Court must weigh between the rights of the Appellant to prosecute his appeal and those of the Respondent to enjoy the fruits of his judgment. Such an application must therefore be **“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.”** - see **WYCLIFFE SIKUKU WALUSAKA -V- PHILIP KAITA WEKESA 2020 eKLR**. A party, like the Appellant herein, who not only has an eviction order hanging over his head but who has also been facilitated

by the owner of the suit land to move elsewhere, cannot be acting in good faith or in the interest of justice by seeking an order of stay of execution against his own benefactor. This Court must bring his shenanigans to an end by dismissing this application.

19. The up-shot of all the above is that having considered the Notice of Motion dated 6th January 2025 and filed on 14th February, I issue the following disposal orders:

- 1) The Motion is dismissed.**
- 2) The Appellant shall meet the Respondent's costs.**

**BOAZ N. OLAO
JUDGE**

26TH FEBRUARY 2026

Ruling dated, signed and delivered on this 26th day of February 2026 by way of electronic mail with notice to the parties.

**BOAZ N. OLAO
JUDGE**

26TH FEBRUARY 2026

Explanatory Notes:

This ruling was due on 21st January 2026. However, following my transfer from Busia to Iten Court w.e.f 15th January 2026, I had to prioritize my part heard cases. That contributed towards the delay. The same is regretted.

BOAZ N. OLAO
JUDGE
26TH FEBRUARY 2026

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