



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Omayo v Gusii Farmers Coffee Co-op Union Ltd & another (Environment & Land Case 1 of 2021) [2024] KEELC 489 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 489 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA  
ENVIRONMENT & LAND CASE 1 OF 2021**

**JM KAMAU, J  
JANUARY 31, 2024**

**BETWEEN**

**PETER ONDARI OMAYO ..... PLAINTIFF**

**AND**

**GUSII FARMERS COFFEE CO-OP UNION LTD ..... 1<sup>ST</sup> DEFENDANT**

**ROBERT G.N. MAINYA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Judgment in this case was delivered on 15/11/2023 in the terms that were concretized in a Decree drawn and issued on 23/11/2024:

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 LR No. 7487/2 (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.

2. It is hereby ordered:

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



3. Subsequently, in a letter dated 18/11/2023 and received in court on 6/12/2023 the Decree Holder's Advocate applied for a certified copy of the Judgment and Decree. On the same date the firm of Riechi Miinda & Company Advocates who had already filed a Notice of change of Advocates on 22/12/2023 to act for the adverse party similarly applied for the same in addition to certified copy of proceedings on 8/12/2023 through a letter dated 7/12/2023. On 22/12/2023 the Judgment Debtor filed a Notice of Appeal pursuant to Rule 75 of the Court of Appeal Rules. The same is dated 24/11/2023 and was lodged in this court on 28/11/2023. Contemporaneously, the Notice of Motion was filed seeking an order of stay of execution pending the Hearing and final determination of the intended Appeal.
4. The aforesaid Application was opposed vide a Replying Affidavit by the Decree Holder sworn on 11/1/2023 citing advice from his Advocates on record to the effect that the said Notice of Appeal was filed out of time and in breach of the court of Appeal Rules, 2022 with no orders enlarging time. There is therefore nothing on which to anchor the Application of stay of execution Motion. It was also brought to the attention of this court that the Notice of Appeal has been challenged in the Court of Appeal. In the premises and before the Notice of Appeal is struck out by the court of Appeal, the same stands. I wonder what would happen if I find that there is no proper Notice of Appeal and the higher court where the same has been challenged and which the court has been moved to strike it out found in the alternative?
5. I need to get a balancing act. I will order a stay of execution limited to the order of specific performance of my Judgment pending the outcome of the Application to strike out the Notice of Appeal in the court of Appeal. Should the order of striking out the Appeal succeed then my orders herein shall automatically lapse. Should then Application fail then these orders shall remain in force until the intended Appeal is filed in the Court of Appeal or until further Orders of the Court of Appeal.
6. However, in prayer number(b) in the Judgment i.e. the order to the effect that no further transaction/ transactions should be undertaken on the subject property i.e. LR No. 7487/2 Simauti Gesima Bideki Simbauti/167 in form of sale or transfer without first recognizing and actualizing transfer of the Ten (10) Acres to the Plaintiff, the same shall not be stayed and to avoid the same happening, and as this Court has held in the case of Nyamira ELC Case No. 92 of 2021 [Shadrack Nyaberi Mwakae v David M. Omoganda Ong'era](#).

.....it is important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question or of the failure to do so. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lies considering the fact that it is the business of the court, so far as possible, to ensure that any transitional motions before the Court do not render nugatory the ultimate ends of justice. The interest of the Court in stay of execution in the case of a non-monetary Decree such as this one is usually meant to serve the purpose of exclusively preserving the subject matter so that whoever succeeds in the Appellate Court will find the property still intact. The court therefore needs to be more cautious and interrogate the consequences of failure to preserve the subject matter. The orders issued in this case should therefore be in respect to the preservation of the subject matter itself until the outcome of the intended Appeal. Should we grant the orders as sought by the Applicants herein, what happens to the properties in issue? The Title Holders would be at liberty to dispose of the properties. Will this not, in the words of the Applicants, place the suit property beyond the reach of the Respondent as



well? This Court therefore has an obligation to give orders that act as a prohibiting safeguard against any further dealings with the suit lands. In this particular case, the Titles to the suit properties are still in the names of and in the hands of the Applicants despite the court having declared that the Applicants acquired them unlawfully. This is very lethal. What would prevent the Applicants from transferring the suit lands to third parties in the absence of any information as to the judgment of the court being available to such third parties? It would turn the entire proceedings herein and in the appellate court into an academic exercise and later burden this court and/ or the appellate court with a flurry of Applications. It is of paramount importance to ensure realization of the ultimate winners' fruits of litigation and that nothing complicates the matters after the final Judgment.....”

7. In the premises taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful Party, I order that the Title Deed in respect of LR No. 7487/2 SIMBAUTI (now Gesima Block 1/Simbauti/167 be deposited in this court within the next fifteen (15) Days from today. This is a condition precedent to the actualization of this court's stay of execution aforegranted. That way the subject matter will be safe and protected.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 31ST DAY OF JANUARY, 2024.**

**MUGO KAMAU**

**JUDGE**

In the Presence of:

Court Assistant: - Brenda

Ms. Kwamboka for the Plaintiff.

Mr. Onyhancha holding brief for Mr. Miinda for the Defendant.

