



**Orwa v Odoyo & 2 others (Environment and Land Appeal
E035 of 2023) [2024] KEELC 931 (KLR) (27 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 931 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E035 OF 2023
GMA ONGONDO, J
FEBRUARY 27, 2024**

BETWEEN

PATRICK MIDENYI ORWA APPELLANT

AND

PAULVET OKEYO ODOYO 1ST RESPONDENT

JAMES ODONGO OLEL 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. By a Notice of Motion Application dated 31st October 2023 (the application herein), the applicant, Patrick Midenyi Orwa, through P. D. Onyango and Company Advocates, is seeking the following orders;
 - a. Moot
 - b. Moot
 - c. The pending the hearing and determination of this appeal there be a stay of execution of the judgment of Mbita Principal Magistrate’s court in Environment and Land Case No. 2 of 2019 between Paulvet Okeyo Odoyo v Patrick Midenyi Orwa and 2 others, delivered on 7th June 2023 and the consequential decree emanating therefrom
 - d. That costs of this application be borne by the respondents.
2. The application is founded upon grounds (1) to (5) stated on the face of the same. It is further anchored on the applicant’s supporting affidavit of eight paragraphs sworn on 1st November 2023 as well as a further supporting affidavit dated 18th December 2023.



3. Briefly, the applicant contends that the trial court delivered judgment on 7th June 2023 and issued orders that a survey be carried out on land parcel number Kasgunga/Kamreri/5393 (the suit land herein) which shares a common boundary with land parcel number Kasgunga/Kamreri/3848. That he was also ordered to vacate any portion of the suit land that he occupies. That being aggrieved thereby, he has lodged the instant appeal. That he has been in occupation of the suit land since 1976 and risks being evicted therefrom if the orders sought herein are not granted. That the instant application has been lodged without unreasonable delay and the respondent will not suffer any prejudice if it is allowed.
4. The 1st respondent through G. S. Okoth and Company Advocates, opposed the application by way of grounds of opposition dated 14th November 2023 and filed herein on 17th November 2023 and deponed, inter alia, that the application is not supported by a competent affidavit and the delay of 5 months in lodging the same was not explained. That also, the judgment of the trial court and the consequent decree consists of negative orders not capable of execution until the resurvey is conducted.
5. The application was heard by way of written submissions further to this court's directions of 5th December 2023; see Order 51 Rule 16 of the *Civil Procedure Rules, 2010* and Practice Direction number 33 of the *Environment and Land Court (ELC) Practice Directions, 2014*.
6. Accordingly, the applicant's counsel filed submissions dated 18th December 2023 and submitted that the applicant risks being evicted from the suit land, which will occasion him substantial loss that cannot be compensated by way of damages. He reiterated that the instant application has been lodged without unreasonable delay and that the applicant is ready to comply with any conditions set for grant of the orders sought. That should the application be disallowed, the appeal lodged in this court will be rendered nugatory. Counsel cited Order 42 Rule 6(6) of the *Civil Procedure Rules, 2010* as well as various authoritative pronouncements including the case of *Nicholas Stephen Okaka and another v Alfred Waga Wesonga* [2022] eKLR, to buttress the submissions.
7. The 1st respondent's learned counsel filed submissions dated 19th January 2024 on 25th January 2024 and identified two issues for determination thus: whether the appellant has established any substantial loss that he will suffer if stay of execution is not granted and whether the application has been brought after an unreasonable delay. Counsel submitted that the applicant has not demonstrated how he stands to suffer substantial loss since his home is not established on the suit land where the resurvey exercise ought to be carried out. That the delay of 5 months in filing this application has not been explained. Thus, counsel urged the court to dismiss the present application with costs to the respondent and relied on the case of *Jaber Mohsen Ali and another v Priscillah Boit and another* [2014] eKLR, to reinforce the submissions.
8. Notably, the 2nd and 3rd respondents did not oppose the application or file any submissions herein.
9. I have duly considered the application, the grounds of opposition and the rival submissions in their entirety. The principal issues for determination are:
 - a. Whether the court should order a stay of execution of the judgment in Mbita Principal Magistrate's Court in Environment and Land Case No. 2 of 2019, pending the hearing and determination of the appeal; and
 - a. Who should bear the costs of this application?
10. The applicant's counsel submitted that there is a likelihood of the respondent executing the trial court's judgment thereby occasioning the applicant irreparable loss. That such execution would also render the intended appeal nugatory. He averred that no prejudice will be suffered by the respondent should the instant application be allowed.



11. The conditions concerning grant of an order for stay of execution are stipulated under Order 42 Rule 6(2) (*supra*), which provides in part thus:
 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. (Emphasis supplied)
12. Sections 75 and 79G of the *Civil Procedure Act* Chapter 21 Laws of Kenya provide for orders from which appeal lies and the time for lodging an appeal from the subordinate courts respectively. In the memorandum of appeal dated 29th June 2023 and lodged herein on 30th June 2023, the appellant seeks to appeal against the judgment delivered on 7th June 2023 in Mbita Principal Magistrate’s Court Environment and Land Case No. 2 of 2019.
13. The respondent’s assertion as regards the delay of 5 months in filing this application, has been explained by the applicant’s averment that the instant application was initially filed on 10th July 2023 at the trial court. That the same was dismissed on 27th September 2023, prompting him to lodge the instant application on 1st November 2023. That therefore, there was no delay in commencing the same.
14. I note that whilst judgment of the trial court was delivered on 7th June 2023 and the memorandum of appeal duly filed herein on 30th June 2023, the instant application was initiated on 1st November 2023. It is my considered view that this delay of almost five months has been satisfactorily explained by the applicant. Also, the errors in the supporting affidavit dated 1st November 2023 were rectified by the further supporting affidavit sworn on 18th December 2023.
15. Clearly, Article 48 of the *Constitution* of Kenya, 2010 anchors the right of access to justice. Furthermore, the applicant is entitled to unlimited right to fair hearing of this appeal as stipulated in Articles 50(1) and 25(c) of the same Constitution.
16. It is established law that the right to be heard before an adverse decision is taken against a person is fundamental and permeates the entire justice system: see *James Kanyiita Nderitu and another v Marios Philotas Ghikas and another* [2016] eKLR and *Onyango Oloo-v- Attorney General* [1986-89] EA 456.
17. In the instant case, there is an impending eviction of the applicant from the suit land which may occasion him substantial loss as disclosed in the application. Indeed, those are special circumstances that attract the stay order sought in the application.
18. Further, I subscribe to the Court of Appeal decision in *Butt v Rent Restriction Tribunal* (*supra*), where it was observed that;

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church* (No. 2) 12 Ch D [1879] 454 at p 459...

....and the appellant has an undoubted right of appeal.” (Emphasis added)



19. In the foregone, I find that the application has met the requirements for the grant of stay of execution sought therein. The application is merited.
20. Security for costs is at the discretion of this court as stipulated in Order 42 (supra). So, the applicant is hereby directed to deposit in court within thirty (30) days from this date, the sum of Kshs.30,000 (Thirty thousand only) as security for the due performance of such decree or order as may ultimately be binding upon him, failing which the stay so granted shall automatically lapse without further order(s) herein.
21. Wherefore, the stay order sought in the application dated 31st October 2023 as set out in paragraph 1(c) hereinabove, be and is hereby granted pending the hearing and determination of the instant appeal and subject to the condition as stated in paragraph 20 hereinabove.
22. Costs of this application be the costs in the appeal.
23. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 27TH FEBRUARY 2024.

G.M.A ONGONDO

JUDGE

Present

1. D. Onyango, learned counsel for the appellant/applicant
2. Odhiambo holding brief for G. S. Okoth, learned counsel for the 1st respondent
3. Luanga, Court Assistant

