



**Oduori & 5 others v Mika & another (Civil Application
E072 of 2024) [2024] KECA 872 (KLR) (19 July 2024) (Ruling)**

Neutral citation: [2024] KECA 872 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E072 OF 2024
HM OKWENGU, JA
JULY 19, 2024**

BETWEEN

CHARLES OLOO ODUORI & 5 OTHERS APPLICANT

AND

FRANCISCA AWINO MIKA 1ST RESPONDENT

JOHN JAMES BARAZA 2ND RESPONDENT

(Being an application for leave and extension of time to file an appeal out of time in respect to the decision of the Environment and Land Court at Busia, (Omollo, J.) dated 26th November, 2020 in ELC Case No. 196 of 2014)

RULING

1. The application before me is one dated 23rd May, 2024, brought by Charles Oloo Oduori (herein applicant). It is said to be brought under Article 59 of the Constitution, Sections 3A and 3B of the Appellate Jurisdiction Act and Rules 4, 31, 39(b), 41, 42, 43 and 53 of the Court of Appeal, Rules ('the rules').
2. The application stems from a judgment that was delivered by the ELC (Omollo J) in a suit that was filed by John James Barasa (herein respondent), against the applicant and 5 others. The dispute was over ownership of land known as LR No Samia/Buburi/82. Upon hearing the evidence and submissions by the respective parties the learned Judge delivered a judgment in favour of the respondent as follows:
 - i. The defendants are hereby ordered to vacate and deliver vacant possession of land parcel LR No Samia/Buburi/82 to the plaintiff within four months from the date of delivery of this judgment



- ii. In default of compliance with (i) above the plaintiff shall be entitled to an order of eviction for the forcible removal of the defendants or any person claiming through them from land parcel LR No Samia/Buburi/82 upon application.
 - iii. General damages awarded in the sum of Kshs 300,000, payable within 60 days hereof. In default execution to issue.
 - iv. The plaintiff shall have the costs of the suit.
3. In the motion subject of this ruling, the applicant is seeking in the main prayers as follows:
- i. That this Court be pleased to grant leave to the applicant to file the appeal as well as an application for stay of execution of the judgment and decree out of time against Busia Environment and Land Court Case No 196 of 2014.
 - ii. That this Court be pleased to extend time for filing the appeal against Busia Environment and Land Court Case No 196 of 2014.
 - iii. That upon granting prayers (i) and (ii) above, the Court do provide time-lines for filing the application and the appeal.
 - iv. That the costs of this application and incidentals thereto be borne by the respondent
4. The motion is supported by grounds stated on its face, and an affidavit sworn by the applicant. In brief the applicant explains that immediately after the judgment was delivered his advocate became indisposed and did not advise them of the delivery of the judgment, nor did he file any notice of appeal or application for stay of execution. In addition, during the same period Corvid 19 pandemic struck and there was lockdown for a period of two years. Being unable to get their advocate, the applicant finally sought help from the court registry where he learnt that judgment had already been delivered. The applicant maintains that it is their wish to file an appeal and that they have an arguable appeal, and that this appeal will be rendered nugatory, unless the orders sought are granted.
5. Both the applicant and the respondents were served with a hearing notice through email and advised that the matter would be disposed of through written submissions which they were required to file within three days from the date of service. Neither the applicant nor the respondent filed any submissions, nor did the respondent file any reply to the motion.
6. I have considered the motion and do note that it is an omnibus application which is not properly before me as a single Judge. This is because the first prayer seeks leave to appeal together with an order for stay of execution of the judgment. Under Rule 55(2)(a) of the *Court of Appeal Rules*, such an application is to be heard by a full bench and not a single Judge. The second prayer is for extension of time and this is a prayer which under Rule 55(1) of the *Court of Appeal Rules* is within my jurisdiction as a single Judge. Since it is an omnibus application, the motion cannot fit before a full bench or a single Judge. Moreover, the Court has no jurisdiction to hear an application for stay of execution before the issue of leave to appeal is heard and determined. For, it is that leave to appeal that will give the Court jurisdiction, to hear an application for stay of execution under Rule 5(2)(b) of the *Court of Appeal Rules*, once a notice to appeal is filed. I therefore strike out the application as incompetent.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF JULY, 202

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

