



REPUBLIC OF KENYA



KENYA LAW
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**Obwoge v Nyakundi & 6 others (Environment & Land Case
89 of 2017) [2024] KEELC 1423 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1423 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 89 OF 2017**

M SILA, J

MARCH 13, 2024

**APPLICATION FOR STAY OF EXECUTION PENDING APPEAL;
APPLICATION ALLOWED SUBJECT TO DEPOSIT OF SOME AMOUNT
OF MONEY AND TAXED COSTS WITHIN A SPECIFIED PERIOD**

BETWEEN

DANIEL OGARO OBWOGE PLAINTIFF

AND

JAMES BARARE NYAKUNDI 1ST DEFENDANT

JOHNSON MAGUMO ONDIMU 2ND DEFENDANT

PAUL OMACHE OKIAMBA 3RD DEFENDANT

JAMES MOGIRE 4TH DEFENDANT

SAMUEL M. ORUTA 5TH DEFENDANT

PAUL G. MOKAYA 6TH DEFENDANT

EVANS BUONDA 7TH DEFENDANT

RULING

1. The application before me is that dated 9 November 2023 filed by the 1st, 2nd, 3rd, 4th and 6th defendants. They seek a stay of execution of the judgment delivered on 25 October 2023 pending hearing and determination of an intended appeal to the Court of Appeal. The application is opposed.
2. To put matters into perspective, the plaintiff/respondent commenced this suit through a plaint filed on 12 April 2017 alleging that the applicants have encroached into his land parcel Wanjare/Bogiakumu/4969 claiming it to be part of their land parcels Wanjare/Bogiakumu/8095, 8790 and 8791. He sought orders of a declaration that these are separate and distinct parcels of land, an order of



eviction, and a permanent injunction against the applicants from interfering with his land parcel No. 4969. The applicants filed defence claiming to be in possession of their land parcels and contended that the problem was with the map which needed to be amended. I heard the dispute and found for the respondent, and found that the applicants are actually within the land parcel No. 4969. I did not find any error in the map that would require amendment. I gave the applicants 60 days from the date of the judgment to give vacant possession of the respondent's land and awarded costs to the respondent.

3. In this application, the applicants aver that they are aggrieved by the judgment and have filed a notice of appeal. They state that if the judgment is executed they shall be evicted from their parcels of land which they have been in occupation for a considerable length of time.
4. The respondent has filed a replying affidavit to oppose the motion. He contends that the applicants have failed to demonstrate substantial loss that they will suffer if the orders are not granted and that they have not placed before court any documentary evidence to substantiate the claim of loss or financial difficulty that will be occasioned by them if they are evicted. He avers that the applicants are intent on delaying him from enjoying the fruits of the judgment.
5. At the hearing of the application, Ms. Nyandoro, learned counsel holding brief for Ms. Sagwa for the respondent, submitted that the applicants can deposit their titles or the sum of Kshs. 5 million as security. Mr. Nyamurongi for the applicants did not see any basis for this and was of opinion that it will suffice if the applicants are bonded not to interfere with the title or waste the land. I have taken note of these submissions.
6. This being an application for stay pending appeal, I stand guided by the provisions of Order 42 Rule 6 (2) which provides as follows:
 - 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.
7. From the above, three issues emerge, being :-
 - (i) That the application has been made without unreasonable delay;
 - (ii) That the applicant satisfies the court that she stands to suffer substantial loss if the order for stay is not made;
 - (iii) That there is provision of security as the court may order for the due performance of the decree.
8. On the aspect of delay, the application was filed on 15 November 2023 which was less than one month from the date of judgment and within the 60 days given to give vacant possession. There is therefore no delay. On substantial loss, the applicants stand to be evicted and may thus suffer substantially. The only issue left is security. If stay is granted, it means that for the duration of the appeal, the applicants will remain in the suit land and derive benefit from it to the detriment of the respondent. If the applicants lose the appeal there is no way the respondent will recoup the loss he will have suffered for not being able to use the suit land while the appeal was pending. It is thus only fair that some amount of money be deposited as security to address any loss that will be occasioned to the respondent for not using the land during the pendency of the appeal. From the evidence that was before me the estimated area which is in dispute is about 0.115 Ha which is just about $\frac{1}{4}$ of an acre. The land is agricultural land which I believe is more or less used for subsistence. I do not have the benefit of information of the profit that



such land can provide. However, doing the best I can I will estimate an amount of Kshs. 100,000/= per year and again estimate a period of two years for the hearing of the appeal. I think that the respondent can be sufficiently compensated if this sum of Kshs. 200,000/=, together with taxed costs, is deposited as security and availed to him in the event that the applicants lose their appeal.

9. I will thus allow a stay of execution subject to the applicants depositing in a joint interest earning account, or in court, the amount of Kshs. 200,000/= within 60 days from today and also deposit in court, or in the same joint interest earning account, the taxed costs within 60 days of taxation. If such monies are not deposited as ordered above then the applicants will proceed with their appeal without the benefit of an order of stay of execution pending appeal.
10. The costs of this application will be costs in the appeal.
11. Orders accordingly.

DATED AND DELIVERED THIS 13 DAY OF MARCH 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

Delivered in the presence of:

Ms. Kebungo holding brief for Mr. Nyamurongi for the 2nd/3rd/4th & 6th Defendants/Applicants

Ms. Nyandoro present for the respondent/plaintiff holding brief for Ms. Sagwa

Court Assistant – David Ochieng'

