



**Joseph v Orodi - Deceased (Sued through the administrator of his Estate
Charles Odhiambo Gundo & 11 others) (Environment and Land Appeal
E020 of 2023) [2024] KEELC 1302 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1302 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E020 OF 2023
SO OKONG'O, J
MARCH 7, 2024**

BETWEEN

MARTHA AYIEKO JOSEPH APPELLANT

AND

**EVANS GUNDO ORODI - DECEASED (SUED THROUGH THE
ADMINISTRATOR OF HIS ESTATE CHARLES ODHIAMBO GUNDO & 11
OTHERS) RESPONDENT**

RULING

1. What is before the court is the Appellant’s application brought by way of a Notice of Motion dated 22nd May 2023 seeking a stay of execution of the judgment and decree made by Hon. P.K.Rugut SRM on 27th April 2023 in Tamu CMC ELC NO. E05 of 2018 (hereinafter referred to only as “the lower court”) pending the hearing and determination of the appeal herein. The application is supported by the affidavit of the Appellant.
2. The Appellant was at all material times the registered proprietor of all those parcels of land known as Title No. KisumuKoru706 and Tile No. KisumuKoru1279 (hereinafter individually referred to as “Plot No. 706” and “Plot No. 1279” respectively and together as “the suit properties”). Plot No. 706 is a subdivision of Title No. KisumuKoru360 (Plot No. 360) which was owned by the 1st Respondent. The subdivision of Title No. KisumuKoru360 gave rise to KisumuKoru705 (Plot No. 705) and KisumuKoru706 (Plot No. 706). Plot No. 705 was subdivided into Title No. KisumuKoru1279 (Plot No. 1279) and Title No. KisumuKoru1280 (Plot No. 1280). The 1st Respondent sold Plot No. 706 and Plot No.1279 to the Appellant and Plot No. 1280 to the 2nd to 11th Respondent who divided the same amongst themselves.
3. The Appellant claimed that the 2nd to 11th Respondents had trespassed on the suit properties owned by the Appellant. The Appellant filed the lower court suit against the 1st and the 2nd to 11th Respondents



- to restrain the said acts of trespass. The 1st Respondent filed a defence and a counter-claim against the Appellant claiming that the acquisition of the suit properties by the Appellant was fraudulent, null and void. The 2nd to 11th Respondents filed a defence in which they denied the Appellant's claim and also contended that the acquisition of the suit properties by the Appellant was fraudulent.
4. In a judgment delivered on 27th April 2023, the lower court dismissed the Appellant's suit against the Respondents and allowed the 1st Respondent's counter-claim against the Appellant. The lower court ordered the Land Registrar to hive off 2.5 acres from the Appellant's parcel of land, Plot No. 706 and 3.9 acres from the Appellant's parcel of land, Plot No. 1279 and allocate the same to the 1st Respondent. The lower court also ordered the Land Registrar with the help of a surveyor to align the boundary between Plot No. 706 belonging to the Appellant and Plot No. 1280 belonging to the 1st to 11th Respondents. The Land Registrar was also ordered to rectify the registers of the affected parcels of land accordingly.
 5. The Appellant was aggrieved by the said judgment of the lower court and filed the present appeal. In her application before the court, the Appellant averred that her appeal had overwhelming chances of success. The Appellant averred that the Respondents had started the process of executing the lower court judgment which would result in the Appellant being dispossessed of her land that she had occupied for over 3 decades. The Appellant averred that her appeal would be rendered nugatory if the stay sought was not granted. The Appellant averred further that the Respondents would not suffer any prejudice if the stay sought was granted since the same would not interfere with the occupation of their respective parcels of land.
 6. The application was opposed by the 1st to 11th Respondents (the Respondents) through a replying affidavit sworn by the 1st Respondent, Charles Odhiambo Gundo. The Respondents averred that the Appellant "stole" Plot No. 1279 from the 1st Respondent. The Respondents averred that the suit properties were larger than what the Appellant claimed to have purchased from the 1st Respondent a fact that was found by the lower court to be true. The Respondents averred that the Appellant was unable to explain how the suit properties increased in size. The Respondents averred that the surveyors who visited the suit properties at the request of the Appellant found that on the ground, Plot No. 706 exceeded the land which the Appellant claimed to have purchased from the 1st Respondent by 2.5 acres and Plot No. 1279 exceeded the land allegedly purchased by the Appellant by 3.6 acres. The Respondents averred that the Appellant's appeal was frivolous and had no prospects of success.
 7. The application was argued by way of written submissions. The Appellant filed submissions dated 14th December 2023 while the 1st to 11th Respondents filed submissions dated 26th February 2024. I have considered the application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the 1st to 11th Respondents in opposition to the application. Finally, I have considered the submissions by the advocates for the parties.
 8. The Appellant's application was brought principally under Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6(1) and (2) of the [Civil Procedure Rules](#) provides that:
 6.
 - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such



order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

- (2) No order for stay of execution shall be made under sub-rule (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 ultimately be binding on him has been given by the applicant.

9. In *Kenya Shell Limited v. Karuga* (1982 – 1988) I KAR 1018 the court stated that:

It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions 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.”

10. I am persuaded that the Appellant’s application was brought without unreasonable delay contrary to the submissions by the 1st to 11th Respondents. The judgment of the lower court was delivered on 27th April 2023 and the present stay application was filed on 24th May 2023. A delay of less than a month in the circumstances cannot be said to be unreasonable. I am also satisfied that the Appellant is likely to suffer substantial loss if the stay sought is not granted. It is not disputed that the Appellant is registered as the proprietor of the suit properties. It is also not disputed that in the judgment of the lower court which is the subject of this appeal, the court has ordered that portions of the suit properties measuring a total of 6.4 acres be excised and transferred to the 1st Respondent. The effect of this order is that unless the stay sought is granted, the Appellant risks losing 6.4 acres of the land currently registered in her name. Once the said portions of the suit properties are registered in the name of the 1st Respondent, nothing would stop the 1st Respondent from disposing of the same to third parties. In the circumstances, there is a real possibility of the said portions of the suit properties being put beyond the reach of the Appellant if the stay sought is not granted. On the issue of security, the Appellant has stated that she is willing to abide by any order on security that the court may make as a condition for granting the stay sought.
11. The foregoing would have been sufficient to dispose of the application. However, the 1st to 11th Respondents have raised another issue that I need to respond to. The 1st to 11th Respondents have contended that the application before the court is incompetent because the same should have been filed in the lower court in the first instance. I do not agree with the 1st to 11th Respondents’ interpretation of Order 42 Rule 6(1) of the *Civil Procedure* reproduced above. In my view, the rule gives a party against whom judgment has been entered in the lower court and who intends to appeal against the same a right to seek a stay of execution of that judgment in the lower court or in the court to which the appeal has been preferred. Where an application for stay is made in the lower court and the same is not granted, the appellant has a right to file a similar application before the court to which the appeal has been preferred. The rule does not require that an application for a stay be filed in the lower court in the first instance. The 1st to 11th Respondents did not cite any authority in support of this novel argument.



Conclusion

12. The upshot of the foregoing is that the Appellant's Notice of Motion application dated 22nd May 2023 has merit. The application is allowed in terms of prayer 3 thereof. There shall however be an inhibition inhibiting the registration of any other or further dealings with Title No. KisumuKoru706 and its subdivisions, KisumuKoru1955-1960, and Title No. KisumuKoru1279 pending the hearing and determination of the appeal or further orders by the court. The Appellant shall deposit in an interest-earning bank account in the joint names of the advocates on record for the parties a sum of Kshs. 500,000- as security within 60 days from the date hereof in default of which the stay granted herein shall stand discharged without any further reference to the court. The costs of the application shall be in the cause.

DELIVERED AND DATED AT KISUMU ON THIS 7TH DAY OF MARCH 2024

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Odeny for the Appellant

Mr. Otieno D. for the Respondents

Ms. J.Omondi-Court Assistant

