



REPUBLIC OF KENYA



KENYA LAW
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**Owano v Jera (Environment and Land Appeal E015 of 2023)
[2024] KEELC 1389 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1389 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E015 OF 2023
GMA ONGONDO, J
MARCH 7, 2024**

BETWEEN

DENNIS OKUMU OWANO APPELLANT

AND

NATHANIEL OYUGI JERA RESPONDENT

RULING

1. In an application by way of a Notice of Motion dated 9th November 2023, the applicant/appellant, Dennis Okumu Owano through Madoro Khairalla and Company Advocates, is seeking the following orders;
 - a. Moot
 - b. The Honourable Court do issue an order of stay of execution of the judgement of Hon. Nicodemus Moseti delivered on 21st June, 2023 pending the hearing and determination of this appeal.
 - c. The Honourable court do issue an order quashing the most recent decision of Honourable Magistrate made on 6th day of November, 2023 committing the appeal herein this case to civil jail.
 - d. The Honourable Court do issue an order to the HomaBay Remand Prison to release the appellant herein James Okumu Owano from the Remand Prison.
 - e. The cost of the application be in the cause.
2. The anchorage of the application is the applicant's supporting affidavit of twelve paragraphs sworn on even date and grounds 1 to 6 set on the face of it. In a nutshell, the applicant laments that the trial court delivered judgment on 21st June 2023 and that on 6th November 2023, the court decided to commit the applicant who is old and sickly, to civil jail during the pendency of this appeal which was originated



- by the memorandum of appeal dated 18th October 2023 herein. That the respondent has threatened to invade the suit property, title number Lambwe West B/1323 and that the applicant is likely to suffer irreparably thereby hence, the application is not merited.
3. The respondent, Nathaniel Oyugi Jera through Aluoch Odera and Nyauke Advocates, opposed the application by grounds of opposition dated 5th December 2023 thus;
 - a. The Application lacks merit, is scandalous and is an abuse of the court process.
 - b. It offends order 42 of the civil procedure rules as it proposing to proceed with an appeal without deposit of security.
 - c. The same application is an abuse of the court process as it is only coming in to stay execution without offering how decree should be settled.
 - d. The application is an afterthought and an abuse of court process.
 4. In a further affidavit in opposition to the application sworn on 6th February 2024 by the respondent, there is an document annexed thereto and marked as “001” being a court order given on 5th January 2024 which indicates the terms of consent entered into between the applicant and himself before the trial court. That the circumstances under which a consent can be set aside are well settled and none is present in the instant case. That the application is not tenable and amounts to an abuse of the process of the court.
 5. On 14th December 2023, the court directed that hearing of the application be by way of written submissions.
 6. Be that it may, the applicants’ counsel and the respondent’s counsel did not file and serve submissions. There is a set of undated submissions by the applicant’s counsel not uploaded in the e-filing platform.
 7. I have duly considered the entire application, the grounds of opposition, and the further affidavit. Therefore, is the applicant entitled to the orders sought in the application?
 8. Stay of execution sought in the application is governed by Order 42 Rule 6 (4) of the Civil Procedure Rules, 2010 which provides for triple conditions thereof namely; substantial loss, delay and security for the due performance of decree or order as may ultimately be binding on the applicant. The conditions are cumulative in nature as noted in the case of *Trust Bank Ltd-vs-Ajay Shah and 3 others* (2019) eKLR.
 9. On substantial loss, the applicant stated that he is likely to suffer irreparably if the application is not allowed. I bear in mind that substantial loss is the cornerstone of the jurisdictions for granting a stay of execution and that is what has to be prevented; see *Kenya Shell Ltd-vs-Benjamin Karuga Kibiru and another* (1986) eKLR.
 10. As pertains to delay, time is stipulated under Order 50 of the *Civil Procedure Rules*, 2010. There was a delay of three (3) months and 10 days to mount the instant application as it was filed on 9th November 2023 while the trial court delivered judgment on 21st June 2023. Any delay must demand a plausible and satisfactory explanation as held in *Andrew Kiplangat Chemaringo-vs-Paul Kipkorir Kibet* (2018) eKLR.
 11. Furthermore, delay for a day will result in dismissal of the application in question if not explained by the applicant; see *Raphael Musila Mutiso & 3 others-vs-Joseph Ndava Nthuka and another* (2019) eKLR.
 12. Concerning security, the same is within the discretion of the court. A property of duly assessed value may be security for a bank to issues a banker’s bond for the sum due to the respondent as observed in



the case of *Halai and Another-vs-Thorton & Turpin* (1963) Ltd (1990) eKLR. The applicant has not offered any such security or at all in the application.

13. Besides, the consent order entered into before the trial court in the presence of counsel for the respective parties herein was to the effect, inter alia, that the judgment debtor/appellant having paid kshs. 15, 000 as part of outstanding decretal amount was to be released from prison upon identification to pay a further Kshs.15, 000/= on or before 19th January 2024. Thereafter, the judgment debtor was to make payment of Kshs.25, 000/= on each succeeding day of each month commencing on 5th February 2024 until the whole decretal sum shall be paid. That failure to comply with any term of the consent, the whole outstanding amount shall become due and payable in one whole execution.
14. Clearly, the parties are bound by the terms of the said consent order which can only be set aside on the same grounds as would justify the setting aside a contract as held in *Brooke Bond Liebeg (T) Ltd-vs-Mallya* (1975) EA 266 and *Flora Wasike-vs-Destimo Wamboko* (1988) KLR 429. Hitherto, there is nothing availed in the application to disclose coercion, fraud or undue influence in regard to the terms of the consent as noted in *National Bank of Kenya Ltd-vs-Pipe Plastic Samkolit Ltd and another* (2002) EA 503.
15. To that end, it is the finding of this court that the applicant was committed to civil jail further to the trial court's judgment and the subsequent consent order in execution of the decree thereof. There is no basis for suspending the right of the respondent who is the successful litigant to enjoy the fruits of the judgment in the suit as fortified by the consent order which has not been set aside
16. Thus, the application dated 9th November 2023 is devoid of merit. The same be and is hereby dismissed with costs to abide the outcome of this appeal.
17. It is so ordered

DATED AND DELIVERED AT HOMA BAY THIS 7TH DAY OF MARCH 2024

G M A ONG'ONDO

JUDGE

Present;

- a. Mr. K. Madoro learned counsel for the applicant
- b. Mr. S Nyauke learned counsel for respondent
- c. T. Luanga, court assistant

