



Okech v Dado & 2 others (Suing as the Administrator of the Estate of David Tado Nyabola); District Lands Registrar, Busia (Interested Party) (Environment and Land Appeal E004 of 2023) [2024] KEELC 1216 (KLR) (7 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1216 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND APPEAL E004 OF 2023
BN OLAO, J
MARCH 7, 2024

BETWEEN

MATHEWS TONADO OKECH APPELLANT

AND

JUSTUS NAMENYA DADO 1ST RESPONDENT

HERBERT TINTIN DADO 2ND RESPONDENT

ANTONY OKOBWA DADO 3RD RESPONDENT

**SUING AS THE ADMINISTRATOR OF THE ESTATE OF DAVID TADO
NYABOLA**

AND

DISTRICT LANDS REGISTRAR, BUSIA INTERESTED PARTY

(Arising out of the ruling of Hon Edna Nyaloti Chief Magistrate in Busia Chief Magistrate's Court ELC NO E7 of 2023 dated 31/10/2023 and delivered on 7/11/2023)

RULING

1. The dispute between Mathews Tonado Oketch (the Applicant herein) and Herbert Tintin Dado, Justus Namenya Dado, and Antony Okobwa Dado (the Respondents herein) over the ownership of the land parcel No Bukhayo/Bugengi/1190 (the suit land) is still pending determination before the Chief Magistrates Court in Busia.
2. Meanwhile by a Notice of Motion dated 6th December 2022, the Respondents sought the main order that the Applicant be enjoined from demolishing, carrying out any construction, excavation, building fencing, farming, cutting down trees, charging selling or carrying out any activities on the suit land



pending the hearing and determination of the suit. That application was allowed vide a ruling delivered by Hon. Edna N. Nyaloti on 31st October 2023. At this point, I wish to state that the said ruling is also dated 7th November 2023 and also bears the name of one Wilmina Odima as a plaintiff yet she was not a party in the plaint dated 6th December 2022 as filed in the trial Court. I shall address those discrepancies later in this ruling since they have been highlighted by the Applicant.

3. Aggrieved by that ruling injuncting him from using the suit land, the Applicant filed a Memorandum of Appeal dated 14th November 2023. That appeal has already been admitted to hearing.
4. Meanwhile, by a Notice of Motion dated 14th November 2023, the Applicant, citing the provisions of Sections 1, 1B, 3 and 3A of the Civil Procedure Act, Order 42 Rules 5, 6 and 7 of the Civil Procedure Rules and Article 159(2) of the Constitution has approached this Court seeking the following orders:
 1. Spent
 2. Spent
 3. That an order be issued for stay of execution of orders in Busia CM ELC Case No. E7 of 2023 dated and pronounced on 31/10/2023 pending the hearing and determination of the appeal.
 4. Spent.
 5. That an order of stay of proceedings in Busia CM ELC Case No E7 of 2023 pending the hearing and determination of the appeal.
 6. That in any event the Honourable Court be pleased to issue any conservatory orders pending the hearing and determination of the appeal.
 7. The costs of this application be provided.
5. The application is premised on the grounds set out therein and is also supported by the affidavit of the Applicant herein.
6. The gravamen of the application is that the ruling subject of the pending appeal has apparent errors on its face since it is dated and stated to have been pronounced on 31st October 2023 whereas it was delivered on 7th November 2023 and in the absence of all the parties. That the ruling granted orders in favour of one Wilmina Odima who was never a party in the suit hence muddling up of the proceedings. That the orders issued in the ruling are inexecutable since the parcel of land talked about does not exist at all to wit the suit land and the Applicant has timeously filed his appeal within three (3) days of the impugned ruling. The Applicant is afraid that the Respondents may go ahead and commence execution process which may prejudice him and occasion irreparable loss and damage as the orders will affect land that does not exist and which is not the subject of this suit. That the Respondents may succeed in executing the said orders before the hearing and determination of the appeal thus rendering the same nugatory as it will affect a separate title registered in his names but which is not the subject of this suit. That he is willing to abide by any conditions which this Court may grant and also prepare the record of appeal within seven (7) days so that the appeal can be determined in good time.
7. Annexed to the application are the following documents:
 1. Copy of ruling delivered in Busia Chief Magistrate's Court ELC Case No E7 of 2023 on 31st October 2023 but also dated 7th November 2023.
 2. Memorandum of Appeal dated 14th November 2023.



8. In response to the application, the defendants filed both a Notice of Preliminary Objection dated 1st December 2023 and a replying affidavit by Antony Okobwa Dado the 3rd defendant also dated 1st December 2023.
9. In their Preliminary Objection, the defendants question the jurisdiction of this Court to determine the appeal herein. They state that the Applicant has not annexed in his record of appeal the order from which they appeal.
10. In the replying affidavit, the 3rd defendant has averred, inter alia, that he is the Administrator to the Estate of one David Tado Nyabola who is the registered proprietor of the suit land having purchased the same in 1981. That the Applicant has without any legal right entered into the suit land and constructed a temporary structure thereon. That the Respondents then filed the suit in the subordinate Court and sought orders of injunction which were granted thus prompting the appeal herein.
11. That the Applicant has erroneously averred that the ruling is in favour of one Wilmina Odima who is not a party to this suit and that is only typographical error.
12. That the application is incompetent as the Applicant has not offered any security nor established that he has a good appeal. In any case, the order by the subordinate Court is not adverse to the Applicant nor prejudicial to him in any way since it only prevents him from interfering with the suit land pending the hearing of the suit. On the other hand, the Respondents have a good case with chances of success. That the substantive appeal is defective as raised in the Preliminary Objection. This application is therefore frivolous, vexatious and an abuse of the process of the Court.
13. The following documents are annexed to the replying affidavit:
 1. Copy of Authority to act signed by the 1st and 2nd defendants in favour of the 3rd defendant.
 2. Copy of the title deed in respect to the suit land.
 3. Copy of the Grant of Letters of Administration issued to the 3rd defendant in respect to the Estate of David Tado Nyabola.
 4. Copy of the Notice of Preliminary Objection.
14. The Land Registrar Busia who is named as an Interested Party in these proceedings did not file any response to the application. However, submissions were filed on behalf of the said Interested Party by Mr Gilbert Tarus Senior State Counsel on behalf of the Attorney General.
15. The application has been canvassed by way of written submissions. These have been filed both by Mr Okutta instructed by the firm of Ouma-okutta & Associates Advocates for the Applicant, Mr Sala instructed by the firm of Sala & Mudany Advocates for the Respondents and Mr Tarus Senior State Counsel on behalf of the Attorney General for the Interested Party.
16. I have considered the application, the rival affidavits and the submissions by counsel.
17. Before I delve into the merits or otherwise of the application, there are a few issues that I need to address.
18. First, the District Land Registrar Busia has been named as an Interested Party in this application as well as in the pending appeal. However, I have perused the original plaint in Busia Chief Magistrate's Court ELC Case No E7 of 2023 and found that the said District Land Registrar Busia was in fact the 2nd defendant while the Applicant was the 1st defendant. It is not clear how the District Land Registrar mutated from being a 2nd defendant to an Interested Party. Besides, there would be no basis upon which the said District Land Registrar would have an interest in what appears to me to be a dispute over



private property between the Applicant and Respondents. Perhaps that is a typographical error which the parties will at the appropriate time have sorted out.

19. Secondly, and another obvious typographical error, is the naming of one Wilmina Odima as a plaintiff in the ruling delivered by the trial Court on 31st October 2023. The said Wilmina Odima is not named as a plaintiff in the plaint filed in the trial Court. Indeed in his replying affidavit, Antony Okobwa Dado the 3rd defendant, has deposed in paragraphs 7 and 8 as follows:

7:

“That the Applicant in his supporting affidavit erroneously avers that the ruling is defective as it is issued in favour of one Wilmina Odima who is not a party to this suit. This is (sic) averment is unfounded as the said person is not mentioned anywhere in the ruling and the said orders are not issued against him.”

8:

“That this is clearly a typographical error that has no bearing on the case at hand whatsoever.”

20. The above averments were in response to the supporting affidavit by the Applicant in which he deposed at paragraph 6 as follows:

6:

“That also, the same ruling granted orders in favour of on (sic) Wilmina Odima who was never a party to the suit hence the muddling of proceedings.”

21. It is trite law that it is the pleadings which determine who the parties in a suit are and the remedies sought by them. As I have already stated above with regard to the District Land Registrar Busia, he was named in the plaint dated 6th December 2022 and filed in the trial Court as a 2nd defendant but not as an Interested Party. Indeed that is how that office is designated in the ruling by the trial Court. The said District Land Registrar Busia appears to have been designated as an Interested party in the Memorandum of Appeal. That must be rectified by counsel for the Applicant.

22. Thirdly the ruling which is the subject of this application has two dates in the final paragraphs and reads:

“Dated, Signed and Pronounced In Open Court at Busia Law Court this 31st Day of October 2023 in the Absence of the Parties.

E. A. Nyaloti

Chief Magistrate

Busia Law Courts

7/11/2023”

The above has elicited the following observation from the Applicant in paragraph 5 of his supporting affidavit:



5:

“That the said ruling has apparent error on its face, for instance, same is dated and stated to have been pronounced on 31/10/2023 whereas the actual delivery was on 7/11/2023 in the absence of all parties.”

The ruling therefore have two dates i.e. 31st October 2023 and 7th November 2023. Order 21 Rule 3(1) and (2) of the [Civil Procedure Rules](#) provides that:

3(1)

“A judgment pronounced by the judge who wrote it shall be dated and signed by him in open Court at the time of pronouncing it.”

(2)

“A judgment pronounced by a judge other than the judge by whom it was written shall be dated and counter-signed by him I open Court at the time of pronouncing it.”

The term Judge is defined in Section 2 of the [Civil Procedure Act](#) as:

“... the presiding officer of a Court.”

The provision of Order 21 Rule 3 of the [Civil Procedure Rules](#) must apply mutatis mutandis to the dating and signing of rulings and the reference to a judge includes a magistrate. Therefore, the only time a judgment or ruling can have two different dates is when it is written by one officer and delivered subsequently by another.

23. In this case, it is not clear why the ruling is indicated as having been “dated signed and pronounced in open Court at Busia on this 31st day of October 2023” but also has the date “7/11/2023” at the end. The date of 7th November 2023 was really not necessary because the ruling was delivered by the same magistrate who heard the application for injunction. I am prepared to find, which I hereby do, that the correct date on which the ruling was delivered was on 31st October 2023 and not 7th November 2023 which was an error. I am also prepared to find that the inclusion of one Wilmina Odima as a plaintiff was a typographical error as is the inclusion of the District Land Registrar Busia as an Interested Party in the Notice of Motion the subject of this ruling. Since the substantive suit is still pending hearing in the subordinate Court, the trial magistrate shall ensure, in terms of the provisions of Section 100 of the [Civil Procedure Act](#), that appropriate amendments are made to reflect the correct parties and dates.
24. I shall now consider the merits or otherwise of the application.
25. It is clear that the subject of the pending appeal before this Court is the ruling delivered on 31st October 2023 by which the trial magistrate granted an injunction in favour of the Respondents restraining the Applicant by his employees, servants, workers and/or agents from dealing with the suit land pending the hearing of the substantive suit in the subordinate Court. The Applicant has annexed a copy of the ruling and pending the hearing and determination of that appeal, he has approached this Court seeking the orders cited above. These are:
 1. Stay of execution of the orders issued on 31st October 2023 in Busia CMC ELC Case No E7 of 2023 pending the hearing and determination of the appeal.



2. Stay of the proceedings in Busia CMC ELC Case No E7 of 2023 pending the hearing and determination of the appeal.

I shall first consider the prayer for stay of proceedings in Busia CMC ELC Case No E7 of 2023 pending the hearing and determination of the appeal. This is because, if I allow it, then there will be no need to consider the prayer for application for stay of execution pending appeal.

Stay of Proceedings In Busia CMC ELC Case No E7 of 2023 Pending the Hearing and Determination of the Appeal.

26. In the case of *William Odhiambo Ramogi & 2 Others –v- The Attorney General & Others, Muslims For Human Rights (Interested Parties)* 2020 eKLR, the Court identified the following principles to guide a Court considering an application for stay of proceedings pending the hearing and determination of an appeal over an interlocutory application:
 - a. First, there must be an appeal pending before the higher Court.
 - b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the appeal has been filed and there is no express provisions of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with it's docket and is therefore in a position to calibrate any order it gives accordingly.
 - c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable.
 - d. Fourth, the Applicant must demonstrate that the appeal would be rendered nugatory if the stay of proceedings is not granted.
 - e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal, and
 - f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.

In the case of *Global Tours & Travel Ltd* (Nairobi High Court Winding Up Cause No 43 of 2000), Ringera J (as he then was) described that remedy as follows:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice ... sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.” Emphasis mine.



27. Guided by the above, it is clear from the record that the Applicants timeously filed his appeal on 14th November 2023 some 14 days after the ruling was delivered. There is therefore a pending appeal before this Court which empowers the Court to grant the remedy of stay of proceedings. This Court is therefore in a position to calibrate the order for stay of proceeding pending appeal. Even as I do so, I must bear in mind that at this point, the appeal itself is still pending and I should avoid making any comments that may embarrass the Court which will hear and determine it. All that this Court needs to consider now, as was held by the Court of Appeal in the case of [UAP Insurance Company Ltd -v- Michael John Beckett](#) 2004 eKLR, is that the Applicant has an arguable appeal which is not frivolous and may be rendered nugatory if the proceedings are not stayed. An arguable appeal need not be one that must succeed. The Applicant only needs to demonstrate that he has a prima facie arguable appeal. I have looked at the record herein and particularly the register of the land parcel No Bukhayo/Bugengi/1190 and among the issues that the Court will have to determine in the pending appeal is whether infact that land parcel was in existence on 31st October 2023 when the impugned ruling was delivered. Clearly, that is a substantial question rendering the appeal arguable.

28. In his submissions, counsel for the Respondents appears to be acting on the basis that this Court is considering the substantive appeal. For instance, counsel has cited the case of [Flois Pierro & Another v Giancarlo Falasconi](#) 2014 eKLR and submitted thus;

“ ... an appeal that fails to include the extracted order or decree appealed from is incurable and the only recourse available is to strike it out as the order or decree appealed form is a primary document in terms of Rule 87(1)(h) of this Court’s Rules and must form party and parcel of the record of appeal ...”

Counsel then adds that:

“We therefore humbly submit that the appeal herein is incompetent and ought to be dismissed with costs as the appellant failed to attach the decree that he appeals from.”

This Court is not handling the appeal at this stage. What is before me is an interlocutory application for stay of proceedings. The appeal has been admitted but is yet to be canvassed. Indeed no directions have been taken as yet. In any event, I have looked at the record of appeal filed and the impugned ruling forms part of it. It is infact the last document in the record appearing at pages 105 to 108 of the same. However, as I have already stated above, this Court is not considering the appeal at this stage.

29. As I have already stated above, the existence of the suit land and which is the substratum of the dispute between the parties has been brought into focus. In his submissions, counsel for the Applicant has stated in paragraph 8 as follows:

8:

“Whereas it can be argued that since the Title subject Bukhayo/Bugengi/1190 ceased to exist long before suit was filed and that the instant Applicant was not the registered owner as at the time of filing suit and issuance of injunctive orders, a Court order lacking in specification and incapable of execution is a dangerous tool in the hands of alleged aggrieved party who the Respondents are.”

Clearly, the claim that the suit land is no longer in existence not only renders the appeal arguable but also demonstrates that if the order of stay is not granted, the appeal will be rendered nugatory. Further, these are exceptional circumstances which make the order for stay of proceedings warranted rather than



having the case concluded. There is also no doubt that the Applicant moved to this Court expeditiously in filing this application.

30. In *Halsbury's Laws of England* 4th Edition Vol. 37, the authors at page 330 state that:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore, the Court’s general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond reasonable doubt, ought not to be allowed to continue. This is a power which, it has been emphasized ought to be exercised sparingly and only in exceptional cases ... it will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The Applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of this case.”

I have perused the Memorandum of Appeal dated and filed on 14th November 2023. The first ground of appeal reads:

1:

“That the learned Honourable Magistrate misdirected herself in fact and law in failing to appreciate that temporary injunctive orders cannot issue against the Appellant for entry, occupation and disposal of a land title Bukhayo/Bugengi/1190 which title does not exist.”

Whether or not the title exists, as I have already stated above, is a matter which shall be determined in the pending appeal. I am however persuaded that that single issue is a bonafide arguable ground of appeal which warrants the grant of an order of stay of proceedings. This is a discretionary power exercisable by the Court upon consideration of the facts and circumstances of each case. The facts and circumstances in this case justify the exercise of this Court’s discretion in favour of the Applicant.

31. The prayer for stay of proceedings pending appeal is well merited.

2. Stay of Execution of the Orders Issued on 31st October 2023 in Busia CMC ELC Case No E7 of 2023 Pending the Hearing and Determination of the Appeal.

32. The view I take of this prayer is that having allowed the prayer for stay of proceedings pending the determination of the appeal, it would be superfluous for this Court to consider this prayer. The word “stay”, which is prominent in both prayers, is defined in *Black's Law Dictionary* 10th Edition as:

“The postponement of halting of a proceeding, judgment or the like. An order to suspend all or part of a judicial proceedings or judgment resulting from that proceeding – Also termed stay of execution; suspension of judgment.”

Therefore, having granted the order for stay of proceedings pending appeal, it is clear to me that the prayer for stay of execution has been subsumed in the previous order and does not require any further consideration. Once the proceedings have been stayed, it means that any action premised upon those proceedings cannot continue. That includes any execution process emanating from those proceedings. Everything in the case is brought to a halt. That is why I consider that a determination of the prayer for stay of execution pending the hearing and determination of the appeal is superfluous.



33. Having said so, however, the order for stay of execution pending appeal would not have been available to the Applicant in the circumstances of this case. This is because, all that the trial Court did was to injunct the Applicant from demolishing, carrying out any construction fencing, cutting down trees or selling the suit land. That was a negative order incapable of execution by the Respondents – see *Western College of Arts & Applied Sciences -v- Oranga & Others* 1976 eKLR 63. See also *Kanwal Sarjit Singh Dhiman -v- Keshavji Jivraj Shah* 2008 eKLR. Therefore, if the Applicant had only sought the remedy of stay of execution pending appeal, it is unlikely that the Court would have allowed it.
34. I have considered the notice of Motion dated 14th November 2023 and found it meritorious. The following disposal orders are hereby made in determination of the same:
1. An order of stay of all proceedings, in Busia CM ELC Case No E7 of 2023 is issued pending the hearing and determination of the appeal.
 2. As the record of the trial Court has been availed and the record of appeal filed, the appeal shall be mentioned on 13th March 2024 for directions.
 3. Costs of this application shall abide by the appeal.

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL WITH NOTICE TO PARTIES ON THIS 7TH DAY OF MARCH 2024.

BOAZ N. OLAO

JUDGE

