



Ogega & 3 others v Oyaró (Suing as Legal Representative of Thomas Oyaró Ondange – Deceased) (Environment and Land Appeal E001 of 2023) [2024] KEELC 1199 (KLR) (7 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1199 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL E001 OF 2023**

**M SILA, J
MARCH 7, 2024**

BETWEEN

**NYACHIEO OGEGA 1ST APPELLANT
OGENCHE OGEGA 2ND APPELLANT
SALOME OGEGA 3RD APPELLANT
OIGO OGEGA 4TH APPELLANT**

AND

NIXON MWANDA OYARO (SUING AS LEGAL REPRESENTATIVE OF THOMAS OYARO ONDANGE – DECEASED) RESPONDENT

RULING

1. The application before me is that dated 4 December 2023 filed by the appellants. The application as drafted seeks orders of stay of execution of the ruling delivered by the Magistrates’ Court on 15 November 2023 in the suit Kisii CMCC (ELC) No. 210 of 2018 pending hearing of this appeal. The ruling referred to was a ruling on an application for a stay of execution pending appeal that was filed by the applicants herein and heard by the trial court, vide which the trial court ordered that the applicants do deposit the sum of Kshs. 200,000/= as condition for stay pending appeal within 21 days, failure of which the stay would lapse.
2. Pursuant to Order 42 Rule 6 (1) where there has been a previous application before the trial court for stay pending appeal, and a party is not satisfied with it, what the party ought to do is file an application to the appellate court to set aside that order and to have the appellate court make its own orders regarding the application for stay pending appeal. The said law is drafted as follows:-



- (1) 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.
3. Thus, the application really ought not to have been drafted as one seeking stay of the ruling of 15 November 2023 but one seeking to set it aside and for this court to consider afresh the application for stay of execution pending appeal. It is on the above basis that I will consider the application and not in the manner in which it is drafted.
4. The applicant has annexed a copy of the judgment appealed from and I can see that the respondent had sued the applicants seeking the applicants to be evicted from the land parcel Nyaribari Chache/B/B/Boburia/3981 (the suit property), a permanent injunction to restrain them from the suit land, general damages for trespass, compensation for destruction of trees and costs. The applicants filed defence and counterclaim, contending that the respondent obtained title by way of fraud and his title ought to be cancelled, and for him to be permanently restrained from the suit land. The matter proceeded for hearing culminating in a judgment delivered on 19 June 2023. The trial court held in favour of the plaintiff and dismissed the counterclaim of the applicants. The court directed the applicants to give vacant possession in 60 days and be permanently restrained. On the monetary claim, the court awarded Kshs. 14,513/= as cost of damaged trees and a further Kshs. 50,000/= as general damages for trespass together with costs and interest. Aggrieved, the applicants file an appeal to this court and filed an application for stay pending appeal before the trial court. In a ruling delivered on 15 November 2023 the trial court made an order for stay of execution subject to the applicant depositing security of Kshs. 200,000/= within 21 days. The applicants were also directed not to undertake any activity that would lead to wastage of the suit property.
5. I have independently assessed the application and I am not persuaded to set aside the order of the trial Magistrate.
6. The judgment was partly an award of money and partly an order to vacate land. The monetary award devoid of costs was Kshs. 64,513/=. If stay is granted the applicants will continue being on the land to the detriment of the respondent. I come to the same conclusion that an order of deposit of Kshs. 200,000/= as a condition for grant of stay is fair and just which is exactly what the trial Magistrate ordered. Not being persuaded to set aside the order of the Magistrate, stay is granted subject to deposit of Kshs. 200,000/= . I will only extend the period for compliance to sixty (60) days from the date hereof. If the applicants cannot meet these conditions, then they will have to proceed with the appeal while out of the suit land and hope to succeed in order to regain entry.
7. The costs of this application will be costs in the appeal.
8. Orders accordingly.

DATED AND DELIVERED THIS 7 DAY OF MARCH 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII



Delivered in the presence of: -

Mr. Kimaiyo holding brief for Mr. Mose for the applicants.

No appearance on the part of M/s Mochiemo Gichana & Co. for the respondent.

Court Assistant – David Ochieng.

