



Okuku (Administrator of the Estate of the Deceased, Ibrahim Otieno Otange) & 4 others v Odeyo (Environment and Land Appeal E045 of 2023) [2024] KEELC 1288 (KLR) (7 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1288 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E045 OF 2023**

E ASATI, J

MARCH 7, 2024

BETWEEN

DAMAR YUDEMBA OKUKU (ADMINISTRATOR OF THE ESTATE OF THE DECEASED, IBRAHIM OTIENO OTANGE) 1ST APPELLANT
BENSON OLARE OKUMU 2ND APPELLANT
NICHOLAS OTIENO AYANGA 3RD APPELLANT
DAVID ONYANGO AYANGA 4TH APPELLANT
ISAAC OTIENO OKUMU 5TH APPELLANT

AND

JUSTUS OCHIENG ODEYO RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion application dated 8th December 2023 brought by the appellants pursuant to the provisions of sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 42 Rule 6(1) and Order 51 Rule 1 of the *Civil Procedure Rules* 2010. The application seeks for an order of stay of execution of the ruling and decree in Kisumu CM ELC NO. E058 of 2023 Justus Ochieng Odeyo Vs Damar Yudemba Okuku (administrator Of The Estate Of Ibrahim Otange, Deceased) And 5 Others pending the hearing and determination of the appeal herein.
2. The application is based on the grounds that the trial court issued warrants for the arrest of the appellants, that the appellants are reasonably apprehensive that the warrants will be executed to their detriment. That the appellants will suffer substantial loss in the event stay orders sought are not granted. That the application has been brought without delay.



3. The application was supported by the contents of the Supporting Affidavit sworn by David Onyango Ayanga on 8th December 2023 and the annexures thereto and the Further Affidavit sworn by the same deponent on behalf of the rest of the applicants on 15th February 2024.
4. The application was opposed vide the averments in the Replying Affidavit sworn by the Respondent on 29th January 2024.
5. In support of the application, Counsel for the applicant submitted that the applicants were ready to comply with terms that the court will give regarding security.
6. Counsel for the Respondent submitted that the applicants had not demonstrated that they will suffer substantial loss if the order sought is not granted. That the 2nd to 6th applicants have not indicated what they are likely to suffer. That no undertaking had been given for provision of security. That the Further Affidavit is an afterthought. That if the court is inclined to grant the application, then very strict conditions must be given.
7. The grounds for grant of orders of stay of execution of judgements, decrees or court orders are provided for in Order 42 Rule 6(2) of the [Civil Procedure Rules](#) 2010 which provides;
 - “No order for stay of execution may 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 may ultimately be binding on him has been given by the Applicant.”
8. On whether or not the applicants have demonstrated that they will suffer substantial loss, the order appealed against is an order committing the applicants for contempt of court. The applicants aver that warrants for their arrest have been issued.
9. Regarding provision of security for the due performance of such decree or order as may ultimately be binding on him, in [Focin Motorcycle Co. Ltd –vs- Ann Wambui wanguĩ & Another \[2018\]](#) eKLR the court held that it is a mark of good faith and commitment when an Applicant undertakes to provide security as the court will order or even proposes the kind of security he offers. The court stated that:

“My view is that it is sufficient for the Applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security.”

In the case of [HGE vs SM \[2020\]](#) eKLR the court held that the issue of security is discretionary and that it is upon the court to determine the same. I find that the undertaking given in the Further affidavit and applicant’s submissions suffices.
10. In the case of [Butt vs Rent Restriction Tribunal \[1982\]](#) KLR 417 the court held, inter alia, that:
 - “a.) The power of the court to grant or refuse an Application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal



b.) The general principle in granting or refusing a stay is: if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory...”

11. I find that sufficient grounds have been demonstrated for issuance of an order of stay of execution. I find that the application has merit and hereby allow it in terms of prayer 3 thereof on condition that the applicants deposit Kshs.200,000/=, as security for due performance of such decree or order as may ultimately be binding on them, in an interest earning account in the joint names of Counsel for the applicants and Counsel for the Respondent within 30 days hereof, failing which the order of stay of execution granted herein shall lapse. Costs to the Respondent.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 7TH DAY OF MARCH, 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

Akinyi h/b for Odeny for the Applicants.

Mbeka for the Respondent.

