



**Ogle v Sheikh & 7 others (Environment and Land Appeal  
E051 of 2023) [2024] KEELC 3866 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3866 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E051 OF 2023**

**MD MWANGI, J**

**MAY 16, 2024**

**BETWEEN**

**KATRA ABDI OGLE ALIAS RAHMA HUSSEIN ..... APPELLANT**

**AND**

**ABDI AHMED SHEIKH ..... 1<sup>ST</sup> RESPONDENT**

**HUSSEIN ABDULLAHI IBRAHIM ..... 2<sup>ND</sup> RESPONDENT**

**HASSAN ABDI IBRAHIM ..... 3<sup>RD</sup> RESPONDENT**

**HASSAN ISSAK HACHE (EX-CHAIRMAN BOARD OF MANAGEMENT  
AINSWORTH PRIMARY SCHOOL) ..... 4<sup>TH</sup> RESPONDENT**

**ALI JUMA (HEADMASTER AINSWORTH PRIMARY SCHOOL) .... 5<sup>TH</sup>  
RESPONDENT**

**CHAIRPERSON BOARD OF MANAGEMENT AINSWORTH PRIMARY  
SCHOOL ..... 6<sup>TH</sup> RESPONDENT**

**STAREHE SUB-COUNTY DIRECTOR OF EDUCATION ..... 7<sup>TH</sup> RESPONDENT**

**TRUST BANK LIMITED (IN LIQUIDATION) ..... 8<sup>TH</sup> RESPONDENT**

*(In respect of the Appellant’s application dated 30th November, 2023 seeking to stay the execution of the Ruling of the Honourable Becky Cheloti Mulemia (Principal Magistrate) delivered on the 7th November, 2023 virtually, in the Chief Magistrate’s Court at Milimani MCELC/E438/2022)*



## RULING

### Background

1. This Ruling is in respect of the Appellant's application dated 30th November, 2023. The application is expressed to be brought the provisions of order 42 rule 6, order 51 rule 1 as well as Section 1A and 3A of the [Civil Procedure Act](#). The Applicant seeks the following orders, that;
  - a. The Deputy Registrar of this Court to avail before this Court the original Court file –Chief Magistrate's Court at Milimani MCELC/E438/2022- Ahmed Abdi Sheikh vs Katra Abdi Ogle alias Rahma Hussein and Hussein Issak Hache and 2 Others.
  - b. There be stay of execution of the Orders and/or Ruling of the Honourable Becky Cheloti Mulemia (Principal Magistrate) delivered on the 7th November, 2023 virtually, in the Chief Magistrate's Court at Milimani MCELC/E438/2022-Ahmed Abdi Sheikh vs Katra Abdi Ogle alias Rahma Hussein and Hassan Issak Hache and 2 Others pending the lodging, hearing and determination of this Appeal on condition that the Appellant/Applicant do deposit Kshs. 50,000/= in Court.
  - c. Further and other proceedings in the Chief Magistrate's Court at Milimani MCELC/E438/2022- Ahmed Abdi Sheikh vs Katra Abdi Ogle alias Rahma Hussein and Hassan Issak Hache and 2 Others be stayed until the Appellant's intended appeal is lodged, heard and determined.
  - d. The costs of and incidental to this application do abide the result of the intended appeal.
2. The application is grounded on the Supporting Affidavit of Katra Abdi Ogle alias Rahma Hussein deponed on 30th November, 2023 stating inter alia; that the Honourable Becky Cheloti Mulemia delivered a Ruling on 7th November, 2023 issuing a Warrant of Arrest against the deponent and others for committal to civil jail for six (6) months among other orders. Pursuant to the said orders, the Applicants risks being arrested and committed to civil jail.
3. The Applicant argues that the court did not issue a Notice to Show Cause or grant her the opportunity to be heard on sentencing or mitigation. Further, that the court did not exercise its discretion to grant her the option of a fine or an opportunity to purge the contempt.
4. She states that the impugned Ruling was a result of the application dated 17th August, 2023 and faults the Honourable Magistrate for failing to evaluate the evidence tendered in support of and against the said application. That the court failed to equally consider the relevant legal, procedural and factual considerations in the Ruling.
5. She deposes that she seeks to set aside the entire Ruling vide the Memorandum of Appeal filed herein. She avers that she has since requested for a certified copy of the Ruling and Proceedings of the trial court to enable her compile the Record of Appeal. She maintains that the intended appeal has very high chances of success.
6. The Applicant avers that she is ready and willing to abide by such terms and conditions that the court may impose. The Applicant further states that she stands to suffer irreparable damage unless stay orders are granted as she risks being arrested anytime.



## Replying Affidavit

7. The application is opposed by Abdi Ahmed Sheikh, the 1st Respondent herein, vide the Replying Affidavit sworn on 19th January, 2024. The 1st Respondent avers that the Applicant has had a history of continued defiance of each and every court order issued by all courts which previously handled the matter. He states that on 10th January, 2023, the Court issued temporary injunction orders prohibiting the Respondent and her agents from any dealings on the suit property. However, the Applicant disregarded the said orders and continued with the occupation and constructions thereon.
8. As a result of the said disobedience, the Respondents filed the application dated 8th February, 2023 for contempt of court against the Applicant and a Ruling was delivered on the 12th May, 2023. In the said Ruling, the Applicant and her Agents were found to be in contempt of the court orders of 10th January, 2023. They were directed to comply with the said orders.
9. However, contrary to the aforesaid orders, the Applicant did not cease contravening the orders. It is the said disobedience that informed the filing of the application dated 17th August, 2023 seeking warrants of arrest against the Applicant. Subsequently, a Ruling was delivered on 7th November, 2023 committing the Applicant to six (6) months imprisonment.
10. The Deponent argues that it is evident that the Applicant has always disobeyed court orders and as such, she should not be granted audience before this court.
11. The 1st Respondent in response to the assertions of failure to issue a Notice to Show Cause, avers that the Court exercised its discretion in accordance with the law. The Ruling was delivered virtually in compliance with the Practice Directions of 2022 and that there was no need for a Notice to Show Cause as the Applicant had continually disobeyed Court Orders necessitating punitive action.
12. Regarding the failure to grant the Applicant an option of paying a fine and a chance to purge the contempt, the 1st Respondent states that the Applicant has no regard for the rule of law and has continually disobeyed Court Orders.
13. He asserts that in view of the foregoing, the intended appeal herein does not raise any triable issues hence it is an abuse of the Court processes and ought to be dismissed. The deponent avers that the rental income generated from the suit property is about Kshs. 350,000/=. Therefore, the proposed sum of Kshs. 50,000/= is an insult.
14. He maintains that the Respondents stand to be prejudiced if the application is allowed. He insists that the Applicant is in violation of pre-existing Court Orders yet at the same time seeks protection by the Court. The Applicant has not come to court with clean hands and the application should therefore be dismissed with costs.

## Supplementary Affidavit

15. The Applicant filed a Supplementary Affidavit sworn on the 15th February, 2024 in response to the assertions raised in the Replying Affidavit. The Applicant avers that although the 1<sup>st</sup> Respondent purports to swear court documents on behalf of the 2nd to 7th Respondents, he has not adduced the requisite written authority authorizing him to do so on their behalf.
16. The Applicant further denies the allegation of contempt of court levelled against her. She states that the purported photographs attached to the Replying Affidavit do not contain a Certificate of Production of electronic evidence to affirm their source and authenticity. She maintains that her application is merited and ought to be allowed as prayed.



## Court's direction

17. The court directed that the application be disposed of by way of written submissions. Both parties complied and the court has had the opportunity to peruse the same together with the cited authorities.

## Issues for Determination

18. In the court's opinion, the issues for determination in this matter are:
- a. Whether the orders of stay of execution pending appeal are merited.
  - b. Whether this court ought to grant stay of proceedings in the lower court case pending hearing of this appeal.

### Analysis and Determination

A. Whether the orders of stay of execution pending appeal are merited.

19. Under the provisions of order 42 rule 1 appeals to the High Court (and courts of equal status), are in the form of a memorandum of appeal signed in the same manner as a pleading.
20. A party will therefore be considered to have complied with the procedure for instituting an appeal (from a subordinate court or a tribunal) when he/she files a memorandum of appeal in accordance with the provisions of order 42 rule 1. The Applicant herein has filed a Memorandum of Appeal dated 21st November, 2023 hence has a proper appeal before the court.
21. Turning to the first issue, the provisions of order 42 rule 6(2) of the *Civil Procedure Rules* make provisions for the grant of stay of execution, as follows:
- “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 may ultimately be binding on him has been given by the applicant.
22. Therefore, an applicant for stay of execution pending appeal is obliged to satisfy the conditions aforementioned; namely
- i. Satisfy the court that substantial loss may result to him/her unless stay of execution is ordered;
  - ii. File the application without undue delay; and
  - iii. Provide such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him/her.
23. On substantial loss, the court in the case of *James Wangalwa & Another -vs- Agnes Naliaka Cheseto* [2012] eKLR, stated that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show



that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

24. In the instant case, the applicant avers that she stands to suffer substantial loss as she is in imminent danger of being arrested and committed to a Civil jail for six (6) months as directed by trial court. The 1st Respondent on the other hand argues that the Respondents stand to be prejudiced if the orders sought are granted since the Applicant has continually disobeyed Court Orders to their detriment.
25. At this stage, the court must be careful as to avoid delving into the merits of the appeal thereby embarrassing the hearing of the appeal. I have perused the Memorandum of Appeal and I am persuaded that the Applicant has an arguable appeal. Considering the nature of the orders appealed from, it is obvious that the Applicant stands to suffer substantial loss by being committed to jail before the appeal is heard and determined unless the orders of stay are granted.
26. On the second condition, I note that the Applicant filed the application within reasonable time after the delivery of the ruling appealed from. I find that the said application is brought without undue delay.
27. On the last condition as to provision of security, the court in the case of *Aron C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates & 4 Others* (2014) eKLR, the court held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

28. I have read the ruling by the Lower Court. In my view, the security in this case, if at all would not be for due performance of the decree but the fine in the alternative of serving a jail term. My finding is that an order of security is not required in this instance. If the Appellant was to be unable to raise the amounts ordered as fine, she would simply serve a jail term.
29. My finding is that the Appellant’s application is merited. I therefore grant an order of stay execution of the ruling of the trial court pending the hearing and determination of the appeal herein.
  - A. Whether this court ought to grant stay of proceedings in the lower court pending hearing of this appeal
30. In the case of *Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No. 43 of 2000, Ringera J (as he then was) held as follows in regard to stay of proceedings;

“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 ..... the 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.”

31. Similarly, in the case of *Christopher Ndolo Mutuku & Another vs. CFC Stanbic Bank Ltd* [2015] eKLR, the court held that;

“What matters in an application for stay of proceedings pending appeal is the overall impression the court makes out of the total sum of the circumstances of each which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice.”

32. The *Halsbury’s Law of England* 4<sup>th</sup> Edition Vol. 37 pages 330 and 332 states 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 proceeding beyond all reasonable doubt ought not to be allowed to continue.”

33. 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 the case.”

34. It is therefore clear that in determining whether or not to grant an order for stay of proceedings, the court must bear in mind the general rule that once a suit is filed, proceedings ought to continue without interruption until the suit is determined. This is premised on the right of every person to a fair trial which includes the right to have the trial begin and conclude without unreasonable delay as enshrined in article 50(2) (e) of *the Constitution* as well as the principle that justice delayed is justice denied, being a cardinal principle that guides courts in the exercise of judicial authority. It is against this background that orders for stay of proceedings ought to be sparingly granted and only in exceptional circumstances that demonstrate that there are compelling reasons and it would go against all that is deemed just and fair to proceed with the suit.

35. In the instant application, the applicant has argued in her submissions that the justification for grant of stay of proceedings is that she has raised an arguable appeal and that once the Lower Court file is availed before this court, it will save judicial time. She argues that there will be no need of filing a Record of Appeal.

36. In the appeal filed herein, this court is called upon to determine whether the Appellant is in contempt of court orders previously issued and whether she was procedurally convicted to serve the jail term of six months. This court will not be determining on the substance of the case before the lower court. It is therefore my considered view that there is no justification for staying the lower court proceedings.

37. The prayer for stay of proceedings is declined.



## **Conclusion**

38. For the above reasons, I determine the instant application in the following terms: -

- a. There shall be stay of execution of the Orders and/or Ruling of the Honourable Becky Cheloti Mulemia (Principal Magistrate) delivered on the 7th November, 2023 virtually, in the Chief Magistrate's Court at Milimani MCELC/E438/2022-Ahmed Abdi Sheikh vs Katra Abdi Ogle alias Rahma Hussein and Hassan Issak Hache and 2 Others pending the hearing and determination of this Appeal.
- b. The Applicant is to file the record of appeal within 60 days from date of this Ruling.
- c. The prayer for Stay of Proceeding in the Chief Magistrate's Court at Milimani MCELC/E438/2022- Ahmed Abdi Sheikh vs Katra Abdi Ogle alias Rahma Hussein and Hassan Issak Hache and 2 Others is declined.
- d. Costs of the application shall be in the cause.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16<sup>TH</sup> DAY OF MAY, 2024.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Kiluva for the Appellant/Applicant

Ms. Rotich holding brief for Mr. Orlando for the Respondent

Yvette: Court Assistant

**M.D. MWANGI**

**JUDGE**

