



**Orachi v Oridi (Environment and Land Appeal E001 of 2023)
[2024] KEELC 5635 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5635 (KLR)

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

BN OLAO, J

JULY 25, 2024

BETWEEN

FRED OMAMUKIROR ORACHI APPELLANT

AND

HERBERT OCHODI ORIDI RESPONDENT

RULING

1. On 28th September 2023, and having heard the application by Fred Omamukiror Orachi (the Respondent for purposes of this ruling) dated 23rd February 2023, I made the following orders in his favour:
 - a. As stay of proceedings in Busia CM ELC NO 82 of 2020.
 - b. The intended judgment in Busia CM ELC NO 82 of 2020 be arrested pending the hearing and determination of the appeal herein.
 - c. Costs to the Appellant.

As is therefore clear from the above orders, the import thereof was principally to arrest the judgment which was pending in the Chief Magistrate's Court with respect to the dispute between the Appellant and Herbert Ochodi Oridi (the Applicant herein) with respect to the land parcels No South Teso/ Osurette/3286, 3287, 3288, 3289 and 3290 (the suit land). That judgment was due for delivery on 28th April 2023 but prior to that, this Court had on 23rd February 2023 issued an order staying any further proceedings before Hon. P. Olengo Senior Principal Magistrate Busia and who was seized of the trial in the subordinate Court. It is not clear whether that order of stay of proceedings was brought to the attention of the trial magistrate after it had been delivered. What is clear however is that the judgment Busia ELC NO 82 of 2020 was infact delivered on 6th September 2023 long before this Court had delivered it's final ruling on 28th September 2023 but long after I had issued my ex-parte orders on 23rd February 2023 staying proceedings of the matter in the subordinate Court pending the hearing of the



- application inter-parte and which orders were subsequently confirmed on 28th September 2023 after an inter-parte hearing. The appeal against the ruling of the trial magistrate dated 17th February 2023 is therefore still pending in this Court yet the suit that gave rise to that ruling and this appeal has been finally determined.
2. The Applicant has now approached this Court vide his Notice of Motion dated 20th November 2023 premised under the inherent powers of this Court and the provisions of Section 63(e) of the Civil Procedure Act and Orders 45 and 50 of the *Civil Procedure Rules*. He seeks the following orders:
 - a. Spent
 - b. That this Honourable Court be pleased to issue a temporary stay of execution of the Honourable Court's orders issued on 28th day of September 2023 pending the hearing and determination of this application inter-parte.
 - c. That this Honourable Court be pleased to review, vary and set aside its orders issued on 28th September 2023.
 - d. That costs of this application be provided for.
 3. The application is premised on the grounds set out therein and is also supported by the Applicant's affidavit of even date.
 4. The gravamen of the application is that the Applicant had a counter-claim in the subordinate Court which was determined in his favour. However, he cannot now execute it because of the stay orders issued in this appeal on 28th September 2023 and which arrested a judgment that had already been delivered in the subordinate Court.
 5. The following documents are annexed to the application:
 1. The Applicant's defence and counter-claim in Busia CMC ELC NO 82 of 2020.
 2. The ruling delivered herein on 28th September 2023.
 3. The judgment delivered in Busia CMC ELC NO 82 of 2020 on 6th September 2023.
 4. Decree issued in Busia CMC ELC NO 82 of 2020.
 6. The application is opposed and the Respondent has filed a replying affidavit dated 8th December 2023 in which he has deposed, inter alia that this Court having ordered a stay of proceedings it has done its duty, that despite being aware about the appeal herein, the Applicant proceeded with his counter-claim in the subordinate Court. That since he had already withdrawn his suit in the subordinate Court, the only remedy was for the Applicant to file a fresh suit against him. That this application is an afterthought after the Respondent had already filed his Notice of taxation of Bill upon the Applicant.
 7. Annexed to the replying affidavit are the following documents:
 1. Copy of Notice of Motion dated 23rd February 2023.
 2. Notice of withdrawal of the suit in Busia CMC ELC NO 82 of 2020.
 3. Replying affidavit to the Notice of Motion dated 23rd February 2023.
 4. Submissions filed by the Respondents in respect to the application dated 23rd February 2023.
 8. When the application was brought before me on 21st November 2023, I directed that it be canvassed by way of written submissions. The same were subsequently filed both by Mr Otsiula instructed by



the firm of J. B. Otsiula & Associates Advocates for the Applicant and by Mr Ashioya instructed by the firm of Ashioya & Company Advocates for the Respondent.

9. I have considered the application, the rival affidavits and the submissions by counsel.
10. The Applicant seeks the substantive order that this Court do review, vary and set aside the orders issued on 28th September 2023. Those orders were basically that the proceedings in Busia CMC ELC NO 82 of 2020 be stayed pending the hearing and determination of this appeal and that the judgment which was pending therein be arrested. It is common ground that pursuant to the Notice of Motion dated 23rd February 2023, this Court had on the same day issued an ex-parte order being prayer NO 2 thereof pending the hearing of the said Notice of Motion. That prayer provided thus:

2: “That there be a stay of proceedings in Busia CMC ELC NO 82 of 2020 pending the hearing and determination of this application inter-partes.”

That order should have been served promptly upon the trial magistrate Hon. P. Olengo Senior Principal Magistrate who was seized of the suit in the trial Court. It is not clear why that was not done. Counsel for the Applicant believes that the Appellant in this appeal, and who is the Respondent in this application, should have served the trial magistrate with the said order. This is how counsel has pleaded in grounds NO VII, VIII and IX of the grounds upon which the Notice of Motion is founded:

VII: “That the Appellant herein failed to serve the trial Court with orders staying the delivery of the judgment both on the Plaintiff’s suit and counter-claim.”

VIII: “That the Appellant despite withdrawal of his suit never bothered to furnish the trial Court with orders of stay if any.”

IX: “That the trial Court delivered it’s judgement in Busia Chief Magistrate’s Court Environment and Land Case NO 82 of 2020 on 6th day of September 2023.”

Counsel followed up on the above grounds by making the following submissions at page 3:

“The ruling delivered before this Honourable Court barely touched on the counter-claim filed by the Respondent as the Appellant who is duty bound to inform the Court of the said counter-claim failed to do so and the Court delivered it’s rulings without the clear facts at hand.”

The fact of the matter is that the moment this Court issued it’s ex-parte orders staying the proceedings in Busia CMC ELC NO 82 of 2020 which orders were confirmed by my subsequent ruling dated 28th September 2023 staying the proceedings and arresting the judgment in that case, it was really the duty of either of the parties herein to have the said order served upon the trial magistrate. It was not the sole responsibility of the Respondent to do so. Secondly, the order of stay of proceedings and arrest of the pending judgment affected not only the Respondent’s claim but also the Applicant’s counter-claim.

11. The Respondent’s counsel has submitted on the same issue as follows at page 2:

“Your Lordship, in the original affidavit which was supporting the application for stay of suit and stay of judgment, we attached to the same an affidavit filed in this matter on 8/12/2023; we availed the evidence of the notice of withdrawal of the suit; we also availed evidence that the lower Court had been duly notified of the order issued by this Court staying proceedings and staying judgment; notably.”

That is a serious indictment on the trial magistrate if indeed he was notified of the order of stay but nonetheless proceeded to deliver the judgment. I need not go beyond that.



12. What is important however, for purposes of this ruling, is that an *ex parte* order of stay of proceedings was issued by this Court on 21st November 2023 and subsequently on 28th September 2023, an order of stay of proceedings was confirmed pending the hearing and determination of the appeal. However, the trial Court had already delivered its judgment on 6th September 2023 granting the Applicant the orders sought in his counter-claim. Counsel for the Respondent has submitted that since the Respondent has himself already approached this Court vide his own Originating Summons in Busia ELC NO E003 of 2023, this makes the proceedings rather untidy. This is what counsel has stated in page 2 of those submissions:

“Your Lordship, what the Applicant is seeking for if allowed, would render this proceedings untidy and the whole process convoluted; it should not be forgotten that the Respondent has already filed an Originating Summons in the High Court. This is Busia ELC NO E003 of 2023; the same is yet to be set down for hearing.”

That may be so. However, it is now common ground that the Applicant has a judgment delivered on 6th September 2023 in his favour with respect to the counter-claim in Busia CMC ELC NO 82 of 2020. Therefore, by the time this Court was delivering its ruling on 28th September 2023 arresting the judgment in the subordinate Court, that judgment had already been delivered three (3) weeks earlier. That means there was really nothing left to be stayed on 28th September 2023 by this Court.

13. The Applicant has invoked the provisions of Section 63(e) of the *Civil Procedure Act*, Orders 45 and 50 of the Civil Procedure Rules as well as the Inherent Powers of this Court. Section 63(e) of the *Civil Procedure Act* does not really assist him. It reads:

63: “In order to prevent the ends of justice from being defeated, the Court may, if it is so prescribed –

- a. Make such other interlocutory orders as may appear to the Court to be just and convenient.” Emphasis mine.

The orders which this Court is being asked to make are not interlocutory. That provision is not applicable.”

14. Order 45 Rule 1 (1) of the *Civil Procedure Rules* on the other hand provides that:

“Any person considering himself aggrieved-

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.” Emphasis mine.

The order sought to be reviewed was issued on 28th September 2023 and this application was filed on 20th November 2023 some two (2) months later. That is an unreasonable delay



which has not been explained. The provisions of Order 45 Rule 1(1) of the Civil Procedure Rules cannot come to the aid of the Applicant.

15. The Applicant has also invoked the inherent powers of this Court. These are provided for under Section 3A of the [Civil Procedure Act](#) in the following terms:

3A: “Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

The above provision has now been broadened by the overriding objectives set out in Sections 1A & 1B of the [Civil Procedure Rules](#) as well as Article 159 of [the Constitution](#). In the case of [Kenya Power & Lighting Company Ltd -v- Benzene Holdings Ltd T/a Wyco Paints C.a. Civil Appeal No 132 of 2014 \[2016 eKLR\]](#) the Court cited with approval the following passage from [Halsury’s Law Of England 4th Edition](#) Volume 37 Paragraph 14 as follows in describing the inherent powers of the Court:

“The jurisdiction of the Court which is comprised within the term ‘inherent’ is that which enables it to fulfil itself, properly and effectively as a Court of law. The overriding feature of the inherent jurisdiction of the Court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of Court. The inherent jurisdiction of the Court enables it to exercise control over process by regulating it’s proceedings, by preventing the abuse of process and by compelling the observance of the process ... in sum, it may be said that the inherent jurisdiction of the Court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.” Emphasis mine.

The Court went on to add that:

“This inherent jurisdiction is a residual intrinsic authority which the Court may resort to in order to put right that which would otherwise be an injustice.” Emphasis mine.

16. As already stated above, the Applicant has a judgment in his favour pursuant to his counter-claim which was allowed vide the judgment of the subordinate Court delivered on 6th September 2023. Unless it is reviewed by the trial Court or set aside on appeal, it remains a valid judgment. It must therefore be executed to enable the Applicant enjoy the fruits thereof, otherwise it will remain hollow and of no consequence. I think this is an appropriate case in which this Court must invoke it’s inherent jurisdiction because it is “just” and “equitable” to intervene as failure to do so “would otherwise be an injustice” to the Applicant.
17. The judgment in Busia CMC ELC NO 82 of 2020 having been delivered on 6th September 2023, it follows that this Court’s orders issued on 28th September 2023 staying the proceedings and arresting the judgment in the subordinate Court are spent and of no effect. Indeed in my view, the orders issued on 28th September 2023 are only of nuisance value simply adding to the statistics but not addressing



any issue. They should not be an impediment to the execution of the judgment in Busia CMC ELC NO 82 of 2020. However, for the avoidance of doubt, I shall be issuing appropriate orders shortly.

18. Ultimately therefore and having considered the Notice of Motion dated 28th September 2023, this Court issues the following orders:

- 1: The orders issued on 28th September 2023 are hereby vacated.
- 2: The Applicant is at liberty to proceed and execute his judgment in Busia CMC ELC NO 82 of 2020.
- 3: The Respondent shall meet the costs of this application.

BOAZ N. OLAO

JUDGE

25TH JULY 2024

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 25TH DAY OF JULY 2024.

BOAZ N. OLAO

JUDGE

25TH JULY 2024

