



**Obiba v Bwire & 6 others (Environment & Land Case
29 of 2018) [2024] KEELC 5626 (KLR) (23 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5626 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 29 OF 2018**

**BN OLAO, J
JULY 23, 2024**

BETWEEN

PETER JOLANA OBIBA PLAINTIFF

AND

MARY NABWIRE BWIRE 1ST DEFENDANT

JAMES WAFULA WANGIRA 2ND DEFENDANT

LEONORA APONDI 3RD DEFENDANT

LAND REGISTRAR, BUSIA COUNTY 4TH DEFENDANT

HON ATTORNEY GENERAL 5TH DEFENDANT

REGINA WANGIRA 6TH DEFENDANT

JOHANES BOY OKOBA 7TH DEFENDANT

RULING

1. By a ruling delivered herein on 9th December 2022, this Court made the following orders pursuant to an application filed by Peter Jolana Obiba (the Plaintiff):
 1. The 5th Defendant and Kaloyi Oloo to surrender the original title deed in respect to the land parcel No Bunyala/Bulemia/309 to the Land Registrar Busia within 45 days from the date of this ruling and also execute all the necessary documents to facilitate the transfer of a portion measuring 1.2 Hectares in the name of the Plaintiff.
 2. In default of the above, the Land Registrar Busia shall be at liberty to sub-divide the land parcel No Bunyala/Bulemia/309 and register a portion measuring 1.2 Hectares in the name of the Plaintiff notwithstanding the absence of the original title deed.



3. The Deputy Registrar shall also after the lapse of 45 days be at liberty to execute all the relevant documents on behalf of the 5th Defendant and Kaloyi Oloo to facilitate the transfer and registration of the said portion measuring 1.2 Hectares out of the land parcel No Bunyala/Bulemia/309 in the name of the Plaintiff.

4. No orders as to costs.

The purpose of the above orders were to facilitate the execution of the judgment delivered by Omollo J on 22nd June 2022 which had decreed, inter alia, that the Land Registrar and County Surveyor Busia do sub-divide the land parcel No Bunyala/Bulemia/309 (hereafter the suit land) so that the Plaintiff is registered as proprietor of a portion thereof measuring 1.2 Hectares.

2. Although Mary Nabwire Bwire, Regina Wangira, Johanes Boy Okoba, James Wafula Wangira and Leonora Apondi (the 1st to 5th Defendants respectively) filed a Notice of Appeal dated 1st July 2022 and lodged herein on 7th July 2022 intimating their intention to appeal against the judgment of Omollo J, no such Notice of Appeal has been filed against my ruling delivered on 9th December 2022.

3. I now have for my determination the Defendants' Notice of Motion dated 17th January 2024 in which they seek the following remedies:

1. Spent.

2. Spent.

3. That pending hearing and determination of the appeal, there be issued and it is hereby issued a stay of execution of decree and judgment.

4. That an order of injunction be issued restraining the Plaintiff, his servants, agents and those claiming through him from sub-dividing, selling, transferring to third parties and disposing in any way all those parcels of land known as LR Bunyala/Bulemia/8354, 8440, 8441, 8442, 8443, 8444 And 8445 and any other parcel of land mutated from the suit property Bunyala/Bulemia/309 pending the hearing and determination of this application inter-parties.

5. That pending hearing and determination of the appeal, order in (4) above be confirmed and/or varied by the Court.

6. That in any event, the Honourable Court be pleased to issue any conservatory orders pending hearing and determination of the appeal filed.

4. The application which is premised on the provisions of Sections 3, 3A, 75, 78 and 79 of the *Civil Procedure Act*, Order 40 Rules 1, 2, 3 and 4 and Order 42 Rules 5 and 6 of the *Civil Procedure Rules* is based on the grounds set out therein and is also supported by the affidavit of Leonora Apondi the 5th Defendant herein.

5. The gist of the application is that following the judgment delivered herein on 22nd June 2022, the Defendants filed a Notice of Appeal within time but their numerous attempts to get copies of proceedings and judgment have been futile. Meanwhile, the Plaintiff has commenced the execution of the decree and sub-divided the suit land to create the land parcels No Bunyala/Bulemia/8354 and 8355. He has further sub-divided the land parcel No Bunyala/Bulemia/8355 into various parcels namely Bunyala/Bulemia/8440, 8441, 8442, 8443, 8444 and 8445 one of which he has disposed off. That the Plaintiff is sub-dividing the suit land with intent to transfer and sell to third parties in order to defeat justice since he never owned it as it was ancestral land belonging to the Defendants. That there has



been no delay in filing this application but the delay in compiling the record of appeal has been due to the typing of proceedings. That the Defendants are willing to abide by all the conditions which this Court may impose as regards security and the Plaintiff will not suffer any prejudice since he does not reside on the suit land.

6. That the trial Court granted the Defendants a stay of execution of 30 days which has since lapsed and there is real danger that the Plaintiff will dispose of the suit land thus exposing the Defendants to loss of their property. The Defendants are ready to file the record of Appeal within 7 days which Appeal is not frivolous. The Defendants have annexed the following documents to the Notice of Motion:
 1. Notice of Appeal dated 1st July 2022 and lodged herein on 7th January 2022.
 2. Certificates of Official Search for the land parcels LR Bunyala/Bulemia/8440, 8441, 8442, 8443 and 8444 all in the name of Peter Jalano Obiva.
 3. Certificate of Official Search for the land parcel No Bunyala/Bulemia/8445 in the name of Francis Ojiambo Mutula.
 4. Letter dated 27th March 2023 from the Land Registrar Busia addressed to the Deputy Registrar of this Court seeking for the verification of Court order.
 5. Letter dated 28th March 2023 from the Deputy Registrar of this Court and addressed to the Department of Lands confirming the authenticity of this Court's order.
 6. Copy of this Court's ruling delivered on 9th December 2022.
 7. The application is opposed and the Plaintiff has filed a replying affidavit dated 31st January 2024 in which he has deposed, *inter alia*, that following this Court's judgment delivered on 22nd June 2022, the Land Registrar visited the suit land and sub-divided it into two portions one in the name of the 5th Defendant and Kiloyi Oloo and the other in his name. That his portion was Bunyala/Bulemia/8355 measuring 1.2 Hectares while the other was Bunyala/Bulemia/8354 in the name of the 5th Defendant Kaloyi Oloo. That he has since sub-divided his portion No Bunyala/Bulemia/8355 to create parcels No Bunyala/Bulemia/8440, 8441, 8442, 8443, 8444 and 8445 in order to share them among his children and therefore the allegation that he is selling the suit land is fictitious. That this Court granted the Defendants a 30 days stay of execution which lapsed and this application has been brought one year after the Notice of Appeal was filed and it should be dismissed with costs.
 8. The following documents are annexed to the replying affidavit:
 1. Decree issued on 29th June 2022.
 2. Certificate of Official Search for the land parcels No Bunyala/Bulemia/309 and 8355.
9. When the application was placed before me on 17th January 2024, I directed that it be canvassed by way of written submissions. The same have been filed by Mr Okutta instructed by the firm of Ouma Okutta & Associates Advocates for the Defendants and by Mr Ouma instructed by the firm of B. M. Ouma & Company Advocates for the Plaintiff.
10. I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.
11. From what I can discern in the application, the Defendants seek the following substantive orders:
 - a. Stay of execution pending appeal of the judgment and Decree herein; and



- b. Injunction/conservatory orders with respect to the land parcels No Bunyala/Bulemia/8354, 8440, 8441, 8442, 8443, 8444 and 8445 and any other parcels of land mutated from the parcel No Bunyala/Bulemia/309 pending the hearing and determination of the appeal.

I shall consider them in that order.

A:Stay Of Execution Pending Appeal

12. The power to order a stay of execution of judgment is donated by the provisions of Order 42 Rule 6 (1) and (2) of the [Civil Procedure Rules](#) which states:

(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.”

(2) “No order for stay of execution shall be made under subrule (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.” Emphasis mine.

A party seeking an order of stay of execution pending appeal must prove the following:

1. Show sufficient cause.
2. Demonstrate that unless the order is granted, he will suffer substantial loss.
3. Approach the Court without unreasonable delay.
4. Offer security for due performance of any decree or order that may ultimately be binding on him.

The jurisdiction of this Court while considering such an application was circumscribed by the Court of Appeal in the case of *Visbram Ravji Halai & Another v Thornton & Turpin* [1963] LTD 1990 KLR 365 as follows:

“Thus, the Superior Court’s discretion is fettered by three conditions. Firstly, the Applicant must establish a sufficient cause, secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the Applicant must furnish security. The application must, of course, be made without unreasonable delay.”

Following the delivery of the judgment herein, the Defendants filed a Notice of Appeal which he lodged herein on 7th July 2022. That demonstrated their intention to appeal the judgment. The Defendants have therefore shown sufficient cause.



13. The Defendants were also required to satisfy this Court that unless an order of stay of execution pending appeal is granted, they stand to suffer “substantial loss.” Such loss, as was held by Platt Ag JA (as he then was) in the case of *Kenya Shell Ltd v Kibiru & Another* 1986 KLR 410,

“... is the cornerstone of both jurisdiction for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.”

Although the Defendants have not stated what particular substantial loss they will suffer if the order of stay of execution is not granted, it is clear from paragraph 6 of the supporting affidavit by the 5th Defendant that the suit land has since been sub-divided into various portions one of which has been transferred to a third party. If the suit land and the resultant sub-division are all transferred to other persons, clearly there will be substantial loss and his appeal, if successful, will be rendered nugatory. I am persuaded that the Defendants have proved substantial loss.

14. The Defendants were also required to approach the Court without unreasonable delay. The judgment sought to be stayed was delivered on 22nd June 2022 and a Decree was issued one week later on 29th June 2022. This application was filed on 17th January 2024 some 19 months later. That is an unreasonable delay in the circumstances. In trying to explain that delay, the Defendants have pleaded in paragraphs 11 and 12 of the supporting affidavit by the 5th Defendant thus:

“ 11: “That there has been no delay in bringing this application and what is there can be explained reasonably.”

12: “That the delay in compiling record of appeal is not caused by the Applicants but due to delay in typing proceedings.”

The fact however is that, under the law, the Defendants did not need the record of appeal to file this application. All that they needed was to file a Notice of Appeal which they did on 7th July 2022 and thereafter file this application without unreasonable delay. A record of appeal is not a requirement under the provisions of Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules*. The delay of 19 months from the time of delivery of judgment to the time of filing this application is clearly unreasonable and the delay which has been proffered is not satisfactory.

15. Lastly, on the issue of offer of security, the Defendants have averred as per paragraph 15 of the supporting affidavit sworn on their behalf by the 5th Defendant as follows:

“ 15: “That I am ready and willing to comply with all conditions and terms imposed by this Court in the interest of justice including but not limited to fast tracking determination of the appeal within a record of 30 days from determination of this application as or the Court would direct.”

Of course the Defendants are being overly ambitious in suggesting that they will “fast track determination of the appeal within a record of 30 days from the determination of this application”. Having said so, however, the Defendants have pleaded that they are “willing to comply with all conditions and terms imposed by this Court in the interest of justice.” In my view, that is a sufficient offer of security because such terms are ordinarily imposed by the Court itself although the party seeking the remedy of stay is also at liberty to make any specific offer.

16. The Defendants have been able to surmount the fourth ground set out in Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules*.



17. The Defendants were required to meet all the four conditions set out in Order 42 Rule 6(1) and (2) of the Civil Procedure Rules and not only some of them. They have been unable to satisfy this Court with regards to the condition of filing the application without unreasonable delay and have therefore not met the threshold of the law.

B:Injunction/Conservatory Pending Appeal

18. With regard to this prayer, the subject matter of the suit herein was land parcel No Bunyala/Bulemia/309 which has since mutated to create other parcels of land No Bunyala/Bulemia/8354, 8440, 8441, 8442, 8443, 8444 and 8445. The suit land is therefore no longer in existence and cannot be the subject of any appellate process.

19. An order of temporary or conservatory order pending appeal is, under the provisions of Order 40 Rule 1 of the [Civil Procedure Rules](#), meant to achieve the following:

1: “Where in any suit it is proved by affidavit or otherwise -

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- (b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.”

The subject matter of the dispute which gave rise to the impugned judgment was the suit land i.e. land parcel No Bunyala/Bulemia/309. That land has since mutated to other parcels of land one of which parcel No Bunyala/Bulemia/8445, is currently registered in the name of one Francis Ojiambo Mutula since 15th December 2023. It cannot be the subject of these proceedings and therefore no orders of injunction nor any other conservatory orders can be issued in respect to it. The proprietor thereof is also a stranger to these proceedings.

20. Besides, in an application such as this one, the Court must also be guided by the conditions set out in the case of *Giella v Cassman Brown* 1973 EA 358 which are that the Applicant must show a prima facie case with a probability of success, that if the order is not granted, the Applicant will suffer irreparable injury which cannot adequately be compensated by an award of damages and if in doubt, the Court will determine the same on the balance of convenience. The same was reiterated in the case of [Patricia Njeri & 3 Others v National Museum Of Kenya](#) 2004 eKLR.

21. As the suit land has already mutated and no longer exists, there is really nothing upon which an injunction or conservatory order can be based upon.

22. The up-shot of all the above is that the Notice of Motion dated 17th January 2024 is dismissed with costs to the Plaintiff.

RULING DATED, SIGNED AND DELIVERED ON THIS 23RD DAY OF JULY 2024 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO

JUDGE



23RD JULY 2024

