



**Sure v Awuor (Environment and Land Appeal E033 of 2023)
[2024] KEELC 6540 (KLR) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6540 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E033 OF 2023
GMA ONGONDO, J
SEPTEMBER 30, 2024**

BETWEEN

JOHANA OBUDHO SURE APPELLANT

AND

TERESA AWUOR RESPONDENT

RULING

1. The instant ruling is in respect of an application by way of a Notice of Motion dated 7th May 2024 by the appellantapplicant, Johanna Abudho Sure through Aluoch Odera and Nyauke Company Advocates seeking the following orders;
 - a. An order of stay of the lower court’s decree pending final determination of the instant appeal.
 - b. Costs of the application be provided for.
2. The application is founded upon the applicant’s supporting affidavit and the grounds set out on its face which include; that the trial court delivered judgment and decree is to issue any time. That since the appeal has been lodged, he is likely to suffer substantial loss if stay of execution does not issue as the matter involves injunction restraining him from the land in dispute.
3. The respondent, Teresa Awuor through Bruce Odeny and Company Advocates, opposed to the application by grounds of opposition dated 20th May 2024 on the following grounds;
 - a. The application is belated seeking to stay a judgment delivered a year ago on 29th May 2024.
 - b. The application is not meritorious in that no security has been offered as a requirement under Order 42 Rule 6 (2) of the *Civil Procedure Rules*.
 - c. The applicant has not demonstrated any substantial loss to warrant stay.



- d. The applicant has not furnished any evidence of intention by the respondent to execute the judgment.
 - e. The application is fatally defective in failing to comply with mandatory provision of Order 51 Rule 13 (2) of the [Civil Procedure Rules](#).
4. Hearing of the application was by written submissions pursuant to the court's directions given on 22nd May 2024 and Order 51 Rule 16 of the [Civil Procedure Rules 2010](#).
 5. So, by the submissions dated 27th May 2024, learned counsel for the applicant delineated two issues for determination relating to merit of the application and the cost of the same. Counsel submitted that the application has attained the conditions provided for under Order 42 Rule 6(2) (*supra*) and the just determination of proceedings under Sections 1A and 1B of the *Civil Procedure Act* Chapter 21 Laws of Kenya as held in [Nicholas Mututu MwasunavPatricia Mueni Kilonzo](#) (2022) eKLR.
 6. Also, counsel submitted that the stay sought is what is to be prevented by status quo in order not to render the appeal nugatory as noted in [SuleimanvAmboseli Resort Ltd](#) (2014) eKLR. That the respondent was awarded Kshs.75,000= which she would not be able to refund the decretal sum if the appeal succeeds. That there is merit in the orders sought in the application.
 7. In the submissions dated 10th June 2024, learned counsel for the respondent stated that the applicant has failed to discharge the conditions to warrant stay of execution sought in the application as noted in Vishram Raji HalaivThorton & Turpin Civil Application number 15 of 1990. That the appeal is not arguable as grounds of opposition are not contentious. That the illegality of the agreement and that the applicant was not the legal representative of the estate that he purportedly sold to the respondent, are not in dispute.
 8. Counsel further submitted that the applicant has not proved that he is bound to suffer irreparable loss as the case relates to a monetary decree which can be easily compensated by damages as held in [James Wangalwa & another vNaliaka Cheseto](#) (2012) eKLR. That one year delay to initiate the application is not accounted for and no security has been offered for the due performance of the decree. That there is no merit in the application and the same be dismissed with costs.
 9. In the foregone, has the application met the threshold set out in Order 42 Rule 6 (2) (*supra*) to warrant the orders sought therein?
 10. It is common ground that the trial court's judgment was rendered which attracted the instant appeal. That the decree is a monetary one.
 11. The contention of the applicant is that execution is likely to issues further to the judgment and ensuing decree. That there be stay of execution of the decree to maintain the status quo in the matter.
 12. The essence of status quo order is well settled; see [OgadavMollin](#) (2009) KLR 620.
 13. It is the assertion of the respondent that the applicant has not satisfied the threshold for the grant of the stay order sought in the application as commanded by Order 42 Rule 6 (2) (*supra*) and the conditions thereunder. I bear in mind the conditions which relate to substantial loss, delay and security for the due performance of the decree; see Suleiman and Halai cases (*supra*).
 14. Notably, the amended memorandum of appeal dated 27th may 2024 contains triable issues touching on Section 45 of the *Law of Succession Act* Chapter 160 Laws of Kenya and that the applicant was not the legal representative of the estate of the purportedly sold and the legality of the agreement thereof.



Therefore, if the stay of decree is not granted, this appeal is likely to be rendered nugatory as observed in the case of *David Morton Silverstein vAtsango Chesoni* (2002) eKLR.

15. Furthermore, the court has the mandate to grant interim preservation orders inclusive of stay of execution of decree as envisaged under Section 13 (7) (a) of the *Environment and Land Court Act* 2015 (2011) in appropriate cases. In the case of *Board of Governors Moi High School Kabarak and another v Malcolm Bell* (2013) KLR, the Supreme Court of the Republic of Kenya held that the court has ancillary power;

‘.....of safeguarding the character and integrity of the subject matter of appeal pending the outcome of the contested issues.’

16. Also, the applicant is entitled to pursue this appeal without any restriction. I, therefore, subscribe to the Court of Appeal decision in the case of *ButtvRent Restriction Tribunal* (1979) eKLR, where it was noted;

‘....the appellant has an undoubted right of appeal.’

17. The respondent filed the grounds of opposition to the application pursuant to Order 51 Rule 14 (1) of the *Civil Procedure Rules 2010*. In view of paragraphs 14, 15 and 16 hereinabove, the grounds of opposition are blunt and fail to dislodge the application.

18. In the foregone, it is the finding of this court that the application is meritorious.

19. Accordingly, this application is hereby allowed in terms of stay of the trial court’s decree pending the hearing and determination of this appeal as stated in paragraph 1 (a) hereinabove.

20. Costs of this application to abide the outcome of the instant appeal.

21. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 30TH DAY OF SEPTEMBER 2024.

G. M. A ONGONDO

JUDGE

Present;

Mr S. Nyauke, Learned Counsel for the appellantapplicant

Mr B. Odeny, Learned Counsel for the Respondent

Mr T. Luanga, Court Assistant

