



**Omori v Onsongo (Environment and Land Appeal E012 of 2023)  
[2024] KEELC 6194 (KLR) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6194 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT AND LAND APPEAL E012 OF 2023**

**M SILA, J  
SEPTEMBER 25, 2024**

**BETWEEN**

**ROBERT OMBOGO OMORI ..... APPELLANT**

**AND**

**MARUEN MORAA ONSONGO ..... RESPONDENT**

**RULING**

1. The application before me is that dated 12 March 2024 and filed on 19 March 2024. It is an application seeking a stay of execution of the judgment herein pending hearing of a second appeal to the Court of Appeal.
2. By way of background, the respondent commenced suit against the applicant in the Magistrates' Court vide a plaint filed on 28 October 2019. The respondent pleaded to be the owner of the land parcel West Kitutu/Bomatara/3176 and wished to have the applicant evicted from the said land. The applicant's defence was that the suit land belonged to him for he had purchased it from the father of the respondent and that he had a title deed to it. The trial court upon hearing the suit entered judgment for the respondent on 5 April 2023. In the judgment the applicant was ordered to give vacant possession to the respondent within 90 days. Aggrieved, the applicant filed an appeal to this court. I heard the appeal and delivered judgment on 28 February 2024. I was not persuaded to upset the decision of the Magistrate's Court which I upheld. I further ordered the applicant to give vacant possession to the respondent within 14 days of the judgment.
3. Aggrieved, the appellant filed a Notice of Appeal on 5 March 2024 and thereafter filed the subject application. I have already mentioned that it is one for stay pending appeal and is brought pursuant to the provisions of Order 42 Rule 6 of the *Civil Procedure Rules, 2010*. In his supporting affidavit, the applicant deposes that he stands to be prejudiced and suffer loss and damage if the orders sought are not granted. He also adds that the appeal raises triable issues of law and fact and that the appeal has high chances of success. He states that an appeal is a constitutional right and it is necessary that the



prevailing status quo be maintained pending hearing and determination of the appeal. He does not think that the respondent stands to suffer any loss if the orders sought are granted.

4. I have not seen a reply to the application either through a replying affidavit or grounds of opposition though I have seen submissions filed by counsel for the respondent in opposing the motion. A party wishing to oppose an application needs to comply with Order 51 Rule 14 which is drawn as follows :-

14. Grounds of opposition to application in High Court [Order 51, rule 14]

- (1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents —
  - (a) a notice preliminary objection: and/or;
  - (b) replying affidavit; and/or
  - (c) a statement of grounds of opposition;
- (2) the said documents in subrule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing.
- (3) Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under subrule (1) may, with the leave of the court, file a supplementary affidavit.
- (4) If a respondent fails to file to comply with subrule (1) and (2), the application may be heard ex parte.

5. From the foregoing, it will be discerned that a party opposing an application needs to either file a preliminary objection, a replying affidavit, and/or grounds of opposition. If none is filed the application may be heard ex parte. I am not persuaded that there is avenue to oppose an application where one files nothing towards it. Specifically, I am not persuaded that having failed to file any such documents, then counsel for the respondent was at liberty to file submissions to oppose the motion.

6. I have assessed the application based on the material before me and in light of the provisions of Order 42 Rule 6 which provides as follows :

- (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 ap

7. From the above, three issues emerge, being :

- i. That the application needs to have been filed without unreasonable delay;
- ii. That the applicant needs to demonstrate substantial loss; and
- iii. That the applicant needs to furnish security as the court may order.

8. I do not think that it can be argued that the application was brought after unreasonable delay as it was filed barely a month after the judgment. On substantial loss, the evidence on record shows that it is the applicant in possession and he has a home therein. I am persuaded that he stands to suffer substantial loss if he is evicted then succeeds on appeal. He may very well find his home demolished



and the character of the suit land substantially changed. We cannot however run away from the fact that if he fails on appeal then the respondent will have been deprived of the fruits of her judgment by not having opportunity to derive benefit from the land for the duration of the appeal. It is necessary therefore that the interests of the applicant and the respondent be balanced.

9. Doing the best that I can, considering that the land is a small holding of 0.06 Ha, and estimating that the appeal will take at least two years to be heard, I will order the applicant to deposit in court or in a joint interest earning account, the sum of Kshs. 200,000/= as security within the next 60 days. The applicant to also deposit the taxed costs within 60 days of taxation, either in court or in the same joint interest earning account. If the applicant fails to comply as ordered above then the decree herein may be executed and the applicant will have to pursue his appeal without the benefit of an order of stay of execution.
10. If the applicant complies with the foregoing the costs of this application will be costs in the appeal. If he fails then his application will stand dismissed with costs.
11. Orders accordingly.

**DATED AND DELIVERED THIS 25 DAY OF SEPTEMBER 2024**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII.**

Delivered in presence of :

Mr. Momanyi h/b for Mr. G.M Nyambati for the applicant

Mr. Magara present for the respondent

Court Assistant – David Ochieng’

