



REPUBLIC OF KENYA



Odhiambo v Onyango; Anyande & 9 others (Interested Parties) (Environment & Land Case 139 of 2013) [2025] KEELC 625 (KLR) (18 February 2025) (Ruling)

Neutral citation: [2025] KEELC 625 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 139 OF 2013
BN OLAO, J
FEBRUARY 18, 2025
(FORMERLY HCC 9 OF 2009)**

BETWEEN

ERNEST ODHIAMBO PLAINTIFF

AND

PETER GABRIEL ONYANGO DEFENDANT

AND

**JOHN ORIEDO ANYANDE INTERESTED PARTY
JOACHIM MWANDALE OKESSA INTERESTED PARTY
PIUS OGAYE INTERESTED PARTY
JOSEPH AFUBWA INTERESTED PARTY
PASCAL MWANDALE ANDERA INTERESTED PARTY
ROBERT OJIAMBO ORIENDO INTERESTED PARTY
GODFREY GORI OKIMBA INTERESTED PARTY
JAMES KABA ODHIAMBO INTERESTED PARTY
ELVIS OUMA ORIEDO INTERESTED PARTY
KEVIN OJIAMBO ORIEDO INTERESTED PARTY**

RULING

1. Vide a ruling delivered herein on 8th November 2023, I enjoined Joachim Mwandale Okessa, Pius Ogaye, Joseph Afubwa, Pascal Mwandale Andera, Robert Ojiambo Oriendo, Godfrey Gori Okimba, James Kaba Odhiambo, Elvis Ouma Oriedo And Kevin Ojiambo Oriedo as Interested parties in this



suit having found that they are in occupation of the land parcel NO Bunyala/Mudembi/1735 (the suit land) and therefore have a stake in the same.

2. The Plaintiff (Ernest Odhiambo) was aggrieved by that ruling and promptly lodged a Notice of Appeal at this Court's registry on 10th November 2023. He has since filed at the Court of Appeal registry in Kisumu, Civil Appeal NO E306 of 2023.
3. The Plaintiff has now approached this Court vide his Notice of Motion dated 6th February 2024 and premised under the provisions of Section 3A of the Civil Procedure Act and Order 51 of the Civil Procedure Rules. He seeks the following orders:
 1. Spent.
 2. That this Honourable Court be pleased to grant stay of the orders issued on 8th November 2023 and proceedings in BUSIA ELC CASE NO 139 of 2013 (O.S) pending the hearing and determination of the appeal filed in KISUMU COURT OF APPEAL CIVIL APPEAL NO E306 of 2023.
 3. That the costs of this application be provided for.
4. The application is anchored on the grounds set out therein and supported by the affidavit of the Plaintiff dated 6th February 2024.
5. The gravamen of the application is that the Plaintiff has already filed an appeal at the Court of Appeal Kisumu being Civil Appeal No E306 of 2023 arising out of my ruling delivered herein on 8th November 2023. That the appeal raises weighty and triable issues for determination and if the order of stay is not granted, the appeal will be rendered nugatory. Annexed to the application is the memorandum of appeal filed in the Court of Appeal Kisumu being Civil Appeal No E306 of 2023.
6. The Plaintiff filed a further supporting affidavit dated 27th May 2024 in which he deponed further, that it is in the interest of justice that this application be allowed.
7. In response, the Defendant filed a replying affidavit dated 6th May 2024 in which he described the Motion as an abuse of the Court's process and without merit. He added that this Court is now functus officio and has no jurisdiction to stay its own orders. That the application ought to have been filed in the Court of Appeal and should be dismissed for being frivolous and vexatious.
8. The Interested parties did not file any response to the Motion although the record confirms that their counsel was served.
9. Submissions were thereafter filed both by Ms Achala instructed by the firm of Abalo & Company Advocates for the Plaintiff and by Mr Ashioya instructed by the firm of Ashioya & Company Advocates for the Defendant.
10. I have considered the application, the rival affidavits and the submissions by the counsel.
11. I must start by stating that contrary to the Defendant's averment, this Court is not functus officio. The jurisdiction to stay its orders is vested both in this Court as the trial Court and the Court of appeal.
12. Although the Plaintiff has anchored the Motion under Section 3A of the Civil Procedure Act as well as Order 51 of the Civil Procedure Rules, the substantive remedy which he seeks is a stay of this Court's ruling dated 8th November 2023 pending the hearing and determination of the appeal in the Court of Appeal Kisumu being CIVIL APPEAL NO E306 of 2023 arising out of that ruling. No doubt Section 3A aforesaid also donates inherent jurisdiction.



13. This Court’s jurisdiction to stay its decree or proceedings pending appeal is provided for under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules. It states that:

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- (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.”

It appears to me that Order 42 Rule 6(1) and (2) of the Civil Procedure Rules applies both to application of stay of proceedings as well as stay of execution pending appeal. The term stay is defined in Black’s Law Dictionary 10th Edition as follows:

“The postponement or halting of a proceeding, judgment, or the like. An order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding.”

In Halsbury’s Law Of England 4th Edition Vol 37 page 330, it is stated 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 proceedings beyond all reasonable doubt ought not to be allowed to continue.”

An order of stay of proceedings is a discretionary remedy. Each case must therefore be determined on the basis of its peculiar circumstances. The predominant question which should guide the Court is whether it is in the interest of justice to stay the proceedings, whether the intended appeal is frivolous, the need for ensuring expeditious disposal of proceedings, amongst other considerations. In a case like this where the intended appeal is from my own ruling, I cannot purport to delve into the merits or otherwise of the intended appeal because to do so will be tantamount to usurping the jurisdiction of the Court of Appeal to which an appeal from this Court lies. That can only be a consideration if this Court is determining an application for say of proceedings pending the hearing and determination of an appeal to this Court from a subordinate Court.

14. From the grounds raised in the motion, it is pleaded in ground NO (b) that:

(b) “That the appeal raises valid issues for determination.”

And in paragraph 5 of the Plaintiff’s supporting affidavit, he has deposed thus:



5: “That the said appeal raises weighty and triable issues for determination.”

Basically therefore, what the Plaintiff is asking this Court to do is to interrogate the five (5) grounds raised in the Memorandum of Appeal dated 21st December 2023 in order to determine whether or not it is in the interest of justice to order a stay of these proceedings pending an appeal from this Court’s ruling delivered on 8th November 2023 in which I enjoined Interested Parties in this case. As I have already stated above, having delivered the ruling which is the subject of the pending appeal, my hands are tied and I cannot purport to gauge the merits or otherwise of the pending appeal. That jurisdiction is with the Court of Appeal. I can only consider the strength or otherwise of an appeal pending before me.

15. It is also not lost to this Court that other than the claim that his appeal raises triable issues, the Plaintiff has not stated what prejudice or substantial loss, if any, he will suffer if the order of stay of proceedings is declined. The only prejudice which I can see is the further delay of this case which commenced in KAKamega High Court As Civil Case No 18 of 2006. But that can be compensated with costs. In my view, where parties demonstrate an interest in the subject matter of proceedings before a Court, it is prudent that they be brought on board so that those interests can be fully and finally considered and determined in line with Article 50 of *the Constitution* unless of course it is demonstrated that there is a scheme to unfairly steal a match on the opposite party. I discern no such evidence in this case.
16. Finally, it is not lost to this case that other than the interested parties who were enjoined in these proceedings vide my ruling dated 8th November 2021, there is yet an earlier Interested Party one John Oriedo Anyande who was enjoined in these proceedings. Having been filed way back in 2006, this case’s journey is approaching twenty (20) years in this Court. I am not persuaded that a further delay and which will be the resultant result if the proceedings are stayed, is in the best interest of the parties bearing in mind the constitutional demands under Article 159 (2) (b) that justice shall not be delayed together with the overriding objectives under Section 1A of the *Civil Procedure Act* which requires this Court to expedite the resolution of disputes.
17. I am not persuaded to allow this application.
18. On the issue of costs, the Interested Parties have joined these proceedings rather late in the day. Taking into account the age of this suit, the most prudent order to make is that each party shall meet their own costs.
19. Further, and in order to expedite the hearing and determination of this suit which is part-heard, I shall take the liberty of fixing a hearing date and the parties must be ready to proceed with the trial unless this Court is served with orders staying these proceedings.
20. The up-shot of all the above is that having considered the Notice of Motion dated 6th February 2024, this Court issues the following orders:
 1. The Notice of Motion is dismissed.
 2. Each party to meet their own costs.
 3. To ensure the expeditious disposal of this suit which was filed in 2006, it will be heard for the whole day on 14th July 2025 unless this Court is served with orders staying the proceedings. The parties must therefore bring all their witnesses on that day.

BOAZ N. OLAO

JUDGE



18TH FEBRUARY 2025

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 18TH DAY OF FEBRUARY 2025.

BOAZ N. OLAO

JUDGE

18TH FEBRUARY 2025

