



REPUBLIC OF KENYA



KENYA LAW
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**Odula v Wasianju (Environmental and Land Originating Summons
7 of 2019) [2024] KEELC 6068 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6068 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 7 OF 2019
EC CHERONO, J
SEPTEMBER 19, 2024**

BETWEEN

FREDRICK GIGWA ODULA PLAINTIFF

AND

TITUS WANYONYI WOSIANJU DEFENDANT

RULING

1. The Defendant/Applicant has moved this Honourable Court vide a Notice of Motion application dated 14th, June 2024 seeking the following orders;
 - a. (Spent)
 - b. That this Honourable Court be pleased to order for stay of execution of the Judgment and Decree made on 23rd May, 2024 pending the hearing and determination of Civil Appeal No E053 of 2024 by the Court of Appeal.
 - c. That costs of the application be in the cause.
2. The application is based on grounds that the Applicant/Appellant was aggrieved by the decision of this Honourable Court made on 23rd May, 2024 and has preferred an appeal to the Court of Appeal which raises high chances of success and failure to grant the orders sought would render the said appeal nugatory. He stated that no prejudice shall be suffered by the Respondent if the orders sought are granted.
3. The application is further supported by the affidavit of the Applicant/Appellant sworn on even date in where he reiterated the averments contained in the grounds apparent on the face of the application. In a brief summary, the Applicant/Appellant deposed that he was experiencing serious medical challenges that prompted his previous Counsel to cease acting without notice as a result of which judgment was



entered against him. He deposed that His appeal raises triable with high chances of success and that no real prejudice shall be suffered by the Respondent if the orders sought are granted.

4. The Respondent filed a Replying affidavit in opposition to the application sworn on 14th June, 2024. According to the Respondent, the Applicant's application is not only incompetent, frivolous but a mockery and abuse of the court process. He stated that having delivered its judgment, this Honourable court became functus officio as regards this application. He further stated that the application does not meet the legal requirements as provided by the law and that the notice annexed to the supporting affidavit is not an appeal. The Respondent also stated that the Applicant/Appellant has not demonstrated what substantial loss he will suffer unless the orders sought are granted. In conclusion, the Respondent stated that he stands to suffer more and his family if the application is allowed.
5. I have considered the application, the supporting affidavit and the proceedings as well as the Replying affidavit and the applicable law. Order 42 Rule 6(2) of the Civil Procedure Rules which is the applicable law states 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 applicant...”
6. The law gives three conditions for the grant of stay of execution of a decree/order pending appeal which must be established sequentially. First, such application must be made without unreasonable delay. Secondly, the applicant must demonstrate that he/she will suffer substantial loss unless the order is made and finally, the applicant must give security for the due performance of such decree or order as may ultimately be binding on him/her. From the proceedings and supporting affidavit, the impugned judgment/decree was made on 23rd May, 2024 while the current application was filed in court on 20/06/2024. Though the present application is dated 14th June 2024, it took the applicant until 20/6/2024 to file the same which is 28 days from the date of judgment. A period of 28 days without any explanation in my view is unreasonable delay.
 7. The second condition which is the cornerstone for stay of execution pending appeal is whether the Applicant/Appellant will suffer substantial loss unless the orders sought are granted. This condition was aptly defined by Gikonyo J in the case of James Wangalwa & another v Agnes Naliaka Cheseto (2012) eKLR held as follows;

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal....the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

8. In the instant application, the Applicant/Appellant at paragraphs 6 & 7 of his supporting affidavit has merely stated that he stands to suffer irreparable loss and prejudice if the prayers sought are not



granted. However, he did not elaborate or establish any fact (s) which show that the execution of the decree which is a lawful process would negate his right as the successful party in the intended appeal. The Applicant/Appellant has failed to establish any factors that his appeal would be rendered nugatory unless the orders sought in the application are granted.

9. The third and last condition for stay of execution pending appeal is the giving of security for the due performance of the decree/order as may ultimately be binding on him. From his supporting affidavit, the Applicant/Appellant has not given any security or undertaking to such terms and conditions as this Honourable Court may give.
10. The upshot of my finding is that the Notice of motion dated 14th June 2024 and filed in court on 20th June, 2024 is without merit and the same is hereby dismissed with costs to the Respondent.
11. It is so ordered.

READ DATED AND SIGNED AT BUNGOMA THIS 19TH DAY OF SEPTEMBER, 2024.

HON.E C CHERONO

ELC JUDGE

In the presence of;

Mr. Onyando for the plaintiff/respondent

Mr. Oburu for the defendant/applicant.

Bett – Court Assistant.

