



**Auka (Suing as Legal Representative of the Estate of Charles Otien Osir, Deceased) v Oyugi (Environment and Land Appeal E082 of 2024) [2024] KEELC 7220 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7220 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E082 OF 2024**

**E ASATI, J**

**OCTOBER 31, 2024**

**BETWEEN**

**MOUREEN JOY AUKA ..... APPLICANT**

**SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF CHARLES OTIEN OSIR, DECEASED**

**AND**

**FREDRICK OTIENO OYUGI ..... RESPONDENT**

*(Being an appeal from the ruling of Hon. J. M. Wekesa Senior Principal Magistrate delivered on 25th September 2024 in Nyando MC ELC NO. E025 OF 2025 on the appellant's applications dated 21st May 2024 and 14th June 2024)*

**RULING**

1. The substantive prayers sought in the Notice of Motion application dated 9<sup>th</sup> October, 2024 brought by the Applicant are temporary injunction restraining the Respondent from trespassing onto, selling, transferring, charging, quarrying and selling stones, tilling, building or planting crops or in any way dealing in land parcel No.kisumu/fort Ternan/720 pending hearing and determination of the appeal, a mandatory injunction against the Respondent to allow the family members of the late Charles Otieno Osir to access and work on land parcel No. No. Kisumu/fort Ternan/720, an order for the OCS Muhoroni and/or Koru police stations to assist in the enforcement and implementation of the orders, an order for stay of proceedings in Nyando MC ELC Case No.e025 Of 2024 pending hearing and determination of the appeal, an order for stay of execution of the order awarding costs to the Respondent and that costs be provided for.
2. The application was supported by the averments in the Supporting Affidavit sworn by Moureen Joy Auka on 9<sup>th</sup> October, 2024 and the annexures thereto.



3. The application was opposed vide the contents of the Replying Affidavit sworn by Fredrick Otieno Oyugi on 15<sup>th</sup> October, 2024. The Respondent's case is that he purchased the suit land from Charles Otieno Osir, deceased, at kshs.10,260,000/-. That he paid 10% of the purchase price. That he took possession of the suit property in the lifetime of the deceased as he was granted possession of the suit property by the deceased in good faith. That he has so far paid a total of Kshs.6,576,000 towards the purchase price, leaving a balance of Kshs.3,684,000 which is held by his Advocates awaiting completion of the transaction.

The application was argued orally on 22<sup>nd</sup> October, 2024.

4. I have considered the application, the response thereto and the submissions made.
5. It is clear from the Memorandum of Appeal that the appeal challenges the ruling of the trial court dated 25<sup>th</sup> September, 2024. I have perused the ruling, a copy of which is attached to the application. The ruling shows that the orders sought before the trial court were for temporary injunction and mandatory injunction which the trial court declined to grant hence the appeal. The ruling further shows that prayers 2 and 3 of the present application are a replica of prayers 2 and 3 before the trial court. The substantive issue to be determined in the appeal is whether the trial court erred in disallowing the applications before the it and in declining to grant the temporary and mandatory orders of injunction sought. These are the same prayers being sought vide the present application. My view is that in the circumstances, the prayers cannot be granted at this stage of the appeal for to do so would amount to allowing the appeal without hearing it.
6. Regarding the application for stay of proceedings pending appeal, it has not been demonstrated that any prejudice will be suffered by the appellant if hearing of the suit proceeds in the pendency of the appeal. No sufficient grounds for stay of proceedings have not been demonstrated. In *Global Tours & Travels Limited*; Nairobi HC Winding up Cause No. 43 of 2000 Ringera J, (as he then was) stated that: -

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

7. And in *Kenya Wildlife Service Vs James Mutembei* (2019) eKLR, Gikonyo J held that:

“Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent”.



8. As regards the prayer for stay of execution for recovery of the costs awarded, since the ruling that awarded the costs is the subject of the appeal, it is only just and in the interest of justice that the same awaits determination of the appeal.
9. The upshot is that the application succeeds only in respect of the prayer for stay of execution as follows:
  - a. There be stay of execution of the order dated 25/9/2024 in Kisumu Nyando MC ELC Case No. E025 OF 2024 awarding costs to the Respondent herein, pending hearing and determination of the appeal.
  - b. Costs of the present application to abide the appeal.

Orders accordingly.

**RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 31<sup>ST</sup> DAY OF OCTOBER, 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI**

**JUDGE.**

In the presence of:

Maureen: Court Assistant.

Okello for the Appellant/Applicant

Obala h/b for Gakuo for the Respondent.

