



Akobo & 4 others v Samuel & another (Environment & Land Case 103 of 2015) [2024] KEELC 6801 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6801 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 103 OF 2015
BN OLAO, J
OCTOBER 17, 2024**

BETWEEN

**GIRAIDO OMONGIN AKOBO 1ST PLAINTIFF
REDEMPA IBURA 2ND PLAINTIFF
JOHN OKITWI OBUOLO 3RD PLAINTIFF
SAMMY BARAZA 4TH PLAINTIFF
LEONARD OJUMA OBWOLO 5TH PLAINTIFF**

AND

**OBORE KARANI SAMUEL 1ST DEFENDANT
PATRICK OJUMA OBWOLO 2ND DEFENDANT**

RULING

1. The dispute over the land parcel No South Teso/Osuret/1411 (the Suit land) pitting Giraido, Omogin, Akobo, Redempta, Ibura, John Okwiti Obuolo, Sammy Barasa And Leonard Ojuma Obwolo (the 1st to 5th Plaintiffs respectively) as against Obore Karani, Samuel And Patrick Opama, Osilimong, (the 1st and 2nd Defendants respectively) was determined vide a judgment delivered on 8th July, 2024. The following disposal orders were made in favor of the Plaintiffs:
 1. The 3rd Plaintiffs suit as against the Defendants is withdrawn with costs at 75% after taxation, as per the orders of 15th February 2022.
 2. The Plaintiffs' suit as against the 2nd Defendant is struck out with no orders as to costs.
 3. The suit by the 1st, 2nd, 4th and 5th Plaintiffs, as against the 1st Defendant, is dismissed with costs to the 1st Defendant.



2. The 1st, 2nd, 3rd, 4th and 5th Plaintiffs were all aggrieved by that judgment and lodged a Notice of Appeal dated 17th July, 2024.
3. The 1st Plaintiff has now moved to this Court, vide his Notice of Motion dated 21st August, 2024 and filed under Certificate of Urgency. He seeks the following orders:
 1. Spent.
 2. Spent.
 3. Spent.
 4. That there be a stay of execution of the judgment delivered on 8th July, 2024 pending hearing and determination of appeal. NO E190 of 2024, filed at the Court of Appeal in Kisumu that costs of this application be provided for.
 5. That costs of this application be provided for.
4. The application is premised under the provisions of Section 3A of the Civil Procedure Rules Order 40 Rule 1 and 6 and Order 50 Rule 1 of the Civil Procedure Rules. It is based on the grounds set out therein and supported by the affidavit of the 1st Plaintiff of even date.
5. The gist of the application is that the 1st Plaintiff was aggrieved by this Court's judgment and has filed at the Court of Appeal in Kisumu, Civil Appeal NO E190 of 2024. That the Defendants are in the process of executing the decree herein and if the judgment is not stayed, he will suffer loss yet his appeal has high chances of success.
6. Annexed to the application are the following documents:
 1. Copy of the Defendant's Bill of Costs, dated 14th August, 2024.
 2. Notice of Appeal dated 17th August, 2024.
 3. Copy of letter by the 1st Plaintiff, dated 17th July, 2024 and requesting for the proceedings and judgment herein.
7. The application is opposed, and the 2nd Defendant filed a replying affidavit dated 1st October 2024. Therein, he has averred, inter alia, as follows; that it is not clear who among the five (5) Plaintiffs signed the application yet the law requires a party filing the application or his advocate to sign it. In the circumstances, it is difficult to know who signed it. That this Court is now functus officio and the Plaintiffs have not shown what substantial loss they will suffer. In any event, their appeal is yet to be admitted in the Court of Appeal. That the orders made in the impugned judgment are negative orders which are not capable of being stayed. That the 1st Defendant is infact now deceased and this application is therefore a mere academic exercise, without merit and is an abuse of the Court process and waste of judicial time. It should be dismissed with costs.
8. The application has been canvassed by way of written submissions.
9. The Plaintiffs are acting in person, and their submissions have been filed by the 1st Plaintiff. Mr. Were instructed by the firm of Gabriel Fwaya Advocates filed submissions of on behalf of the Defendants.
10. I have considered the application, the rival affidavits and annextures thereto as well as the submissions by the 1st Plaintiff and by Mr. Were.



11. The Plaintiffs are acting in person and so the application, as is expected of pro se litigants, is not properly drawn. For instance, the application is premised upon the provisions of Section 3A of the Civil Procedure Act as well as Orders 40 and 50 of the Civil Procedure Rules. The proper provision is Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules. And as the 2nd Defendant has correctly deposed in paragraph 5 of his replying affidavit, it is not clear who of the Plaintiffs has signed the Notice of Motion or the supporting affidavit. However, the Notice of Motion clearly states that it is drawn by Giraido Omongin Akobo who is the 1st Plaintiff. Those lapses with regard to the citing of the wrong provisions of the law and also failure to indicate who of the Plaintiffs has signed the supporting affidavit are not, in the circumstances of this case fatal to the application. They are all curable by virtue of Article 159 (2) (d) of the Constitution. In any event, the Defendants have not been prejudiced by those lapses. I shall therefore consider the application as properly brought under the provisions of Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules.

12. That provision donates to this Court the power to stay execution of its judgments pending appeal. It reads:

(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.” Emphasis mine.

The Plaintiffs were therefore required to prove the following in order to be entitled to the order of stay of execution pending appeal:

1. Show sufficient cause.
2. Demonstrate that they will suffer substantial loss unless the order is granted.
3. Approach the Court without unreasonable delay.
4. Offer security.

The above was reiterated in the case of Vishram Ravji Halai & Another -v- Thornton & Turpin (1963) LTD 1990 KLR 365 where the Court of Appeal held:

“ Thus the Superior Court’s discretion is fettered by three conditions; Firstly, the applicant must establish a sufficient cause, secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly, the applicant must



furnish security. The application must of course be made without unreasonable delay.”

The Plaintiffs filed a Notice of Appeal dated 17th July 2024 which was just about 10 days from the date of the Judgment sought to be stayed. That is sufficient cause.

13. This application was filed on 21st August 2024 slightly over 40 years from the date when the judgment was delivered. That delay is not unreasonable in the circumstances of this case.

14. The Plaintiffs have however not demonstrated what substantial loss they will suffer if the order of stay of execution pending appeal is not granted. In ground NO (b) of the Notice of Motion, they have simply stated that:

(b) “The Applicants shall suffer losses if the Respondents are not stayed (sic) to execute the judgment delivered on 8th July 2024 by this Honourable Court.”

There is no explanation by the Plaintiffs of what “losses” they will suffer or indeed to cite the law, what “substantial loss” will result to them if the order of stay of execution is not granted. Substantial loss is the fulcrum upon which such an application should revolve. Platt Ag. J.A (as he then was) put it this way in the case of Kenya Shell Ltd -v- Kibiru & Another 1986 KLR 410 at page 416:

“It is usually a good rule to see if order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in it’s various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money”. Emphasis mine.

In the case of Machira T/a Machira & Company Advocates -v- East African Standard (NO 2) 2002 KLR 63, it was held that:

“In this kind of application for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars ... where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay.”

It is therefore not enough for the Plaintiffs to simply plead, as they have done, that they will suffer losses. The law requires them to go further and show what loss they will suffer and that it will be substantial. The Plaintiffs have not surmounted that hurdle.

15. The Plaintiffs have also not offered any security as is required. Neither have they averred that they are ready and willing to abide by any terms which this Court may impose as a condition of stay. Such an offer is usually a good reason for the Court to conclude that the application is being made in good faith “and not merely as a decoy to obstruct and delay the Respondent’s right to enjoy the fruits of his judgment” – see Wycliffe Sikuku Walusaka -v- Philip Kaita Wekesa 2020 eKLR. It is not lost to this Court that the Plaintiffs only filed this application one week after being served with the Defendant’s Bill of Costs dated 14th August 2024. The inevitable conclusion is that this application is intended to scuttle the taxation of that Bill of Costs and therefore not made in good faith.

16. The Plaintiffs have therefore not satisfied two of the conditions stipulated in Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules. They are not deserving of the order of stay of execution pending appeal.



17. Most importantly, however, as is clear from the disposal orders issued by this Court in the Judgment sought to be stayed, the 3rd Plaintiff's suit as against the Defendants was withdrawn, Plaintiffs suit as against the 2nd Defendant was struck out and the 1st, 2nd, 4th and 5th Plaintiffs' suit against the 1st Defendant was dismissed with costs. As MR WERE has rightly submitted, these were negative orders. They are not capable of execution save for costs. This was reiterated in the case of *Western College Of Arts And Applied Sciences –v- Oranga & Others* 1976 – 80 I KLR 78 where the then Court of Appeal for East Africa held:

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs ... In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum.”

See also *Co-operative Bank Of Kenya Ltd -v- Banking Insurance & Finance Union Kenya* 2015 Eklr. Further, In *The Case Of Kanwal Sarjit Singh Dhiman -v- Keshavji Jivraj Shah* 2008 eKLR, the Court of Appeal while considering an application for stay of a negative order held as follows:

“The 2nd prayer in the application for stay (of execution) of the order of the Superior Court made on December 18, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the Superior Court did not order any of the parties to do anything or to pay any sum. It was thus a negative order which is incapable of execution save in respect of costs only. Emphasis mine

That is the same scenario in this case. The Plaintiffs suit was either withdrawn, struck out or dismissed. None of the parties was directed to do anything else or to pay any sum other than the order for costs. The judgment being a negative order, it cannot be stayed as is clear from the above precedents.

18. Ultimately therefore and having considered the Notice of Motion dated 21st August 2024, I issue the following disposal orders:

1. The Notice of Motion dated 21st August 2024 is dismissed.
2. The 1st Plaintiff shall meet the 2nd Defendant's costs of the application.

BOAZ N. OLAO

JUDGE

17TH OCTOBER 2024

RULING DATED, SIGNED AND DELIVERED ON THIS 17TH DAY OF OCTOBER 2024 BY WAY OF ELECTRONIC MAIL.

