



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Odakha & another v Lubia (Represented by Christopher Maloba Ogokha) (Environment & Land Case E028 of 2021) [2024] KEELC 6792 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6792 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E028 OF 2021**

BN OLAO, J

OCTOBER 17, 2024

BETWEEN

HENRY ANDERA ODAKHA 1ST PLAINTIFF

VICTOR BARASA ODAKHA 2ND PLAINTIFF

AND

**IMELDA WERE LUBIA (REPRESENTED BY CHRISTOPHER MALOBA
OGOKHA) DEFENDANT**

RULING

1. Judgment was delivered in this case on 11th May 2023. The Court decreed, inter alia that the Defendant (Imelda Were Lubia) holds the title to the land parcel No Samia/Butabona/836 (the suit land) in trust for both herself and Henry Andera Odakha and Victor Barasa Odakha (the 1st and 2nd Plaintiffs). The trust was determined and the Court directed that the Plaintiffs shall be jointly registered as proprietors of 8.0 acres and the Defendant be registered as proprietor of 3.8 acres. An appeal has been filed against that judgment being Court of Appeal Kisumu Civil Appeal NO E153 of 2023. The Defendant had donated a Power of Attorney to her son Christopher Maloba Ogokha who testified on her behalf.
2. The said Christopher Maloba Ogokha has now approached this Court vide the Notice of Motion dated 3rd April 2024 and premised under provisions of Order 42 Rule 6 of the Civil Procedure Rules. He seeks the following orders:
 1. Spent
 2. Spent
 3. That this Honourable Court be pleased to issue an order of stay of execution of the judgment and orders issued on 11th May 2023 and all other consequential orders pending the hearing and determination of Court of Appeal Kisumu Civil Appeal No E153 of 2023.



4. That an order of inhibition be placed on the land parcel No Samia/Butabona/836 pending the hearing and determination of Court of Appeal Kisumu Civil Appeal NO E153 of 2023.
5. That the costs of this application be provided for.
3. The application is based on the grounds set out therein and supported by the affidavit of Christopher Maloba Ogokha the donee of the Power of Attorney.
4. It is the Defendant's case that following this Court's judgment delivered on 11th May 2023, the Plaintiffs have already started executing the decree on their own and interfering with the area of the land previously in use by the Defendant and without involving a licensed surveyor. That the Defendant's appeal has very high chances of success and unless the orders sought are granted, the Plaintiffs will proceed and dispose off the suit land to third parties to the detriment of the Defendant. That this application has been made without unreasonable delay and the orders sought should be granted to give the Defendant an opportunity to prosecute her appeal. Annexed to the application is a copy of the decree issued herein.
5. The application is opposed and the 1st Plaintiff has filed a replying affidavit dated 20th May 2024 in which he has deponed, inter alia, that the application has been filed twelve (12) months after the delivery of the judgment on 11th May 2023. That delay has not been explained and there are no grounds to enable this Court exercise its discretion. In any event, the appeal has slim chances of success.
6. When the application was placed before me, I directed that it be canvassed by way of written submissions. Those submissions have been filed both by MR. J. V. Juma instructed by the firm of J. V. Juma & Company Advocates for the Defendant and by Mr Ouma instructed by the firm of B. M. Ouma & Company Advocates for the Plaintiffs.
7. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules on which application is premised reads as follows:
 - (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 added.The Defendant was therefore required to prove the following in order to be entitled to the order of stay of execution:
 1. Show sufficient cause.
 2. Demonstrate that unless the order is granted, she will suffer substantial loss.
 3. File the application without sufficient cause.



4. Offer security.

The jurisdiction of this Court while considering such an application was circumscribed by the Court of Appeal in the case of Vishram Ravji Halai & Another -v- Thornton & Turpin (1963) LTD 1990 KLR 365 where it said:

“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 Defendant has already filed a Notice of Appeal and subsequently, appeal No 153 of 2023 at the Court of Appeal in Kisumu. That is sufficient Cause.

8. On the ground of substantial loss, Platt Ag. J.A (as he then was) said as follows in the case of Kenya Shell Ltd -v- Kibiru 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 its various forms is the cornerstone 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”.

9. The Defendant has stated that unless the order of stay is granted, the Plaintiffs may proceed to dispose off the suit land to third parties to her detriment. No evidence has been placed before this Court to suggest that the Plaintiffs are contemplating disposing off the suit land to third parties. In any case, as was held in the case of Machira t/a Machira & Company Advocates -V- East African Standard (no 2) 2002 KLR 63:

“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.”

The Defendant has also deposed in paragraph 7 of the replying affidavit that “the appeal has very high chances of success hence the orders sought should be granted.” The judgment sought to be stayed was delivered by this Court. Therefore, the arguability, strength or otherwise of the pending appeal at the Court of Appeal cannot be a consideration by this Court. It can only be a matter to be considered when this Court, sitting as an appellate Court is considering an application arising out of a decision of a subordinate Court.

10. The Defendant has been unable to surmount the ground of proving substantial loss.

11. With regard to filing this application without unreasonable delay, the Defendant has deposed in paragraph 9 of the supporting affidavit thus:

9: “That this application has been made without unreasonable delay.”

This has been rebutted by the 1st Plaintiff in paragraph 5 of his replying affidavit thus:



- 5: “That the judgment sought to be stayed was delivered on 11th May 2023 yet this application has been filed on 3rd April 2024 twelve months later without explanation for that delay.”
12. It is common knowledge that the judgment sought to be stayed was delivered by way of electronic mail on 11th May 2023. This application was filed on 3rd April 2024 some 11 months later. No explanation has been proffered for that delay which is clearly unreasonable in the circumstances. Without that explanation, this Court has no basis upon which to exercise its discretion in favour of the Defendant.
13. Finally, the Defendant has not offered any security nor intimated that she is willing to abide by any terms which this Court may impose as a condition of stay. As is clear from the case of *Vishram Ravji Halai -V- Thornton & Turpin (1963)*, any party seeking such an order “must furnish security”. And if no security is offered, at least that party must demonstrate that he or she is willing to abide with any conditions set out by the Court. As was held in *Wycliffe Sikuku Walusaka -v- Philip Kaita Wekesa 2020 eKLR*, a case cited by the Plaintiff’s counsel;

“The offer for security must of course come from the Applicant himself as a sign of good faith to demonstrate that the application for stay of execution pending appeal is being pursued in the interest of justice and not merely as a decoy to obstruct and delay the Respondent’s right to enjoy the fruits of his judgment.”

No security having been offered nor any assurance that the Defendant is ready and willing to abide by any conditions which this Court may impose, and also considering the un-explained delay in filing this application, this Court can only conclude that the Defendant’s motive is to obstruct the Plaintiffs’ in their quest to enjoy the fruits of their judgment. The prayer for stay of execution is devoid of merits. It is dismissed.

14. With regard to the prayer that an order of inhibition be placed on the suit land pending the hearing and determination of Court of Appeal Kisumu Civil Appeal NO E153 of 2023, the law is provided for in Section 68 (1) of the [Land Registration Act](#). It provides as follows:

68

- (1) “The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.”

An order of inhibition is similar to an order of prohibitory injunction. It restricts the registered proprietor from making any transactions thereon pending the determination of the suit in which the land is the subject of trial – *Philip Mwangi Githinji -v- Grace Makarima Githinji 2004 eKLR*.

15. In the circumstances of this case, this Court having declined to stay execution of the judgment herein, it follows that there can be no basis for granting the order of inhibition which, as I have already stated above, is akin to an order of injunction pending trial meant to preserve the property in dispute. The principles laid down in the case of *Giela -v- Cassman Brown & Company LTD 1973 E.A 358* must therefore apply. In light of my findings above on the issue of stay of execution pending appeal, an order of inhibition cannot be justified and that prayer must be declined.
16. The up-shot of all the above is that having considered the Notice of Motion dated 3rd April 2024, I find that it is devoid of any merit. It is accordingly dismissed with costs.

BOAZ N. OLAO

JUDGE



17TH OCTOBER 2024

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

BOAZ N. OLAO

JUDGE

17TH OCTOBER 2024

