



Ambani & another v Mwimali & another (Environment & Land Case 191 of 2016) [2024] KEELC 13914 (KLR) (17 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13914 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 191 OF 2016
DO OHUNGO, J
DECEMBER 17, 2024**

BETWEEN

JOHNSON WYCLIFE AMBANI 1ST PLAINTIFF

JOHN OMUYULA M ODINGA 2ND PLAINTIFF

AND

HENRY LUBANGA MWIMALI 1ST DEFENDANT

MICHAEL OTINGA MWIMALI 2ND DEFENDANT

RULING

1. Judgment was delivered in this matter on 30th January 2024 as follows:

- a. The defendants' counterclaim is dismissed.
- b. Christine Auma Lubanga and Ronald Evans Otinga Lubanga and the family, servants, agents, and representatives of Henry Lubanga Mwimali to vacate the parcel of land known as E. Wanga/Malaha/1165 within ninety (90) days from the date of delivery of this judgment. In default, the plaintiffs shall be at liberty to evict them.
- c. A permanent injunction is hereby issued restraining Christine Auma Lubanga and Ronald Evans Otinga Lubanga and the family, servants, agents, and representatives of Henry Lubanga Mwimali and any other person claiming or acting on their behalf from trespassing onto or interfering with the plaintiffs use and possession of the parcels of land known as E. Wanga/Malaha/1163 and E. Wanga/Malaha/1165.
- d. In view of the family relationship between the parties, I make no order as to costs.



2. Subsequently, the Defendants filed Notice of Motion dated 12th March 2024, which is the subject of this ruling. Through the application, the Defendants seek stay of execution of the judgment and the decree pending hearing and determination of an appeal to the Court of Appeal.
3. The application is supported by an affidavit sworn by Ronald Evans Otinga Lubanga and Michael Otinga Mwimali. They deposed that the Court ordered their eviction, that they had filed a Notice of Appeal against the judgment and that their appeal will be rendered an academic exercise if stay is not granted.
4. The Plaintiffs opposed the application through a Replying Affidavit sworn by the First Plaintiff. Deposed that the Defendants are using and benefiting from the parcel of land known as E. Wanga/Malaha/1165 and that he is therefore both disadvantaged and prejudiced. He added that he is entitled to justice and should be allowed to enjoy the fruits of the judgment.
5. The application was canvassed through written submissions. The Defendants filed submissions dated 18th July 2024 while the Plaintiffs filed submissions dated 21st August 2024.
6. I have considered the application, the affidavits and the submissions. The jurisdiction to grant stay of execution pending appeal is circumscribed within Order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010. The upshot of those provisions is that a litigant seeking stay pending appeal must demonstrate that substantial loss will result to him if stay is not granted, and that the application has been made without unreasonable delay. Such a litigant is also required to give such security as the court may order for the due performance of the decree. See *Kenya Power & Lighting Co. Ltd v Kigaita Ngare Unduthu & 36 others* [2020] eKLR and *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR. As Platt Ag JA (as he then was) stated in *Kenya Shell Limited v Benjamin Karuga Kibiru & another*, substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. It is virtually impossible for such an application to succeed if an applicant fails to demonstrate that he will suffer substantial loss if stay is not granted.
7. The parties have dwelt quite a bit on whether the appeal has a chance of success. I am afraid that is not a consideration under Order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010. The turning point of an application under the said provisions is substantial loss.
8. I note that in the judgment, this Court ordered the applicants to vacate the parcel of land known as E. Wanga/Malaha/1165 within ninety (90) days from the date of delivery of the judgment and in default, the Plaintiffs would be at liberty to evict them. An eviction while an appeal is pending is certainly substantial loss. The Defendants filed Notice of Appeal on 5th February 2024. Thus, they have an appeal within the meaning of Order 42 rule 6 (4). I further note that the present application was filed on 12th March 2024, well within the ninety (90) days that the Court had given in the judgment. There was no inordinate delay.
9. The Plaintiffs have argued that they are entitled to justice and should be allowed to enjoy the fruits of the judgment. While all those are valid concerns, the right of appeal is a cardinal part of the right to a fair hearing. The Court has a duty to see to it that the Defendants' appeal which has been validly filed is accorded an opportunity to be heard on its merits. I will address the Plaintiffs' concerns by imposing conditions to facilitate proactive prosecution of the appeal. I bear in mind that the proceedings in this matter were typed on a day to day basis are readily available for purposes of the appeal.
10. In view of the foregoing discourse, I find merit in Notice of Motion dated 12th March 2024. I make the following orders:



- a. I grant stay of execution of the judgment and decree herein pending hearing and determination of the Defendants' appeal to the Court of Appeal.
- b. The stay orders shall remain in force for a period of only 2 (two) years from the date of delivery of this ruling, unless otherwise extended in the Appellate Court

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 17TH DAY OF DECEMBER 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Masakhwe for the Plaintiffs

The Second Defendant present

Court Assistant: M Nguyayi

