



**Mbala v Chore (Environment and Land Appeal E063 of 2024)  
[2024] KEELC 13805 (KLR) (11 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13805 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E063 OF 2024  
SO OKONG'O, J  
DECEMBER 11, 2024**

**BETWEEN**

**CHARLES OTIENO MBALA ..... APPELLANT**

**AND**

**WASHINGTON ODHIAMBO CHORE ..... RESPONDENT**

**RULING**

1. What is before the court is the Appellant’s application brought by way of a Notice of Motion dated 14<sup>th</sup> August 2024 seeking a stay of execution of the judgment and decree made by Hon. V.Adhiambo SRM on 31<sup>st</sup> July 2024 in Kisumu CMC ELC No. E042 of 2023 (hereinafter referred to only as “the lower court”) pending the hearing and determination of the appeal herein. The application is supported by the affidavit of the Appellant sworn on 14<sup>th</sup> August 2024.
2. The Appellant has averred that he is the registered owner of all that parcel of land known as Title No. Kisumu/Pandpieri/3196 which borders the parcels of land known as Title No. Kisumu/Pandpieri/3195 and Title No. Kisumu/Pandpieri/3197 owned by the Respondent. The Appellant has averred that the three parcels of land are subdivisions of the original land parcel Title No. Kisumu/Pandpieri/784 which was owned by his deceased father, Joannes Mbala Omia (hereinafter referred to only as “the deceased”). The Appellant has averred that the three parcels of land share common boundaries. The Appellant has averred that the Respondent purchased Title No. Kisumu/Pandpieri/3195 and Title No. Kisumu/Pandpieri/3197 from his step brothers after the death of the deceased. The Appellant has averred that the deceased had constructed residential houses on the original parcel Title No. Kisumu/Pandpieri/784 while he was alive which houses now fall within Title No. Kisumu/Pandpieri/3195, Title No. Kisumu/Pandpieri/3196 and Title No. Kisumu/Pandpieri/3197. The Appellant has averred that he also constructed additional residential houses on the original land parcel Title No. Kisumu/Pandpieri/784 which are being claimed by the Respondent. The Appellant has averred that when the Respondent purchased Title No. Kisumu/Pandpieri/3195



and Title No. Kisumu/Pandpieri/3197 from his stepbrothers, the houses in dispute were already in existence.

3. The Appellant has averred that in the judgment the execution of which is sought to be stayed, the lower court ordered the Appellant to vacate land parcels, Title No. Kisumu/Pandpieri/3195 and Title No. Kisumu/Pandpieri/3197 owned by the Respondent within 30 days. The Appellant has averred that the lower court did not make a conclusive determination on whether the houses which were in contention before it were on the Appellant's land parcel Title No. Kisumu/Pandpieri/3196 or the Respondent's land parcels, Title No. Kisumu/Pandpieri/3195 and Title No. Kisumu/Pandpieri/3197. The Appellant has averred that he is dissatisfied with the said judgment and has preferred the present appeal. The Appellant has averred that he stands the risk of being evicted at any time unless the stay sought is granted.
4. The application is opposed by the Respondent through a replying affidavit sworn on 6<sup>th</sup> September 2024. The Respondent has averred that all the parcels of land in dispute namely; Plot Nos. 3195, 3196 and 3197 had houses on them which were constructed by the Appellant's father and that Plot Nos. 3195 and 3197 were sold to the Respondent by the Appellant's stepbrothers together with the houses which were on them. The Respondent has averred that the Appellant did not construct any additional houses on the original land parcel, Kisumu/Pandpieri/784 as alleged. The Respondent has averred that in the lower court suit, the Appellant was not claiming houses on Plot Nos. 3195 and 3197 but the two parcels of land together with everything permanently attached and fixed thereon. The Respondent has averred that the Appellant should vacate the houses on Plot Nos. Kisumu/Pandpieri/3195 and Kisumu/Pandpieri/3197 and move to the houses on his parcel of land, Plot No. Kisumu/Pandpieri/3196 which is adjacent to the Respondent's houses. The Respondent has averred that the Applicant is denying him the rental income by his continuous occupation of the Respondent's houses on Plot Nos. Kisumu/Pandpieri/3195 and Kisumu/Pandpieri/3197. The Respondent has averred that if the Applicant is to continue in occupation of the said houses, he should be ordered to pay rent in the sum of Kshs. 5000/- per month.
5. I have considered the application together with the affidavit of the Appellant filed in support thereof. I have also considered the replying affidavit filed by the Respondent in opposition to the application. Finally, I have considered the submissions by the Appellant and the Respondent dated 14<sup>th</sup> October 2024 and 21<sup>st</sup> September 2024 respectively.
6. The Appellant's application was brought principally under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules which provides that:
  6.
    - (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 sub-rule (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 ultimately be binding on him has been given by the applicant.

7. In *Kenya Shell Limited v. Karuga* (1982 – 1988) I KAR 1018 the court stated that:

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.”

8. I am satisfied that the Appellant’s application was brought without unreasonable delay. However, I am not persuaded that the Appellant is likely to suffer substantial loss if the stay sought is not granted. It is not disputed that Plot No. Kisumu/Pandpieri/3196 owned by the Appellant, and Plot Nos. Kisumu/ Pandpieri/3195 and Kisumu/Pandpieri/3197 owned by the Respondent have houses on them. According to the Appellant, the bone of contention between the Appellant and the Respondent which this court will be called upon to determine in this appeal is the location on the ground of the house which is claimed by both parties. The lower court in its judgment made a finding that the Respondent is the lawful owner of Plot No. Kisumu/Pandpieri/3195 and Plot No. Kisumu/Pandpieri/3197 together with the houses standing thereon which include the house claimed by the Appellant to belong to him. The Appellant owns Plot No. 3196 which has a house standing on it. It is not clear to me whether the Appellant’s case is that the house in contention is on Plot No. Kisumu/Pandpieri/3196 owned by him and not on Plot No. Kisumu/ Pandpieri/3195 and Plot No. 3197 owned by the Respondent. The Appellant appears to be talking about houses that he had allegedly built on the original parcel No. Kisumu/Pandpieri/784 which no longer exists. This may lend credence to the Respondent’s contention that the dispute between the parties is not actually over houses but ownership of Plot No. Kisumu/Pandpieri/3196 and Plot No. Kisumu/Pandpieri/3197. The house in contention is either on Plot No. 3196 owned by the Applicant or Plot No. 3195 and Plot No. 3197 owned by the Respondent. The lower court found that the house in contention is on Plot No. 3195 and Plot No. 3197 owned by the Respondent and that the Appellant who was occupying the same without the Respondent’s permission was a trespasser and should vacate the same. The Appellant has not denied that he has another house on his Plot No. Kisumu/Pandpieri/3196.
9. I am not persuaded that the Appellant would be rendered homeless if he vacates the house found by the lower court to be on Plot No. Kisumu/Pandpieri/3195 and Plot No. Kisumu/Pandpieri/3197 owned by the Respondent. He has another house on Plot No. Kisumu/Pandpieri/3196 which he can move to. He can also look for an alternative residence. I am also not satisfied that the Appellant’s appeal would be rendered nugatory if he vacates the said house. If on appeal the court finds that the house in contention is on Plot No. Kisumu/Pandpieri/3196 owned by the Appellant, he will get the house back because it is on his land in any event. The title of Plot No. Kisumu/Pandpieri/3196 is in the name of the Appellant and as such the chances that the Respondent may dispose of the house is nil.

## Conclusion

10. The upshot of the foregoing is that the Appellant’s Notice of Motion application dated 14<sup>th</sup> August 2024 has no merit. The application is dismissed with costs to the Respondent.



**DELIVERED AND DATED AT KISUMU ON THIS 11<sup>TH</sup> DAY OF DECEMBER 2024**

**S. OKONG'O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Onyango for the Appellant/Applicant

N/A for the Respondent

Ms. J.Omondi-Court Assistant

