



Orowe & 2 others (Suing as the Administrators of the Estate of Austin Francis Orowe, Deceased) v National Land Commission & 2 others (Environment and Land Case Civil Suit 78 of 2017) [2024] KEELC 13734 (KLR) (10 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13734 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 78 OF 2017
SO OKONG'O, J
DECEMBER 10, 2024**

BETWEEN

**BRIDGET MARY ONYANGO OROWE 1ST PLAINTIFF
JULIUS OROWE 2ND PLAINTIFF
LAWRENCE OROWE 3RD PLAINTIFF
SUING AS THE ADMINISTRATORS OF THE ESTATE OF AUSTIN FRANCIS
OROWE, DECEASED**

AND

**THE NATIONAL LAND COMMISSION 1ST DEFENDANT
KENYA NATIONAL HIGHWAYS AUTHORITY 2ND DEFENDANT
THE ATTORNEY GENERAL 3RD DEFENDANT**

RULING

1. On 29th May 2023, judgment was entered herein for the Plaintiffs against the 2nd Defendant in the sum of Kshs. 18,874,503/-. The court ordered that the costs of the suit be discussed and agreed upon by the parties failure to which the same was to be determined by the court. The 2nd Defendant did not settle the principal sum even after the court extended time for it to do so. On 28th November 2023, the Plaintiffs applied for execution against the 2nd Defendant for the recovery of the said judgment sum of Kshs. 18,874,503/-. The court issued warrants of attachment and sale of the 2nd Defendant's movable properties on 30th November 2023. On 1st December 2023, Victoria Blue Services Auctioneers acting on the instructions of the Plaintiffs attached the 2nd Defendant's movable properties including office furniture and motor vehicles in execution of the said warrants.



2. Following the attachment, the 2nd Defendant moved the court by way of a Notice of Motion application dated 13th December 2023 seeking an order for the lifting of the warrants of attachment and sale dated 30th November 2023 and the resultant proclamation notice dated 1st December 2023, and a declaration that the said warrants were prematurely and irregularly obtained. The 2nd Defendant also sought an order that the costs of the application and the unlawful execution be borne by the Plaintiffs.
3. The application was opposed by the Plaintiffs. In a ruling delivered on 19th June 2024, the court held that under Section 68 of the *Kenya Roads Act*, 2007, no attachment or execution could be levied against the property of the 2nd Defendant and as such the mode of execution that was adopted by the Plaintiffs against the 2nd Defendant was unlawful being contrary to the express provisions of the Act. The court made a finding that the warrants of attachment and sale that were issued by the court on 30th November 2023 on the Plaintiffs' application for execution against the 2nd Defendant were irregularly issued. The court allowed the 2nd Defendant's application and lifted the attachment against it. The court however ordered the 2nd Defendant to meet the auctioneers' costs if any since the attachment that was levied by the Plaintiffs against the 2nd Defendant was out of desperation.
4. The 2nd Defendant was dissatisfied with the part of the court's ruling that ordered it to pay the auctioneers charges and filed a notice of its intention to appeal against the same to the Court of Appeal. What is now before the court is the 2nd Defendant's Notice of Motion application dated 10th July 2024 seeking a stay of execution of the order made on 19th June 2024 requiring the 2nd Defendant to meet the auctioneers' costs. The application was brought on the grounds that the 2nd Defendant was aggrieved by the said order and intended to appeal against the same to the Court of Appeal. The 2nd Defendant averred that the said auctioneers' fees were likely to exceed Kshs. 2,960,392/-. The 2nd Defendant averred that its intended appeal would be rendered nugatory if the stay sought was not granted.
5. The application was opposed by the Plaintiffs through grounds of opposition dated 19th July 2024. The Plaintiffs contended that the 2nd Defendant's application was premature in that the auctioneers had not filed their bill of costs for taxation. The Plaintiffs averred further that the application was an abuse of the process of the court as there was no threat of execution to warrant an order for stay.
6. When the application came up for hearing on 24th October 2024, the 2nd Defendant relied on the grounds on the face of the application and the supporting affidavit while the Plaintiffs relied on their grounds of opposition.
7. I have considered the 2nd Defendant's application and the grounds of opposition filed in opposition thereto. The 2nd Defendant's application was brought principally under Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules 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.”

8. 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.”

9. I am satisfied that the 2nd Defendant’s application was brought without unreasonable delay. I am however not satisfied that the 2nd Defendant stands to suffer substantial loss if the stay sought is not granted. In its ruling dated 19th June 2024, the court ordered the 2nd Defendant to pay “the auctioneers charges if any”. The court directed that if there were auctioneers’ fees/charges payable, the same was to be agreed upon by the parties or taxed by the taxing officer of the court. There is no evidence that Victoria Blue Services Auctioneers have demanded fees from the 2nd Defendant or filed their bill of costs for taxation. The quantum of the fees if any likely to be demanded by the said auctioneers from the 2nd Defendant is uncertain.
10. I am unable to see therefore how the 2nd Defendant would suffer substantial loss if it was to pay auctioneers charges yet to be demanded or assessed. I agree with the Plaintiffs that the 2nd Defendant’s application is premature. I find no merit in the application dated 10th July 2024. The same is dismissed with costs to the Plaintiffs.

DELIVERED AND DATED AT KISUMU ON THIS 10TH DAY OF DECEMBER 2024

S. OKONG’O

JUDGE

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

Ms. Okaka h/b for Mr. Ojuro for the Plaintiffs

Ms. Jumba for the 1st Defendant

Mr. Ragot for the 2nd Defendant

N/A for the 3rd Defendant

Ms. J. Omondi-Court Assistant

