



REPUBLIC OF KENYA



KENYA LAW
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**Oyimba v Ogutu (Environment & Land Case 7 of 2022)
[2023] KEELC 516 (KLR) (31 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 516 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 7 OF 2022
GMA ONGONDO, J
JANUARY 31, 2023
(FORMERLY MIGORI ELCC NO. 396 OF 2017)**

BETWEEN

LUCAS OGOLA OYIMBA PLAINTIFF

AND

CHARLES OCHIENG OGUTU DEFENDANT

RULING

1. The 1st and 2nd defendants/applicants, Charles Ochieng Ogutu and Stivin Ouma Otieno respectively who are represented by the firm of Odingo and Company Advocates pursuant to a notice of appointment dated 22nd February 2022, originated a Notice of motion dated 7th February 2022 (The application herein) seeking the orders infra;
 - a. Spent
 - b. That, this honourable court be pleased to issue stay orders of execution of the Ruling/ Judgment of this honourable court delivered and/or read on the 17th day September, 2020 pending the Hearing and determination of an intended appeal to be filed in the Court of Appeal at Kisumu.
 - c. That, costs of this application be borne by the Respondent herein.
2. The application is anchored on the applicant's supporting affidavit of nine paragraphs sworn on even date alongside grounds 1, 2 and 3 set out on the face of it. In a nutshell, the applicants' complaint is that they are aggrieved by this court's judgment delivered on 17th September 2020 and may be prejudiced thereby. That thus, they intend to file an appeal to the Court of Appeal. That the appeal has high chances of success.



3. The plaintiff/respondent, Lucas Ogola Oyimba opposed the application by way of a replying affidavit of eleven paragraphs sworn on 2nd March 2022 and filed herein on 8th March 2022 by his counsel, George Shane Okoth who urged the court to dismiss the same with costs. He deposed in part that the application offends Order 42 Rule 1 as well as Order 22 Rule 6 of the *Civil Procedure Rules*, 2010 and section 79G of the *Civil Procedure Act* Cap 22 Laws of Kenya.
4. Furthermore, the respondent's grounds of opposition dated 2nd March 2022 read infra;
 - a. The same abuses the Court's process.
 - b. That the same is brought in bad faith
 - c. The Applicant's Application is oppressive, vexatious and baseless.
 - d. That the Applicant's grounds of the Applicant's Application cannot occasion this honourable court to allow the same.
 - e. That it is in the interest of justice that this application be dismissed with costs.
5. On 7th November 2022, the court directed that the application be heard by written submissions.
6. The applicants neglected to file any submissions in this application.
7. By the submissions dated 14th September 2022, learned counsel for the respondent referred to Order 42 Rule 6 (1) and section 79G (both supra). Counsel further relied on sections 1A, 1B of the *Civil Procedure Act* Chapter 21 Laws of Kenya and Order 9 Rule 9 of the Civil Procedure Rules, 2010 and the case of *Kenya Commercial Bank Ltd-versus-Kenya Planters Cooperative Union* (2010) eKLR regarding oxygen principle which may not cure the application.
8. I have thoroughly studied the entire application, the replying affidavit and the respondent's submissions herein. Therefore, have the applicants satisfied the requirements stated under Order 42 Rule 6 (2) (a) and (b) of the Civil Procedure Rules, 2010 to enable the court grant the orders sought in this application?
9. On substantial loss requirement, the applicants contend that that they are bound to be prejudiced as the prospective appeal may be rendered nugatory if the orders sought in the application are not granted. That it is crystal clear that the applicants have not even lodged any notice of appeal as envisioned under Order 42 Rule 6 (4) of the Civil Procedure Rules, 2010.
10. It is well settled that substantial loss is the cornerstone of both jurisdictions for granting a stay and that is what has to be prevented; see *Kenya Shell Ltd-versus-Benjamin Karuga Kibiru and another* (1986) eKLR. Clearly, there is no prospective substantial loss disclosed in the application.
11. As regards delay, this court is guided by Order 50 Rules 2, 3, 8 and 9 of the Civil Procedure Rules, 2010 in respect of time. Plainly, the applicants took close to seventeen (17) months to lodge the application without any explanation yet it is a principle of equity that delay defeats equity as per Article 10 (2) (b) of *the Constitution* of Kenya, 2010.
12. In the case of *Andrew Kiplangat Chemaringo-versus-Paul Kipkorir Kibet* (2018) eKLR, the Court held that the applicant must give a plausible and satisfactory explanation for delay in commencing an application.
13. It is trite that delay for even a day without explanation, will result to dismissal of an application; see *Raphael Musila Mutiso and 3 others-versus-Joseph Ndava Nthuku and another* (2019) eKLR. In the obtaining scenario, the delay of commencement of the application, is unreasonable.



14. Concerning security, a party is not exempt from providing security for the due performance of a decree as the same is a statutory requirement; see *Doshi Iron Mongers Ltd-versus-Kenya Revenue Authority and another* (2020) eKLR.
15. Further, it is within the absolute discretion of the trial court to grant an order of stay of execution of decree or order. The applicants have not offered any security for the due performance of decree or order in this application bearing in mind the decision in the case of *Butt-versus-Rent Restriction Tribunal* (1979) eKLR.
16. The plaintiff/respondent extracted a decree as at 1st October 2020 herein. Thus, he is entitled to fruits of the judgment. In *Shahmad-versus-Shamji Bros and another* (1957) EA 438, it was noted that a party has a vested right to the judgment which ought to be effectual.
17. This court has to balance interests of both parties in this application. Sections 3 and 3A of the *Civil Procedure Act* Chapter 21 Laws of Kenya provide for special and inherent jurisdiction and powers of this court to make such orders necessary for the ends of justice. I find no merit in the application.
18. In the ultimate, I would disallow the application with costs to the respondent.
19. Orders accordingly

DATED AND DELIVERED AT HOMA BAY THIS 31ST DAY OF JANUARY 2023.

G. M .A ONG'ONDO

JUDGE

PRESENT;

- a) H. Mimba holding brief for Mr Odingo , learned counsel for the defendants/applicants
- b) Mr. Bigogo Onderi holding brief for Mr. G. S Okoth, learned counsel for the plaintiff/respondent.

