



REPUBLIC OF KENYA



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

**Ouko v Adundo & 2 others (Environment and Land Case Civil Suit
61 of 2021) [2023] KEELC 347 (KLR) (30 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 347 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND CASE CIVIL SUIT 61 OF 2021
GMA ONGONDO, J
JANUARY 30, 2023
(FORMERLY MIGORI ELC (OS) NO 634 OF 2017)**

BETWEEN

MARTIN GUYA OUKO PLAINTIFF

AND

AGUNGA ADUNDO 1ST DEFENDANT

RICHARD OTIENO NDIGA 2ND DEFENDANT

ABAYO MIRIAM OCHIENG 3RD DEFENDANT

RULING

1. By a notice of motion dated October 6, 2022 (the application herein) through the firm of S.N Otinga and Company Advocates, the 3rd defendant/applicant, Abayo Miriam Ochieng is seeking the following orders;
 - a. Spent.
 - b. Spent.
 - c. Pending the hearing and determination of the appeal, the honourable court be pleased to grant an order for stay of execution of its judgment delivered on September 27, 2022 and all the consequential orders and decree.
 - d. The honourable court be pleased to grant any such orders as may be deemed just and reasonable in the circumstances.
 - e. Costs of this application be provided for.



2. The application is premised upon grounds (a) to (k) stated on the face of the same and the applicant’s supporting affidavit of thirteen paragraphs sworn on even date and copies documents collectively marked as “AMO-A” inclusive of the notice of appeal dated October 4, 2022. Briefly, the applicant’s lamentation is that she is aggrieved by this court’s judgment delivered on September 27, 2022 and has filed an appeal in the form of the notice of appeal herein. That the appeal, if successful may be rendered nugatory unless stay of execution of the judgment is granted pending it’s hearing and determination.
3. In a replying affidavit sworn on October 17, 2022 and filed herein on October 18, 2022, the plaintiff/ respondent, Martin Guya Ouko through the firm of A. Okenye and Company Advocates, opposed the application, termed it unmerited and prayed that the same be dismissed with costs. He deposed, inter alia, that the applicant has not shown that the intended appeal is arguable.
4. In her further affidavit sworn on October 31, 2022, the applicant reiterated the entire contents of her affidavit in support of the application and that the property in dispute may be exposed to adverse dealings including sale and transfer of the same. That by a copy of the draft memorandum of appeal marked as “AMO-B” annexed to the further affidavit, the appeal is arguable.
5. The application was heard by written submissions further to this court’s directions of October 7, 2022.
6. By the submissions dated October 31, 2022, learned counsel for the applicant made reference to order 42 rule 6 (1) and (2) (supra) and relied on *Butt v Rent Restriction Tribunal* (1979) eKLR, among other authorities, to demonstrate that she is deserving of an order of stay sought in the application. That the application be allowed in terms of the stay order.
7. The respondent’s submissions dated November 14, 2022 filed on even date is a summary of the contents of his replying affidavit.
8. I have thoroughly considered the application, the replying affidavit and the submissions. So, the applicant has the duty to demonstrate that the application has attained the conditions under order 42 rule 6 of the *Civil Procedure Rules*, 2010 namely;
 - 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)
9. On substantial loss, the applicant must establish that if the order of stay sought is not granted, she is likely to suffer loss which is considerable in amount or value. Therefore, I note grounds (d) and (e) of the application.
10. In *Kenya Shell Ltd v Benjamin Karuga Kibiru and another* (1986) eKLR, the Court of Appeal observed;

“.....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 it’s various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented.....

On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment.....”



11. In light of the notice of appeal (AMO-A) as noted at paragraph 2 hereinabove, an appeal is deemed to have been filed under order 42 rule 6 (4) of the Civil Procedure Rules, 2010 which provides;

“For the purpose of this rule an appeal to the court of appeal is deemed to have been filed when under the rules of that court notice of appeal has been filed.”

11. Moreover, the appellant is entitled to pursue the appeal under articles 25(c), 48 and 50 (1) of the Constitution of Kenya, 2010. In the case of Butt v Rent Restriction Tribunal (1979) eKLR, the Court of Appeal observed;

“.....the appellant has an undoubted right of appeal....”

11. On condition of delay, order 50 rules 2, 3, 8 and 9 of the Civil Procedure Rules, 2010 relate to time. The period of time between the date of judgment and the date of the application hardly amounts to unreasonable delay in this application.

12. Concerning security, I take note of ground (h) of the application. No party is exempt from providing security for the due performance of a decree or order; see Doshi Iron Mongers Ltd v Kenya Revenue Authority and another (2020) eKLR.

13. Furthermore, having taken into account ground (i) of the application, this court has the absolute discretion to grant the stay order sought in the application being guided by the case of Butt (supra) and section 13 (7) (a) Environment and Land Court Act, 2015 (2011).

14. To that end, I find the application meritorious. I proceed to allow the application and grant an order of stay as sought in the application as stated at paragraph 1 (a) hereinabove with condition that the applicant shall within 30 days from this date, deposit in this court a sum of Kshs 15, 0000 only being security for the due performance of the decree herein failure of which the order of stay shall lapse automatically without further orders of this court.

15. Costs of the application to abide the appeal at the Court of Appeal

16. It is so ordered.

DATED AND DELIVERED AT HOMA-BAY THIS 30TH DAY OF JANUARY 2023

G .M.A ONG’ONDO

JUDGE

Present:

Ms. Amondi holding brief for Otinga, learned counsel for 3rd defendant/applicant.

Luanga, Court Assistant.

HOMA BAY ELC OS NO. 61 OF 2021-RULING 2

