



Etyakoro & 6 others v Omusolo & 2 others (Environment & Land Case 35 of 2016) [2023] KEELC 380 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 380 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 35 OF 2016**

**BN OLAO, J
JANUARY 26, 2023**

BETWEEN

**JARED ANYIKO ETYAKORO 1ST APPLICANT
WYCLIFFE EJAKAIT OMARE 2ND APPLICANT
WILLIMINA AKOL 3RD APPLICANT
FIRINGINA ABALI 4TH APPLICANT
JESCA EJAKAIT OTUBIA 5TH APPLICANT
DAVID OLOGE OPURU 6TH APPLICANT
MICHAEL ERAPU RICHARD ODEKE 7TH APPLICANT**

AND

**CHRISTIAN WAFULA OMUSOLO 1ST RESPONDENT
EVALINE AKISA OBARI (SUED ON BEHALF OF THEMSELVES AND AS
LEGAL REPRESENTATIVES OF THE ESTATE OF ENJESLOYS OMUSOLO
OBARI - DECEASED) 2ND RESPONDENT
ROMANO ERONE ITADI (SUED ON BEHALF OF THEMSELVES AND
AS LEGAL REPRESENTATIVES OF THE ESTATE OF ITADI OBARI -
DECEASED) 3RD RESPONDENT**

RULING

1. By a judgment delivered on July 21, 2022, Omollo J decreed that Jared Anyiko Etyakoro, Wycliffe Ejakait Omare, Wimina Akol, Fringina Abali, Jesca Ejakait Orubia, David Ologe Oporu and Michael Erapu Richard Odeke (the 1st to 7th Plaintiffs respectively) were entitled to a total of 11½ acres



comprised in the land parcel South Teso/Asinge/377 (the suit land) having acquired the same by way of adverse possession.

2. The judge similarly directed that Christine Wafula Omusolo and Evaline Akisa Obari (sued as the legal representative of the Estate of Enjesloys Omusolo Obali – 1st defendant) and Romano Erone Itadi (sued as the legal representative of the Estate of Itadi Obari – 2nd defendant) do within 45 days of the delivery of the said judgment execute all the documents to transfer 11½ acres of the suit land in favour of the plaintiffs as per their respective shares failure to which the Deputy Registrar would execute them on their behalf and dispense with the production of the original title deed if the defendants do not comply. Each party was directed to meet their own costs.
3. The Defendants, being aggrieved by that judgment, promptly filed a Notice of Appeal on August 3, 2022.
4. By a Notice of Motion dated August 24, 2022 and predicated upon the provisions of Sections 1A, 1B, 3, 3A, 63(e) and 79G of the *Civil Procedure Act*, the defendants beseeched the Court for the following orders:
 1. Spent
 2. Spent
 3. That this Court be pleased to grant a stay of execution of the judgment and/or decree issued on July 21, 2022 by Hon Lady Justice A. Omollo pending the hearing and determination of the appeal.
 4. That the costs of this application be provided for.
 5. The gravamen of the application which is the subject of this ruling and which is supported by the affidavit of Christian Wafula Omusolo (christian) is that the defendants are aggrieved by the judgment delivered on July 21, 2022 and have filed a Notice of Appeal. That there is a likelihood that the plaintiffs will execute the decree in which case the defendants will suffer substantial loss. That they are willing to provide any security which this Court may require and the plaintiffs will not be prejudiced with any orders of stay. On the other hand, they will be greatly prejudiced as they may lose ownership of the suit land.
 6. The defendants annexed to the application the following documents:
 1. Notice of Appeal.
 2. Letter dated August 2, 2022 from their counsel applying for copies of the proceedings.
7. In opposing the application, the plaintiff's counsel Wycliffe Obwoye Onsongo filed a replying affidavit dated October 3, 2022 in which he has deposed, inter alia, that this Court is not seized with the jurisdiction to grant the orders sought and that the Court of Appeal is the proper Court. That Sections 63(e) and 79G of the *Civil Procedure Act* are not applicable since they deal with injunctions and appeals respectively.
8. Further, that Order 42 of the *Civil Procedure Rules*, even if applicable, is clearly ousted by Rule 5 of the *Court of Appeal Rules*. In any event, the threshold of Order 42 Rule 6 of the *Civil Procedures Rules* has not been met. That this application is an abuse of the process of the Court and should be dismissed.
9. In a supplementary affidavit Christian deposed that the invocation of Section 79G was merely an error which should not affect the substance of the application. That the application has been made in good faith and in the interest of justice.



10. The application has been canvassed by way of written submissions. These have been filed by Mr Mutei instructed by the firm of Tom Mutei & Company Advocates for the defendants and by Mr Onsongo instructed by the firm of Obwoye Onsongo & Company Advocates for the plaintiffs.
11. I have considered the application, the rival affidavits and the submissions by counsel.
12. I must start by recognizing the fact that the replying affidavit filed in opposition to this application has been sworn by counsel for the defendants Mr Onsongo. Ordinarily, counsel should refrain from swearing affidavits in matters in which they are acting unless what they depose to are purely uncontested matters of fact within counsel's knowledge or issues of law – see *Hakika Transporters Services Ltd v Albert Chulab Wamimitaire* [2016] eKLR where the Court of Appeal citing its own decision in *Salama Beach Ltd v Mario* Ross CA Civil Appeal No 10 of 2015 said:

“As regards the appellant's objection regarding the affidavit supporting the application, it is clear that Mr Munityia has deposed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this Court. Ordinarily, counsel is obliged to refrain from swearing affidavits on contentious issues particularly where he may have to be subjected to cross-examination (see *Pattni -v- Ali and others* CA No 354 of 2004 (UR 183/40). Rule 9 of the Advocates (Practise) Rules however permits an advocate to swear an affidavit on formal or non-contentious matters.”

Looking at Mr Onsongo's replying affidavit dated October 3, 2022, it confines itself to issues of law and that is not fatal. That affidavit raises the following issues of law:-

- a. That this Court has no jurisdiction in this matter which is now the preserve of the Court of Appeal.
 - b. That the invocation of Section 63(e) and 79G of the *Civil Procedure Act* is misplaced.
 - c. That the threshold of Order 42 of the *Civil Procedure Rules* has not been met and in any event, that provision is ousted by Rule 5 of the Court of Appeal Rules.
13. It is true that Section 63(e) and 79G of the *Civil Procedure Act* do not apply. Counsel for the Applicant has conceded as much and stated in his submissions that that was a mere error which can be cured by Article 159(2) (d) of the *Constitution* which provides that:

“Justice shall be administered without undue regard to procedural technicalities.”

I agree with that submission. Indeed Section 19(1) of the *Environment and Land Court Act* has a similar provision. It reads:

“In any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure.”

Further, Order 51 Rule 10(2) of the *Civil Procedure Rules* reads:

“No application shall be defeated on a technicality or for want of form that do not affect the substance of this application.”

This application is therefore not defeated for citing Section 63(e) and 79G of the *Civil Procedure Act*.



14. On the issue of jurisdiction, Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules* and which is the applicable provision properly invoked by the defendants provides that:

42. 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 may ultimately be binding on him has been given by the applicant." Emphasis added.

It is clear from sub-rule (1) of Rule 6 that "the court appealed from may for sufficient cause order stay of execution of such decree or order."

For purposes of this application, "the Court appealed from" is this Court. Therefore, the averment by Mr Onsongo in paragraph 3 of his replying affidavit in which he says:

3. "That I am of an honest and humble opinion that this Honourable Court is not seized with jurisdiction to issue order of stay after delivering its judgment as that is the preserve of the Court of Appeal."

is not legally correct. The correct position is that both the trial Court, including a subordinate Court as well as the Court to which the appeal is filed have the jurisdiction to grant an order of stay pending appeal.

15. It is clear that under Order 42 Rule 6(2) of the *Civil Procedure Act*, the defendants needed to prove the following before being granted the order of stay of execution pending appeal, ie;

1. Demonstrate that if the orders are not granted, they will suffer substantial loss.
2. Show sufficient cause.
3. Approach the Court without unreasonable delay.
4. Offer security.

The judgment sought to be appealed was delivered on July 21, 2022 and a notice of Appeal was filed on August 3, 2022. The fact that the defendants have initiated the process of appealing the judgment is sufficient cause.



16. This application was also filed on August 24, 2022 a month after the judgment. I do not consider that delay to be unreasonable. The defendants have also averred through the supporting affidavit of Christian that they are ready and willing to provide any security which this Court may impose.
17. On the issue of substantial loss which, as was held in the case of *Kenya Shell Ltd v Benjamin Kibiru* [1982-88] I KAR 1018, is the cornerstone of such an application, the defendants have only pleaded that they will suffer substantial loss and will lose the title to the suit land and therefore ownership of the same if the execution proceeds. That will render their appeal nugatory. See paragraphs 7 and 14 of the supporting affidavit by Christian. They have also added that the plaintiffs will not be prejudiced with any orders of stay of execution. Since the plaintiffs did not themselves respond to those averments which are matters of fact within their own knowledge, this Court must believe what the defendants have alleged. It must also be remembered that in such an application, the Court exercises its own discretion on whether or not to grant the orders sought – *Butt v Rent Restriction Tribunal* [1979] eKLR; [1982] KLR 417. With regard to prejudice, the plaintiff did not file any reply to rebut the averments by the defendants that an order of stay will not prejudice them. In my estimation, since the plaintiffs are already in occupation of their respective portions of the suit land and there is no imminent fear of their eviction therefrom, I am persuaded that they do not stand to suffer any prejudice if the orders sought are granted but on conditions.
18. Ultimately therefore and having considered the application dated August 24, 2022, I allow it in the following terms;
 1. The defendants shall within 30 days of this ruling deposit with the Deputy Registrar of this Court the Original title deed to the land parcel No South Teso/Asinge/377 together with all the necessary transfer documents duly executed to facilitate the transfer to all the plaintiffs herein their respective portions of the said land in accordance with the judgment herein.
 2. That title deed and the documents will be kept in the safe custody of the Deputy Registrar until the appeal is heard and determined or until further orders of this Court.
 3. In default of (1) above, this order of stay shall automatically lapse, unless otherwise extended by Court, and the plaintiffs shall be at liberty to execute the decree herein.
 4. Parties shall meet their own costs.

RULING DATED, SIGNED AND DELIVERED AT BUSIA ON THIS 26TH DAY OF JANUARY, 2023 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE

JANUARY 26, 2023

