



**Lore v Ojwaka & 2 others (Environment and Land Appeal
E026 of 2022) [2023] KEELC 106 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 106 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E026 OF 2022
AY KOROSS, J
JANUARY 19, 2023**

BETWEEN

OMONDI LORE APPELLANT

AND

JAMES ZADOCK NYADA OJWAKA 1ST RESPONDENT

LAND REGISTRAR, BONDO 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The application that is the subject of this ruling is a notice of motion dated August 26, 2022. It was brought pursuant to the provisions of sections 3A, 63 (e) of the [Civil Procedure Act](#) and order 51 rule 1 of the [Civil Procedure Rules](#). The appellant sought the following orders:
 - a. Spent;
 - b. Spent;
 - c. That this honourable court do issue orders for stay of execution of the decree and/or judgment delivered by the trial court on July 28, 2022 in Bondo ELC case no EO52 of 2021; and
 - d. Costs of the application be provided for.
2. The motion is supported by grounds set out on its face and on the supporting affidavit deponed by the appellant Omondi Lore dated August 26, 2022.
3. It was the appellant's case *inter alia*, he was the registered owner of land parcel no Siaya/Ramba/1538 ('the suit property'); he was dissatisfied by the decision of Bondo ELC case no EO52 of 2021 which had rendered judgement over the suit property in favour of the respondent; he had filed a memorandum and record of appeal; in the absence of stay, the respondent was likely to execute the judgment which



would occasion him substantive and irreparable loss; he had carried out developments on the suit property; the respondent had threatened to dispose of the suit property to his detriment thus this would render the appeal nugatory; the motion was filed without unreasonable delay and he was willing to abide with any orders including an order for provision of security.

4. Despite service, the respondents did not file any document in opposition to the motion. Notwithstanding that the motion was unopposed, it is the duty of the court to nevertheless subject it to a merit evaluation in accord with the applicable laws and principles. When the motion came up for mention for directions on October 31, 2022, this court reserved it for ruling.
5. This court has considered the motion, grounds thereof, supporting affidavit together with the annexures thereto including the title document and memorandum of appeal and the single issue for determination is whether the appellant has met the threshold to warrant issuance of an order for stay of execution pending appeal.
6. Though the invitation to intervene on behalf of the appellant was invoked by section 63 (e) of the Civil Procedure Act which empowers this court to issue interlocutory orders in the interests of justice and order 51 rule 1 of the Civil Procedure Rules which laid down the procedures of how a court could be moved, the principles that guide courts in an application for grant of a stay of execution pending appeal are well settled and the procedural law is order 42 rule 6 (2) of the Civil Procedure Rules which provides as follows:

" 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.

7. By this order 42 rule 6 (2), the ingredients that one has to satisfy are *inter alia*, he will suffer substantial loss, he has moved the court without unreasonable delay and such an applicant has to furnish security for due performance. These principles are now an old hat and were settled in the case *Butt v Rent Restriction Tribunal* [1982] KLR 417. In the case of *RWW v EKW* [2019] eKLR, the court established the intent of a stay of execution order pending appeal as follows;

"The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appellant with those of the respondent." Emphasis added

8. In the instant case, the appellant contended that he would suffer substantial loss if the judgment of the lower court was executed. He is the registered owner of the suit property. The trial court had issued permanent injunctive orders and compelled the 2nd respondent to transfer the suit property to



the 1st respondent. It is my considered view the appellant would suffer substantial loss if execution proceeds. This is a matter that warrants the preservation of the suit property pending the hearing and determination of the appeal.

9. The instant motion was filed on 30/8/2022 and judgement was delivered by the trial court on July 28, 2022. This was a period of a month or so. I am of the humble opinion that the motion was filed timeously. This court has scrutinized the memorandum of appeal and it raises arguable grounds.
10. The appellant was willing to comply with the directions of the court and to furnish such security as this court deemed proper. He gave this court a wide latitude on the nature of the security it could grant. From the lower court record, it is evident the 1st respondent filed a notice to act in person and did not participate in those proceedings. Essentially, he was not represented by counsel. In the circumstances a bank guarantee would suffice.
11. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the *Civil Procedure Act*, I find and hold that the appellant has fulfilled the requirements for grant of stay of execution pending appeal as stipulated under order 42 rule 6 of the *Civil Procedure Rules*.
12. Accordingly, I find the motion is merited and I hereby allow the appellant's motion and grant an order for stay of execution of the judgment and/or decree made in Bondo ELC case no EO52 of 2021 pending appeal subject to the condition that the appellant shall deposit in court a letter of guarantee from a reputable financial institution for the amount of Kshs 200,000/= within a period of 14 days from the date hereof in default of which, the respondent shall be at liberty to execute the decree of the trial court.
13. Additionally, pending the determination of the appeal, the appellant is hereby restricted from transacting on the suit property or interfering with its register. The appellant shall serve the record of appeal within 14 days from the date hereof. This matter shall be mentioned on February 22, 2023 to confirm compliance and issuance of further directions.
14. Costs shall abide the outcome of the appeal.

DELIVERED AND DATED AT SIAYA THIS 19TH DAY OF JANUARY, 2023.

HON. A. Y. KOROSS

JUDGE

19/01/2023

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

In the Presence of:

Mr. Ochieng for the appellant

N/A for the respondents

Court assistant: Ishmael Orwa

