



Omondi (Suing as the administrator of the Estate of Joshua Omondi Obuor (Deceased) v Opiyo & another (Environment and Land Appeal 24 of 2021) [2023] KEELC 102 (KLR) (19 January 2023) (Ruling)

Neutral citation: [2023] KEELC 102 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL 24 OF 2021
AY KOROSS, J
JANUARY 19, 2023**

BETWEEN

ELIZABETH AKINYI OMONDI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOSHUA OMONDI OBUOR (DECEASED) APPELLANT

AND

BENSON OCHIENG OPIYO 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

(Originally Kisumu ELCA 31 of 2019)

RULING

1. Within the provisions of Sections 72 and 79D of the [Civil Procedure Act 2010](#), Order 42 Rule 6 (1) of the [Civil Procedure Rules](#) and Rule 40 of the [Court of Appeal Rules, 2010](#), the 1st respondent filed a notice of motion under certificate of urgency dated October 17, 2022 which sought the following reliefs:
 - a. Spent;
 - b. That the honourable court be pleased to grant leave to the 1st respondent to appeal;
 - c. That the honourable court be pleased to stay execution of its orders issued on October 13, 2022;
 - d. That pending appeal, this honourable court be pleased to review its orders of October 13, 2022 where it issued an injunction and substitute it with an order of status quo; and



- e. That the costs of the application be provided for.
2. The motion was based on the grounds set out on its face and on the supporting affidavit of the 1st respondent dated October 17, 2022 in which he deposed inter alia, due to incapacity, his advocate on October 13, 2022 failed to apply for orders of status quo pending appeal or for leave to file an appeal; he was in occupation of North Gem/Siriwo/202 (hereinafter ‘the suit property’); unless the application was allowed, he stood to suffer irreparable damage; the application had been brought in good faith and without unreasonable delay and it was in the interests of justice if the orders sought were granted.
 3. The appellant and 2nd respondent did not participate in these proceedings. Notwithstanding the motion was unopposed, this court is called upon to determine it on its own merits.
 4. As directed by court, counsel for the 1st respondent Mr. Ochanyo filed his written submissions dated October 21, 2022. He identified four issues for determination; (i) whether the 1st respondent was entitled to the orders sought (ii) whether the stay of execution would be prejudicial to the appellant (iii) what reliefs did the 1st respondent seek from the honourable court and (iv) who should bear the costs of the motion.
 5. On the 1st issue, counsel placed reliance on Order 12 Rule 7 of the *Civil Procedure Rules* and submitted that due to incapacity, the counsel who attended court on October 13, 2022 did not hear the court’s disposal orders and consequently, did not seek an order of status quo pending appeal or for leave to appeal. Counsel cited the case of Peter Nyaga Murake v Joseph Mutunga Civil Appeal Number 86 of 2015 where the court stated that:

‘... an application for staying an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water.’
 6. On the 2nd and 3rd issues, counsel submitted that the appellant would not be prejudiced and the 1st respondent would suffer irreparable damage and substantial loss because he was in occupation of the suit property. He placed reliance on the case of *Butt v Rent Restriction Tribunal* [1979] eKLR and *Visbram Ravji Halal v Thornton & Turpin* Civil application No Nai. 15 of 1990 [1990] KLR 365 where the Court of Appeal held that whereas the court of appeal’s power to grant a stay pending appeal is unfettered, the ELC’s jurisdiction to do so under Order 41 Rule 6 of the *Civil Procedure Rules* was fettered by three conditions namely; establishment of sufficient cause, satisfaction of substantial loss and provision of security. Further, the application must be made without unreasonable delay and the 1st respondent had sufficient grounds of appeal. Counsel urged this court to grant the orders sought.
 7. Having considered the motion, its grounds, supporting affidavit and written submissions, this court is of the considered view that the issues falling for determination are:
 - a. Whether the 1st respondent required leave of this court to appeal;
 - b. Whether the 1st respondent had met the threshold to warrant an order for stay of execution;
 - c. Whether this honourable court should review its final orders issued on October 13, 2022; and
 - d. Who should bear costs.

I. Whether the 1st respondent required leave of this court to appeal

8. On the 1st issue, this court is guided by Section 75 of the *Civil Procedure Act* and Order 43 rule 1(3) of the *Civil Procedure Rules*. Section 75 states that:



‘75. Orders from which appeal lies

- (1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—
 - (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;
 - (b) an order on an award stated in the form of a special case;
 - (c) an order modifying or correcting an award;
 - (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
 - (e) an order filing or refusing to file an award in an arbitration without the intervention of the court;
 - (f) an order under section 64;
 - (g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
 - (h) any order made under rules from which an appeal is expressly allowed by rules.’
9. In furtherance of Section 75(1)(h) above, Order 43 Rule (1) of the *Civil Procedure Rules* sets out the orders from which appeals lie as a matter of right. This provision of law is mandatory and one of the orders that an appeal lies as of right are those that emanate from Order 42 of the *Civil Procedure Rules*.
10. Pursuant to the provisions of Order 42 Rule 32 of the *Civil Procedure Rules*, this court rendered itself on October 13, 2022 and an aggrieved party had the right to appeal against this decision. It is my finding that the prayer for leave is incompetently before me.

II. Whether the 1st respondent had met the threshold to warrant an order for stay of execution

11. Grant of stay of execution is premised on Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules*. Rule 2 thereof states as follows:
 - (2) No order for stay of execution shall be made under subrule (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.’
12. These principles of law were summarised in the case of *Visbham Ravji Halal v Thornton & Turpin* (Supra) as unreasonable delay, substantial loss and provision of security. The 1st respondent who moved this court had to ensure that he had met all these ingredients.



13. The case of *Butt v Rent Restriction Tribunal* (Supra) outlined the factors worth considering in the grant or refusal of stay of execution. At the end of the day, grant or refusal of stay of execution is at the discretion of the court. This discretion must be exercised judicially.
14. The court in the exercise of its powers under Order 42 Rule 6 of the *Civil Procedure Rules* is called to give effect and facilitate the just, expeditious, proportionate and affordable resolution of civil disputes and aim for the just determination of the proceedings, efficient disposal of the business of the court, efficient use of the available judicial and administrative resources, timely disposal of the proceedings and all other proceedings in the court, at a cost affordable by the respective parties and the use of suitable technology See Sections 1A and 1B of the *Civil Procedure Act*.
15. The 1st respondent first had to demonstrate that execution would occasion him substantial loss. Substantial loss is the cornerstone of the jurisdiction of the ELC in granting stay of execution. The 1st respondent stated he would suffer substantial loss because he was the one in occupation of the suit property. It was not sufficient for the 1st respondent to merely state that he was in occupation, he was expected to ride beyond that and substantiate the loss he would suffer. In the case of *Charles Wahome Gethi v Angela Wairimu Gethi* [2008] eKLR, the Court of Appeal expressed itself thus;

‘.. it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.’
16. Secondly, Judgment was given on October 13, 2022 and this motion was filed on the October 17, 2022. It is not in doubt that there was no unreasonable delay.
17. Lastly, had the 1st respondent persuaded me that he would suffer substantive loss which he has not, I would have exercised my discretion and ordered him within 30 days to deposit the sum of Kshs. 200,000/- in a joint interest account of the advocates on record and that pending the determination of the appeal, restricted him from transacting on the suit property or from interfering with its the register. It is my finding the 1st respondent did not meet the threshold to warrant stay of execution.

III. Whether this honourable court should review its final orders issued on October 13, 2022

18. The applicable provisions that govern review of court orders are encapsulated by Section 80 of the *Civil Procedure Act* and Order 45, Rule 1 of the *Civil Procedure Rules* and this court will restate these provisions as follows; Section 80 states that;

“ 80 Any person who considers himself aggrieved-(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit”.
19. While Order 45 Rule 1 of the *Civil Procedure Rules* stipulates thus:

“ Any person considering himself aggrieved—

 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or



(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay” Emphasis added.

20. Though the alleged offending paragraph of this court’s judgment has not been disclosed, I am not in doubt that it is paragraph (c) of the final disposal orders of this court where this court ordered permanent injunctive orders against the 1st respondent.
21. The 1st respondent is yet to put the process of appeal into motion. By seeking a review of the judgement of this court, he may as well have denied himself an opportunity to appeal against the decision of this court. See Order 45 Rule 1 of the *Civil Procedure Rules* and the persuasive decision of Odunga J (as he then was) in *HA v LB* [2022] eKLR.
22. The question that arises is whether the ambit of the prerequisite conditions set out in Section 80 and Order 45 have been met. After scrutinizing the motion that is before this court, I am not satisfied that the 1st respondent had discovered new and important matters or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or demonstrated that there was some mistake or error apparent on the face of the record to warrant a review of the orders. In essence, an order for review did not lie.
23. For the reasons stated above, it is my ultimate finding that the motion was not merited. Since the appellant and 2nd respondent did not participate in these proceedings, I shall not award them costs. I hereby dismiss the motion that is the subject of this ruling. The 1st respondent will bear his own costs.

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

HON. A. Y. KOROSS

JUDGE

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

N/A for the appellant

Mr. Ochanyo for the 1st respondent

N/A for the 2nd respondent

Court assistant: Ishmael Orwa

