



Makokha & another v Okello & another (Environment & Land Case 111 of 2016) [2023] KEELC 16075 (KLR) (23 February 2023) (Ruling)

Neutral citation: [2023] KEELC 16075 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 111 OF 2016
BN OLAO, J
FEBRUARY 23, 2023**

BETWEEN

JOSEPH AKHUNGA MAKOKHA 1ST PLAINTIFF

EPERIM KIZITO MAKOKHA 2ND PLAINTIFF

AND

BENARD OUMA OKELLO 1ST DEFENDANT

VITALIS BARASA NYAMBOKI 2ND DEFENDANT

RULING

1. Joseph Akhungu Makokha and Eperim Kizito Makokha (the 1st and 2nd applicants respectively) approached this Court vide their Originating Summons dated 8th September 2016 seeking against Benard Ouma Okello and Vitalis Barasa Nyamboki (the 1st and 2nd Respondents respectively) judgment in the following terms with respect to the land parcels No Bukhayo/Buyofu/1415 and 1416 (the suit land):
 - a. That the applicants be declared the absolute owners of land parcels No Bukhayo/buyofu/1415 and 1416.
 - b. That the respondents be ordered to execute all documents of transfer in respect of the land parcels NO Bukhayo/Buyofu/1415 and 1416 in favour of the applicants failure to which the Deputy Registrar of this honourable court be empowered to execute the same on behalf of the Respondents.
 - c. That the respondents, their agents, servants and/or workers be restrained permanently by an order of injunction from selling, transferring, fencing off, further sub-dividing and/or in any manner whatsoever interfering with the said parcels of land that they may have transferred into their names.



- d. That the respondents be ordered to give vacant possession of the suit land herein that they may be occupying.
- e. That the Respondents do meet the costs of this suit.

The respondents resisted the claim but after hearing the parties, OmolloJ delivered her judgment on September 27, 2022 dismissing the applicants' claim.

2. The applicants who are acting in person were aggrieved by that judgment and lodged a Notice of Appeal in this court on October 17, 2022.
3. The applicants have now moved to this court vide their Notice of Motion dated November 24, 2022 and premised under the provisions of Order 42 Rule 6 of the Civil Procedure Rules as well as section 3A of the Civil Procedure Act seeking the following remedies:
 1. Spent.
 2. Spent.
 3. Any further proceedings subsequent to the judgment made herein on September 27, 2022 be stayed until an intended appeal is heard and decided.
 4. Spent.
 5. In the interest of justice, a temporary injunction order be issued restraining the Respondents from sub-dividing, alienating, transferring the suit lands No Bukhayo/Buyofu/1415 and 1416 to any other third persons, and from evicting the applicants from the suit land or destroying their homes and houses in the suit land until an intended appeal is heard and decided.
 6. Costs of the application to abide the result of the intended appeal.
 7. Any other order be made as this honourable court deems just.

The application is predicated on the grounds set out therein and is supported by the affidavit of the 1st applicant.

4. The gravamen of the application is that following the delivery of the judgment herein, the respondents went to destroy the applicants' home but the matter was reported to the Police who advised the applicants to seek assistance from the court. That there is no eviction order issued in favour of the Respondents who have even brought a buyer to view the suit land and unless they are restrained, the applicants will suffer serious injustice and irreparable damages should their appeal succeed.
5. The 1st applicant has deposed in his supporting affidavit that although the judgment had been slated for October 13, 2022 in the presence of both parties, it was delivered earlier on September 27, 2022 in their absence. They were therefore not able to file the Notice of Appeal within 7 days. That the Respondents do not stay on the suit land and are in a hurry to dispose it off before the appeal.
6. Annexed to the application is the Notice of Motion lodged herein on October 17, 2022.
7. The application is opposed and the 1st respondent has filed a replying affidavit dated January 23, 2023 in which he has deposed, *inter alia*, that the application is only aimed at denying them an opportunity to realize the fruits of their judgment. That the judgment was delivered in the absence of all the parties and it was only prudent that the Respondents commence the process of sub-dividing and confirming the suit land to its original form. That there is inordinate delay in filing this application and the Applicants



have not met the threshold for obtaining orders of stay of execution or temporary injunction and neither have they approached this Court with clean hands.

8. Annexed to the replying affidavit is a letter dated 2 November 9, 2022 addressed to the Deputy Registrar of this court by the County Surveyor Busia County as well as sketch map showing the suit land.
9. When the application was placed before me for directions on November 27, 2022, I declined to certify it as urgent and directed that it be canvassed by way of written submissions.
10. The submissions were subsequently filed by the applicants in person and by Mr Otsiula instructed by the firm of J. B. Otsiula & Associates Advocates for the Respondents.
11. I have considered the application, the rival affidavits and annexures thereto as well as the submissions by the applicants and by counsel for the respondents.
12. The applicants seek the following substantive orders from this Court:
 1. Stay of execution pending appeal.
 2. Temporary injunction pending appeal.

1. Stay of Execution pending Appeal

This is provided for in Order 42 Rule 6(1) and (2) of the [Civil Procedure Rules](#) which states:

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 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.”

13. I have looked at the judgment delivered by Omollo J on September 27, 2022. All that she did was dismiss the applicants’ claim to be registered as proprietors of the suit land by way of adverse possession. The respondents did not file any counter-claim and so no orders were issued in their favour other than for the award of costs of the dismissed suit. Therefore, the order by Omollo J was a negative order dismissing the applicants suit. There was no positive order directing any of the parties to do or not to do any act. Such an order is not amenable for the remedy of stay of execution pending appeal. In [Western College of Arts and Applied Sciences v Oranga & others](#) 1976 – KLR 163 the Court of Appeal said:

“But what is there to be executed under the judgment the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect



of costs. In *Wilson v Church*, the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case, the High Court has not ordered any parties to do anything or refrain from doing anything or to pay any sum.”

In *Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah* [2008] eKLR, the Court of Appeal while considering an application for stay of a negative order held:

“The 2nd prayer in the application for stay (of execution) of that order of the superior court made on December 18, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or to pay any sum. It was thus a negative order which is incapable of execution save in respect of costs only.”

The judgment sought to be appealed resulted only in a negative order which as is now clear, is incapable of being stayed.

14. And even if the application is considered on the merits, the Applicants have not demonstrated what substantial loss they will suffer nor made any offer of security yet those are two important ingredients of such an application. The prayer for stay of execution pending appeal is therefore for dismissal.

2. Temporary injunction pending Appeal

I am not aware of any provision in the law which allows this Court to grant an order of injunction pending an appeal from its own judgment. I do not think that even article 159 (2) (d) of the *Constitution* which is the prescription of all procedural laws envisages such a scenario. It would be a contradiction in terms for any trial court, having heard a case and made its final judgment, to turn around again and grant a temporary injunction pending an appeal of that judgment. That jurisdiction can only be invoked by this court while exercising its appellate jurisdiction. That is clear from a plain reading of Order 42 Rule 6(6) of the *Civil Procedure Rules* which reads:

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.” Emphasis mine.

This court is not sitting on appeal against the judgment of Omollo J who heard the dispute and made final orders. To do so would be akin to sitting on an appeal on the judgment of a court of concurrent jurisdiction.

15. Secondly, it is clear from the provisions of Order 40 Rule 1 of the *Civil Procedure Rules* that a temporary injunction such as is sought by the applicants is only available where there is a case pending trial before the court in which the order is sought. That is why the provision states that such an order is granted “until the disposal of the suit or until further orders.” Further, it is clear from the available jurisprudence that a party seeking an order of temporary injunction must establish, inter alia, that he or she has a prima facie case with a probability of success – *Giella v Cassman Brown & Co Ltd* [1973] EA 358. The dispute over the ownership of the suit land having been heard and determined at least as far as this court is concerned, I cannot again be heard to state that the applicants have a prima facie case with a probability of success. As far as this court is concerned, it is now functus officio with regard to the dispute over the ownership of the suit land. The only jurisdiction it can exercise in this matter is an application for stay of execution pending appeal which is among the remedies sought by the Applicants, an application for review under Order 45 of the *Civil Procedure Rules* or an application to amend clerical or arithmetical mistakes in the judgment under section 99 of the *Civil Procedure Act*. However, this court would be acting in excess of its jurisdiction if it purported to grant an order of



temporary injunction in a matter in which it has delivered a final judgment. That is now the province of the Court of Appeal. The prayer for an order of temporary injunction is therefore not well founded and must be dismissed as well.

16. Ultimately therefore and having considered the Notice of Motion dated November 24, 2022, this court makes the following disposal orders:

The Notice of Motion dated November 24, 2022 is devoid of merit.

It is dismissed with costs to the respondents.

BOAZ N. OLAO

JUDGE

23RD FEBRUARY 2023

Ruling dated, signed and delivered in open Court at BUSIA ELC on this 23rd day of February 2023.

Mr. Mogi for Mr. Otsiula for Defendants/Respondents present.

1st Plaintiff/Applicant present in person.

2nd Plaintiff – Absent.

BOAZ N. OLAO

JUDGE

23RD FEBRUARY 2023

BUSIA ELC NO. 111 OF 2016 (O.S) - RULING Page 3 of 3

