



**Odira & 2 others v Ooyo (Environment and Land Miscellaneous Application  
15 of 2022) [2023] KEELC 881 (KLR) (14 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 881 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 15 OF 2022  
GMA ONGONDO, J  
FEBRUARY 14, 2023**

**BETWEEN**

**GORDON ODIRA ..... 1<sup>ST</sup> APPLICANT**

**OTIENO MARIKO ..... 2<sup>ND</sup> APPLICANT**

**ODERO MARIKO ..... 3<sup>RD</sup> APPLICANT**

**AND**

**PAULVET OKEYO ODOYO ..... RESPONDENT**

**RULING**

1. On November 10, 2022, the three applicants through the firm of J.O Otieno and Company Advocates, filed an application by way of a notice of motion of even date under, *inter alia*, Order 22 Rule 22 of the [Civil Procedure Rules, 2010](#) seeking the following orders;
  - a. Moot
  - b. Moot
  - c. That pending hearing and determination of the intended appeal the court be pleased to stay the execution of the judgment delivered on January 27, 2022 in Mbita Environment and Land No E10 of 2021 and the others therefrom by Hon. Japheth Bii (Senior Resident Magistrate).
  - d. That upon grant of leave to file appeal out of time; the memorandum of appeal annexed herewith be deemed as duly filed upon payment of the court fees
  - e. That the costs of this application be in the course.
2. The application is premised upon grounds 1 to 10 set out on the face of the same, the 1<sup>st</sup> applicant's supporting affidavit of seventeen paragraphs with the authority of the other applicants together with a copy of title (GO1) and a copy of survey report (GO2) in respect of the land in dispute, LR Kasungu/



Kamreri/2055. In a nutshell, the applicants' complaint in part is that the respondent filed Mbita Senior Resident Magistrate's court Environment and Land case number E10 OF 2021 which proceeded ex-parte as they were not served. That after the judgment, they instructed learned counsel, Quinter Adoyo and Company Advocates who delayed in acting on their instructions in good time. That they are in occupation of the land in dispute hence entitled to the orders sought in the application.

3. By a replying affidavit filed in court on November 21, 2022, the respondent deposed, in part that the application is brought in bad faith, contains lies and only meant to mislead the Honourable court. That in the year 2016, the applicants trespassed into the land in dispute prompting the respondent to make a report to the area chief, surveyor Mbita sub county and the police. That he filed a suit before the trial court and judgment rendered in his favour and an application for stay of execution of the Judgment was disallowed by the court. That no appeal has been preferred therefrom thus, the application is *res judicata*.
4. Further, the applicants deposed that an application dated June 22, 2022 by the applicants seeking to set aside the trial court's judgment was dismissed by the trial court. That therefore the application cannot act as an appeal against the said ruling. They relied on documents marked as "POO-1" to "POO-30" which include; proceedings, letters and reports, a notice, a plaint, a statement of defence, and the trial court's judgment.
5. By the 1<sup>st</sup> applicant's further supporting affidavit of twelve paragraphs sworn on 1<sup>st</sup> December 2022, the applicants deposed that the trial court failed to accord the applicants an opportunity to tender evidence in support of their defence. They termed the defence a mere denial which is against the rules of natural justice and *the Constitution* of Kenya, 2010, among other things.
6. In his further affidavit of twenty-one paragraphs sworn on December 7, 2022 filed on even date, the respondent deposed in part that the case is full of untruthfulness thus, it be dismissed with costs for lack of evidence and merit. He provided the history regarding ownership and acquisition of the land in dispute upon which the applicants are alleged to trespass. That the applicants' challenge is that they have never believed that anybody can possess land anywhere within Kenya.
7. On November 11, 2022, the court ordered and directed that the application be heard by written submissions.
8. The parties' respective submissions-contain the gist of their cases, issues and authorities cited therein.
9. I have duly considered the application, the replying affidavit and the further affidavits as well as the parties' respective submissions. So, is the application meritorious?
10. The applicants assert that they depend on the land in dispute as their only source of livelihood. That pursuant to the trial court's Judgment, they are likely to be evicted from the land. Therefore, they may suffer substantial loss if the orders sought in the application are not granted as those are special circumstances herein as noted in Butt Case (*infra*).
11. This court is aware of Order 50 of the *Civil Procedure Rules, 2010* regarding time. Section 79 G of the *Civil Procedure Act* Chapter 21 Laws of Kenya provides time for filing of appeals from subordinate courts.
12. Indeed, Judgment of the trial court was rendered on January 27, 2022 and the application was initiated on November 9, 2022. Clearly, the delay thereof was close to ten months.
13. The applicants have given reasons including delay or mistake of counsel in mounting the application. Thus, I invoke the decision in the case of client *Shabir Din-vs-Ram Parkash Anand* 1955 EACA Volume 22 page 48 that mistake of counsel should not be visited upon a client.



14. In the circumstances, the applicant has given a plausible and satisfactory explanation for the delay in commencing the application; see *Andrew Kiplangat Chemaringo-vs-Paul Kipkorir Kibet* (2018) eKLR.
15. Regarding security for the due performance of decree or order, the same is within the discretion of the court as held in *Halai and another –versus Thornton and Turpin (1963) Limited* (1990) eKLR. In the obtaining scenario, there be no orders as to security herein.
16. As regards leave to file appeal out of time, it must be noted that the applicant has the right to the intended appeal. In the case of *Butt-vs-Rent Restriction Tribunal* (1979) eKLR, the Court of Appeal observed thus;

“...and the appellant has an undoubted right of appeal....”
17. Furthermore, Articles 48, 25 (c) and 50 (1) of *the Constitution* of Kenya, 2010 governs access to justice and unlimited right to fair hearing. It is noted that a fair opportunity to be heard even in the prospective appeal, is a fundamental principle of justice, see Halsbury’s Laws of England 5<sup>th</sup> Edition 2010 Volume 61 paragraph 639.
18. In the foregone, the applicants have met the requisite conditions under Order 42 Rule 6(2) of the *Civil Procedure Rule, 2010* and demonstrated sufficient cause to file the prospective appeal out of time. Therefore, there is merit in the application.
19. Accordingly, the application is allowed in terms of orders of stay and leave sought therein and as stated at paragraph 1(c) and (d) herein above.
20. The applicants’ counsel to serve the requisite papers and pay requisite fees within the next ten days from this date.
21. Costs of the application to abide the outcome of the prospective appeal.
22. It is so ordered.

**DATED AND DELIVERED AT HOMA BAY THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**G.M. A ONG’ONDO**

**JUDGE**

**In the presence of;**

- a. Mr. J.O Otieno, learned Counsel for the applicants
- b. Respondent in person
- c. Okello, Court Assistant.

