



REPUBLIC OF KENYA



KENYA LAW
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**Webuye v Mangeni & another (Environment & Land Case
178 of 2010) [2023] KEELC 896 (KLR) (14 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 896 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 178 OF 2010
BN OLAO, J
FEBRUARY 14, 2023**

BETWEEN

ANDREW KISZY WEBUYE PLAINTIFF

AND

FREDRICK WABWIRE MANGENI 1ST DEFENDANT

ERNEST BONIVENTURE OKELLO 2ND DEFENDANT

RULING

1. By a judgement delivered on November 10, 2022, Omollo J made the following orders:
 1. A declaration that the plaintiff has acquired 2¼ acre of LR No Samia/bukangala ‘a’/280 by way of adverse possession having been in occupation and possession of the same for a period in excess of 12 years.
 2. The plaintiff is awarded costs of the suit to be borne by the 1st defendant.

A decree followed but on November 22, 2022, the defendants lodged a notice of appeal against the said judgment.
2. I now have before me for my determination, the defendants’ notice of motion dated December 5, 2022 and premised under the provisions of section 3A of the *Civil Procedure Act* and order 42 rule 6 of the *Civil Procedure Rules*. The defendants seek the following orders:
 1. Spent.
 2. Spent.
 3. That there be a stay of execution of the decree delivered on November 10, 2022 pending the hearing and determination of appeal.



4. That the costs of the application be provided for.
The application is premised on the grounds set out therein and is supported by the affidavit of Fredrick Wabwire Mangenithe 2nd defendant.
3. The gravamen of the application is that the land parcel No Samia/bukangala/'A'/280 (the suit land) is the residence of the 2nd defendant and the plaintiff has never been in occupation thereof. That the plaintiff has already asked the county surveyor to hive off 2¼ acres out of the suit land and this includes the 2nd defendant's residence. That the defendants have already filed their notice of appeal which has high chances of success and the plaintiff will not suffer any prejudice as he does not occupy the suit land. Further that the application has been filed without delay.
4. Annexed to the application are the following documents:
 1. Notice of appeal lodged herein on November 22, 2022.
 2. Letter dated November 30, 2022 from the county surveyor addressed to the parties herein.
5. The application is resisted and the plaintiff's counsel Erick Jumbahas filed grounds of opposition raising the following issues:
 1. The application is an abuse of the court process.
 2. The decree issued cannot be stayed as it sets out status quo on the ground hence a stay disturbs the same.
 3. The defendants have not set out any prejudice which they will suffer.
 4. The application lacks merit and ought to be dismissed.
When the application was placed before me on November 6, 2022, I directed that it be canvassed by way of written submissions.
6. Submissions were subsequently filed both by Mr JV Juma instructed by the firm of JV Juma & Company advocates for the defendants and by Mr Erick Jumbainstructed by the firm of Balongo & Company advocates for the plaintiff.
7. I have considered the application, the supporting affidavit and grounds of opposition as well as the submissions by counsel.
8. Order 42 rule 6(1) and (2) of the Civil Procedure Rules provides that:
 - 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.' Emphasis mine.
9. In the case of *Visbram Ravji Halai & Another -v- Thornton & Turnpin (1963) Ltd 1990 KLR 365*, the Court of Appeal circumscribed the jurisdiction of this court while considering an application such as this one. It said:

' Thus the superior court's discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly, the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must of course be made without delay.'

It is therefore clear that in an application such as this, the defendants were required to prove the following:

- a. Show sufficient cause.
- b. Demonstrate that they will suffer substantial loss unless the order for stay is granted.
- c. Offer security.
- d. Approach the court without unreasonable delay.

Substantial loss is the cornerstone of such an application. Plat Ag JA (as he then was) captured it as follows in the case of *Kenya Shell Ltd -v- Benjamin Kibiru & Another 1986 KLR 410*:

' It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.'

The defendants filed a notice of appeal on 22nd November although as is clear from the impugned judgment, it appears to have been entered against the 1st defendant only and he is the one who was penalized with costs. However, the supporting affidavit in respect of the application is deposed by the 2nd defendant and the notice of appeal bears both defendants' names. I will therefore take it that both are appealing the judgment. The notice of appeal is sufficient cause for purposes of this application.

10. The defendants filed this application on December 5, 2022. I do not consider that delay of about, three (3) weeks to be inordinate or unreasonable.
11. The 2nd defendant has deposed that it is very likely that once the plaintiff gets the title to the suit land, he will dispose of the same since he does not utilize it – see paragraph 10 of the supporting affidavit. That is a matter solely within the knowledge of the plaintiff who elected not to file a replying affidavit rebutting the same and instead relied on his grounds of opposition which are basically issues of law. Grounds of opposition are general averments which cannot amount to a proper and valid rebuttal of allegations made on oath – *Daniel Kibet Mutai & 9 Others -v- Attorney General*. See also the case of *Kennedy Otieno Odiyo & Others -v- Kenya Electricity Generating Company Ltd 2015 eKLR* where it was held that:

' The respondents only filed grounds of opposition to the application. Grounds of opposition address only issues of law and no more. The grounds of opposition aforesaid are



basically general averments and in no way respond to the issues raised by the application in its supporting affidavit. Thus what was deposed to was not rebutted by the respondents. It must be taken to be truth.'

Therefore, the averments by the 2nd defendant in his supporting affidavit that he will be evicted from the suit land if the plaintiff gets 2¼ acres as decreed (paragraph 6), that the plaintiff will dispose the suit land since he does not occupy or utilize it (paragraph 10) and that the plaintiff will not be prejudiced as he has nothing to lose (paragraph 11) must be considered by this court to be the true position since the plaintiff did not file any replying affidavit to rebut them.

12. It must also be remembered that the remedy of stay of execution pending appeal is a discretionary one. The court must consider all the prevailing circumstances of each case and ensure that any appeal is not rendered nugatory. In the circumstances of this case and bearing in mind that none of the 2nd defendant's averments were rebutted through a replying affidavit, the interests of justice will best be served if the application is allowed. However, this court will make appropriate conditions with regard to security.
13. The up-shot of the above is that the notice of motion dated December 5, 2022 is allowed in the following terms:
 1. An order is issued staying the execution of the judgment dated November 10, 2022 and the subsequent decree pending the hearing and determination of the appeal.
 2. The defendants shall deposit the original title to the land parcel No Samia/bukhangala/'A'/280 with the deputy registrar of this court together with duly executed transfer documents for the transfer of 2 ¼ acres out of the said land in favour of the plaintiff within 30 days from today.
 3. The above documents shall remain in the safe custody of the deputy registrar until the appeal is heard and determined or until further orders by this court.
 4. In default of (2) above, the stay order shall lapse automatically and the plaintiff shall be at liberty to execute the decree herein.
 5. Costs shall abide by the appeal.

BOAZ N. OLAO

JUDGE

14TH FEBRUARY 2023

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 14TH DAY OF FEBRUARY 2023 AT BUSIA ELC.

BOAZ N. OLAO

JUDGE

14TH FEBRUARY 2023

