



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Oginga v Moko (Civil Appeal (Application) 33 of 2019)
[2024] KECA 1455 (KLR) (18 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1455 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) 33 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
OCTOBER 18, 2024**

BETWEEN

RISPER AKEYO OGINGA APPELLANT

AND

TITUS KAHUNYORO MOKO RESPONDENT

(Being an Application for stay of execution of the judgment of Environment and Land Court at Migori (G.M.A. Ongondo, J) delivered on 12th April 2018 in ELC No 192 of 2017))

RULING

1. By a Notice of Motion dated 24th November, 2023, the applicant, Risper Akeyo Oginga (Risper), seeks an order of temporary stay of execution of the decree arising from the judgment of the Environment and Land Court (ELC) at Migori in *ELC No. 192 of 2017*. The application is supported by an affidavit sworn by the applicant on 24th November, 2023, and written submissions duly filed by her advocates, S.M. Sagwe & Company Advocates.
2. The respondent, Titus Kahunyoro Moko (Titus), has opposed the notice of motion through a replying affidavit and written submissions filed by his advocate, M/S Oguttu, Mboya, Ochwal & Partners Advocates.
3. The applicant has attached to her supporting affidavit an order issued on 23rd October, 2023, by Kullo, J. dismissing her application dated 27th June, 2023, in which she had sought *inter alia*, an order to set aside, review or vacate the ruling that was delivered on 15th June, 2023. The applicant has also annexed the ruling by Kullo, J. delivered on 23rd October, 2023.
4. In the written submissions, the applicant, through her advocate, explained that an order was made on the 23rd February, 2021, dismissing the appeal as both the applicant and her advocate were absent. The applicant explains that both the advocate and herself were unable to attend the court due to illness



and, therefore, seeks to have their application restored to hearing on merit under Rule 102(2)(3) of the *Court of Appeal Rules*.

5. On his part, the respondent has explained in his replying affidavit that the dispute between the parties originated from a decision of the Land Disputes Tribunal, which was adopted by the Rongo Magistrate's Court, and that the respondent filed a civil suit in the ELC at Migori for recovery of the suit property, as the applicant had failed to pay the balance of the purchase price for the suit property, in accordance with the decree that was adopted by the magistrate's court at Rongo. Subsequently, the suit at Migori ELC was heard and determined in the respondent's favour on 12th April, 2018. The applicant, being aggrieved, lodged a notice of appeal dated 12th April, 2018, intending to appeal to this Court from the judgment of the ELC. Also attached is an order of this Court dated 23rd February, 2021, confirming the respondent's contention that when the appeal came up for hearing on 23rd February, 2021, neither the applicant nor her advocate were present which resulted in the appeal being dismissed under Rule 102(1) of the *Court of Appeal Rules*.
6. The respondent pointed out that the applicant's prayer for stay of execution ought not to be granted, as it is not supported by any appeal, the applicant's appeal to this Court having been dismissed on 23rd February, 2021. The respondent has attached a copy of this Court's order dated 23rd February, 2021 confirming the dismissal of the appeal for non-attendance.
7. The respondent also contends that the applicant's motion is premature and an abuse of the Court's process as her appeal which was dismissed has not been restored. In addition, the respondent points out that the appeal is frivolous as no memorandum of appeal has been exhibited nor has the applicant satisfied the Court that the intended appeal would be rendered nugatory if stay orders are not granted. The respondent maintains that the title to the suit property is in his name, and if the applicant were to succeed on appeal, the same would be available to him. He has annexed a copy of the Green Card for the title and a certificate of Official Search confirming that the title is in his name.
8. We have carefully considered the application before us. It purports to be an application for stay of execution of the decree in *Migori ELC No. 192 of 2017* "pending the delivery of the ruling in Court of Appeal No. 33 of 2019." However, the respondent has demonstrated clearly that Civil Appeal No. 33 of 2019 was dismissed under Rule 102(1) of the *Court of Appeal Rules*, 2010 (now repealed) on 23rd February, 2021, as per a certified copy of the order which he has attached to his replying affidavit.
9. We note that the proviso to Rule 102(1) of the *Court of Appeal Rules*, 2010, provided that:

"Where an appeal has been so dismissed or any cross appeal so heard has been allowed, the appellant may apply to the court to restore the appeal for rehearing or to rehear the cross appeal, if he can show that he was prevented by any sufficient cause from appearing when the appeal was called out for hearing."
10. Rule 102(3) of the *Court of Appeal Rules*, 2010, provided that:

"An application for restoration under the proviso to sub rule 1 or the proviso to sub rule 2 shall be made within 30 days of the decision of the court, or in the case of a party who should have been served with notice of the hearing but was not so served, within 30 days of his first hearing of the decision."
11. On its face, the applicant's notice of motion dated 24th November, 2023 does not seek restoration of her appeal, but instead applies for stay of execution, anchored on appeal No. 33 of 2019. However, that appeal is no longer pending, having been dismissed on 23rd February, 2021. To this extent, the



applicant's motion is incompetent, as the Court has no jurisdiction to grant an order of stay of execution of a judgment of the High Court or Court of equal status in the absence of an appeal against that judgment.

12. In the written submissions, the applicant's advocate has submitted, that the applicant has come to Court pursuant to Rule 102(2) & (3) of the *Court of Appeal Rules* seeking to have the appeal restored for hearing on merit. In the first place, that is not the correct position, for as already stated above, the applicant is seeking an order for stay of execution of the judgment of the ELC, and not an order for restoration of the appeal arising from the judgment. Secondly, assuming that the applicant had sought the order for restoration of the appeal, the order for dismissal of the appeal having been made on 23rd February, 2021, and the applicant's motion before the Court having been filed on 24th November, 2023, the motion is incompetent as Rule 102(3) requires that such an application for restoration of the appeal, be filed within 30 days of the decision of this Court dismissing the appeal.
13. For these reasons, the application before us is incompetent and is accordingly struck out with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 18TH DAY OF OCTOBER, 2024.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

