



REPUBLIC OF KENYA



Wasike v Simiyu (Environment & Land Case 161 of 2014 & 91 of 2013 & 99 of 2019 & 86 of 2017 (Consolidated)) [2024] KEELC 13665 (KLR) (10 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13665 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 161 OF 2014 &
91 OF 2013 & 99 OF 2019 & 86 OF 2017 (CONSOLIDATED)**

BN OLAO, J

DECEMBER 10, 2024

BETWEEN

KEVIN MORRIS WASIKE PLAINTIFF

AND

GABRIEL MUINDI SIMIYU DEFENDANT

RULING

1. The following four (4) suits were consolidated for purposes of hearing and final determination:
 1. Busia Elc Case NO 161 of 2014 – Kevin Morris Wasike -v- Gabriel Muindi Simiyu.
 2. Busia Elc Case No 91 Of 2013 – Gabriel Muindi Simiyu -v- Desterio Barasa Ondwasi.
 3. Busia Elc Case No 99 Of 2019 – Kevin Morris Wasike Matumbayi -v- Abdala Tabata, and
 4. Busia Elc Case No 86 Of 2017 - Kulundu Desterio Barasa -v- Gabriel Muindi Simiyu & 4 Others.

Busia Elc Case File NO 161 of 2014 was the lead file.
2. Having heard the consolidated suits, Omollo J rendered a judgment on 7th May 2024 in which the following disposal orders were made:
 - a. The Plaintiff's case in ELC Case No 161 of 2014, 99 of 2019 and 86 of 2017 (Kevin Morris Wasike Matumbayi and Desterio Kulundu Barasa Ondwasi) is proved only as against Gabriel Muindi Simiyu who is the registered owner of L.R. NO Bukhayo/lupida/2491. The extent of the encroachment is 0.3 Ha as established in the survey report dated 10th June 2021.
 - b. The claim of encroachment as against Asumani Mbayi, Benjamin Otyanga and Abdala Tabata is dismissed.



- c. Following finding in (a) above, the Plaintiff in ELC CASE number 91 of 2013 (Gabriel Muindi Simiyu) against Desterio Kulundu Barasa Ondwasi for encroachment onto his land parcel number Bukhayo/lupida/2491 fails. It is dismissed.
- d. An order is issued that L.R number Bukhayo/lupida/1979 is co-owned by Desterio Kulundu, Barasa Ondwasi, Kevin Morris Wasike Matumbayi and Joseph Wanjala Adedi until the process of sub-division is complete.
- e. The Busia County Land Registrar in conjunction with County Land Surveyor be and are hereby directed to visit the suit parcels and restore the boundaries between L.R NO. 1979 (3210) and L.R NO 2491.
- f. A permanent injunction be and is hereby issued to the Plaintiffs (DESTERIO KULUNDU BARASA ONDWASI and KEVIN MORRIS WASIKE MATUMBAYI) against Gabriel Muindi Simiyu and JOSEPH ETYANG EKASIBA, their representatives or persons claiming through them from interfering with possession of L.R NO Bukhayo/lupida/1979 and any number arising from it.
- g. Each party shall bear their respective costs of the consolidated suits.

The record shows that both Kevin Morris Wasike and Gabriel Muindi Simiyu were aggrieved by that judgment and separately lodged Notice of Appeal at this Court's registry on 13th May 2024.

3. Gabriel Muindi Simiyu (the Applicant herein) has gone further and approached this Court vide his Notice of Motion dated 9th May 2024 and filed on 13th May 2024 premised under the provisions of Sections 1A, 3A and 65 of *Civil Procedure Act*, Order 42 Rule 6 of the Civil Procedure Rules and Rule 1(3) and 47 of the Court of Appeal Rules 2010. He seeks the following orders:

- 1 Spent.
 - 2 Spent
 - 3 Spent.
 4. That an order of temporary injunction be and is hereby issued restraining the Respondent whether by himself, his agents, workers and/or servants from encroaching, alienating, disposing or altering the land records grabbing part of it, excavating, entering, remaining on or dealing in any manner whatsoever including purported rectification of boundaries by any surveyor over LR. Bukhayo/lupida/2491 pending the hearing and final determination of the intended appeal.
 5. That the execution of the judgment dated 7th May 2024 be stayed pending the hearing and determination of the intended appeal.
 - 6 That the costs of and incidental to this application be provided for.
4. The application is based on the grounds set out therein and is supported by the Applicant's un-dated affidavit and a supplementary affidavit dated 31st May 2024.
 5. The gist of the application is that the Applicant is aggrieved by the Judgment delivered on 7th May 2024. That the appeal is arguable and the Respondents are likely to execute the same yet the Applicant is using their portion on which they have planted sugar cane which is yet to mature. That if the Judgment is executed, the result will be that a road of access to other users including Igara Polytechnic will be affected rendering other parties with no right of way. The Respondent will not be prejudiced and the



Applicant is willing to abide with any conditions which this Court may impose and if the Judgment is executed, the Applicant will be left without any land and he shall suffer. The application has been filed without delay and it is in the interest of justice that the same be allowed.

6. In opposition to the application, the Respondent (Kevin Morris Wasike) who had himself filed a Notice of Appeal on 13th May 2024 but which was later withdrawn on 3rd June 2024, filed a replying affidavit dated 10th July 2024 in which he has deposed, inter alia, that the Applicant has not filed any Notice of Appeal nor served the same and there is no appeal pending to warrant the orders sought. He has therefore moved to the Surveyor's office to have the Judgment implemented so that this litigation which is now 80 years old can come to an end.
7. The application has been canvassed by way of written submissions. These have been filed by Mr Otieno instructed by the firm of Masiga, Wainaina & Associates Advocates for the Applicant and by the Respondent who is acting in person.
8. I have considered the application, the rival affidavits and the submissions on record.
9. An application for stay of execution of a decree or order is governed by the provisions of Order 42 Rule 6(1) and (2) of the Civil Procedure Rules. It reads:
 - 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."

The above was reiterated by the Court of Appeal in the case of Vishram Ravji Halai -v- Thornton & Turpin 1963 Ltd 1990 KIR 365 at page 367 as follows:

"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 unreasonable delay."

Guided by the above, I find that there is a Notice of Appeal filed by the Applicant on 13th May 2024. For purposes of this application therefore, therein is an appeal filed. That is sufficient cause.

10. This application was also filed on 9th May 2024 some two days after the delivery of the ruling sought to be appealed. There has been no inordinate delay.
11. The Applicant has also deposed in para8 of his supporting affidavit that he is willing and ready to comply with any conditions which this Court will impose as a condition for and order of stay of execution pending appeal. That satisfies the condition of offer of security.



12. On the final issue of substantial loss and which is the cornerstone of such an application as stated in the case of Kenya Shell Ltd -v- Kiburu 1986 KLR 410, the Applicant has in his supplementary affidavit deposed that the execution of this judgment may lead to closure of roads thus leaving many people without access including Igara Polytechnic and Busia Sugar Company which uses such roads to access sugar cane from the Applicants land as well as other farmers. Of course, the said Igara Polytechnic and Busia Sugar Company are not parties in this dispute and have not therefore filed any pleadings. This Court however has no reason to doubt the Applicant's averments on that issue. I am persuaded that the Applicant has established that unless the order of stay is granted, he will suffer substantial loss especially given the averment that he has sugarcane on the land in dispute.
13. In view of all the above, I am satisfied that an order of stay of execution pending appeal is well merited. I am also persuaded that an order for temporary injunction is deserving in the circumstances.
14. Having considered the Notice of Motion dated 9th May 2024, I hereby issue the following orders:
 - 1 Prayer NO 4 and 5 thereof are hereby granted as prayed.
 - 2 The appeal be lodged within 60 days from the date of this ruling.
 3. The Applicant will within 30 days of the delivery of this ruling deposit in the Court the sum of Kshs.50,000 as security.
 4. In default of (2) and (3) above, the orders of stay of execution and temporary injunction will lapse without any further reference to the Court and the Respondent shall be at liberty to execute the Judgment herein.
 5. Costs shall abide by the appeal.

BOAZ N. OLAO

JUDGE

10TH DECEMBER 2024

RULING DATED, SIGNED AND DELIVERED ON THIS 10TH DAY OF DECEMBER 2024 BY WAY OF ELECTRONIC MAIL.

