



**Wakhungu v Bink (Environment and Land Appeal E024 of 2024)
[2024] KEELC 14006 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 14006 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND APPEAL E024 OF 2024**

BN OLAO, J

DECEMBER 18, 2024

BETWEEN

FRANCISCA NAMBUDIE WAKHUNGU APPELLANT

AND

GEORGE WANDERA BINK RESPONDENT

*(Arising out of the ruling and order issued by Hon. P. A. Olengo
(SPM) on 30th August 2024 in Busia Cm Elc Case No 053 of 2024)*

RULING

1. The parties herein are litigating over the land parcel No Bukhayo/mundika/4921 (the suit land) in the subordinate Court. It is not clear at this stage what the status of the suit is. What is clear is that pending the hearing of the said suit, the trial Magistrate Hon. P. A. Olengo (senior Principal Magistrate) issued an order dated 30th April 2024 and couched in the following terms:

“That an order of permanent injunction be and is hereby issued restraining the Defendants/ Respondents either by themselves, their agents or any person whoever acting on their behalf or direction from cultivating, trespassing into, fencing, building or in any way interfering with the plaintiff’s peaceful and quiet possession and occupation of land parcel No Bukhayo/mundika/4921 pending the hearing and determination of the suit.”

Aggrieved by that order, the 1st Defendant/Appellant filed this appeal on 29th October 2024 seeking to have that order set aside.

2. Simultaneously with that appeal, the 1st Defendant/Appellant filed a Notice of Motion dated 28th October 2024 and also filed on 29th October 2024 seeking the following order:

1. Spent



2. Spent
3. That pending the hearing and determination of the appeal, there be a temporary stay of proceedings in Busia Cmc Elc Case No E053 of 2024.
4. That costs of this application be provided for.
3. The application is premised on the provisions of Sections 1A, 1B, 3 and 63(e) of the *Civil Procedure Act*, Order 42 Rules 5 and 6 of the *Civil Procedure Rules* and Article 159(2) of the *Constitution*. It is based on the grounds set out therein and supported by the affidavit of Francisca Nambudie Wakhungu the 1st Defendant/Appellant.
4. The gravamen of the application is that the ruling which gave rise to the order being appealed was pending since July 2024 before Hon. P. Olengo who has since been transferred and enquiries about its pronouncement elicited no answer. On 25th October 2024, the 1st Defendant/Appellant was served with the said order yet she was not aware about its ruling and it had not been delivered by the time the trial magistrate was transferred. The 1st Defendant/Appellant is aggrieved by the same since it has the effect of locking her and her family from the suit land before the suit is heard and determined. That the Respondent is only a purchaser of part of the suit land yet he now wants to grab a separate parcel of land which was not sold to him. That it is just and fair for the orders sought to be granted.
5. The application is opposed and the Respondent George Wandera Bink filed a replying affidavit dated 26th November 2024 in which he has deposed, inter alia, that the 1st Appellant is not the only Defendant against whom the suit was filed and the other 3 Defendants have not appealed the order. That he was not served with the ex-parte orders issued herein on 30th October 2024 within 7 days as directed but was only notified on 12th November 2024. That there is nothing left to be complied with and the 1st Defendant/Appellant is a trespasser on the suit land on which the Respondent has been in occupation since 1998 and that notwithstanding the wording of the order, it is limited to pending the hearing of the suit. That the 1st Defendant/Appellant has not been prejudiced with the order and indeed the matter came up on 20th November 2024 for purposes of directions as to the hearing of the suit.
6. The application has been canvassed by way of written submissions. These have been filed by Mr Okutta instructed by the firm of Ouma Okutta & Associates Advocate for the 1st Defendant/Appellant and by Mr Makokha instructed by the firm of J. P. Makokha & Company Advocates for the Respondent.
7. I have considered the application, the rival affidavits and the submissions by counsel.
8. This is an application for stay of execution pending appeal. The power to grant such a remedy is provided for under Order 42 Rule 6 of the *Civil Procedure Rules* whose marginal notes read:

“stay in case of appeal”

Sub-rule (1) of the said order reads:

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- (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.”

It is clear therefore that this Court, sitting as an appellate Court, can only consider this application if satisfied that there is an appeal before it. That is also clear from the marginal notes cited above.

9. I have looked at the Memorandum of Appeal dated 28th October 2024 and which was filed on 29th October 2024. The ruling sought to be appealed was delivered on 30th August 2024 and therefore the appeal ought to have been filed on or before 30th September 2024. There is no application for extension of time within which to file any appeal against the ruling delivered on 28th October 2024. The appeal having been filed out of time and without leave, it follows that there is no valid appeal before this Court upon which an order of stay of execution can be founded. In the circumstances, this Court cannot exercise any discretion and consider the application dated 28th October 2024.
10. The up-shot of all the above is that this Court makes the following orders:
 1. The Notice of Motion dated 28th October 2024 is struck out.
 2. Costs to the Respondent.

BOAZ N. OLAO

JUDGE

18TH DECEMBER 2024 RULING DATED, SIGNED AND DELIVERED ON THIS 18TH DAY OF DECEMBER 2024 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO

JUDGE

18TH DECEMBER 2024

