



**Juma & another v Masakhalia & another (Environment & Land Case
87 of 2015) [2024] KEELC 6083 (KLR) (23 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6083 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 87 OF 2015
BN OLAO, J
SEPTEMBER 23, 2024**

BETWEEN

LEONARD DAWAFULA JUMA 1ST PLAINTIFF

ANZELIMO OKOTH JUMA 2ND PLAINTIFF

AND

CHARLES OUMA MASAKHALIA 1ST DEFENDANT

KENNEDY OCHIENG OUMA 2ND DEFENDANT

RULING

1. The dispute between Leonard Dawafula Juma and Anzelimo Okoth Juma (the 1st and 2nd Applicants respectively) against Charles Ouma Masakhalia and Kennedy Ochieng Ouma (the 1st and 2nd Respondents respectively) with regard to the ownership of the land parcel No Bukhayo/Bugengi/21 (the suit land) was heard by Omollo J. In a judgment delivered on 6th October 2021, the judge dismissed the Applicants' claim to the suit land having found that it had no merit. The judge also condemned them to pay costs of the suit to the Respondent.
2. Aggrieved by that judgment, the Applicants lodged at this Court's registry a Notice of Appeal dated 14th October 2021. They have since filed at the Court of Appeal in the Kisumu Registry Civil Appeal No E239 of 2021.
3. The Applicants have now approached this Court vide their Notice of Motion dated 22nd June 2023 in which they seek the following orders:
 1. Spent
 2. That an order be issued inhibiting any dealings on the land parcel No Bukhayo/Bugengi/21 until the Kisumu Court of Appeal Civil Appeal no E239 of 2021 is heard and determined.



3. That this Honourable Court be pleased to grant a stay of execution of the judgment and/or decree issued on 6th October 2021 pending the hearing and final determination of Kisumu Court of Appeal Civil Appeal No E239 of 2021.
4. That the costs of the application be provided for.
4. The application is premised under the provisions of Section 68 of the *Land Registration Act*, Sections 1A, 1B, 3, 3A and 63(e) of the [Civil Procedure Act](#) and Order 42 Rule 6 of the [Civil Procedure Rules](#). It is based on the grounds set out therein and supported by the affidavit of the 1st Applicant.
5. The gravamen of the application is that Applicants being aggrieved by the judgment delivered herein on 6th October 2021 have preferred an appeal to the Court of Appeal. That the suit land is registered in the names of the Applicants father Nicholas Juma Masakhalia and the Respondent's father Alfonce Ouma (both deceased) with each owning ½ a share. That the Applicants' father occupied 6 acres while the Respondents' father occupied 2 acres which portions the parties herein continue to occupy. That the Applicants prayers in this suit was that they be registered as owners of 4 acres out of the suit land having acquired it by way of adverse possession or through a customary trust. That the Respondents have now obtained a confirmed Grant in Busia High Court Succession Cause No 90 of 2013 and are in the process of sub-dividing the suit land which action will render their appeal nugatory.
6. The following documents are annexed to the Notice of Motion:
 1. Memorandum of Appeal filed at the Court of Appeal Kisumu being Civil Appeal No 239 of 2021.
 2. Certificate of Official Search for the land parcel No Bukhayo/Bugengi/21.
 3. Copy of the Originating Summons dated 24th August 2015.
 4. Copy of the supporting affidavit in respect of the Originating Summons dated 24th August 2015.
 5. Copy of the Certificate of Confirmation of Grant issued in respect of the Estate of Masakhalia alias Alfonce Ouma in Busia High Court P&A Cause No 90 of 2013.
7. The application is opposed and the 1st Respondent, also acting on behalf of the 2nd Respondent, filed a replying affidavit dated 22nd September 2023 in which he deposed, inter alia, that the issue regarding the ownership of the suit land has been heard and determined vide the judgment delivered on 6th October 2021. That in the judgment, the Court found that the beneficiaries to the Estate of the deceased are entitled to have a share each out of the suit land. The Applicant cannot now claim an additional 2 acres from the suit land by way of adverse possession. That there was a Succession Cause No 104 of 2007 which was awaiting the determination of this case and which also involves the suit property. That the Applicants are not beneficiaries of the Estate of Alfonce Ouma and their application should therefore be dismissed.
8. In response, the Applicants filed a supplementary affidavit dated 13th October 2023 in which it is deposed, inter alia, that the Respondents themselves enlisted the services of the County Surveyor who confirmed that the Applicants occupy 2.12 hectares of the suit land. A sketch map was annexed to the said affidavit.
9. However, in a rejoinder, the Respondents vide a further replying affidavit state that infact the County Surveyor did not carry out any exercise even after being paid for the work. Therefore, the sketch



map annexed to the Applicant's supplementary affidavit is a sham and a strange document and the Applicants are only seeking to frustrate the Respondents and disinherit them.

10. The Court having directed that the Application be canvassed by way of written submissions, only the Applicants' counsel Mr Onsongo instructed by the firm of Obwoye Onsongo & Company Advocates filed submissions. Ms Achala counsel for the Respondents opted to rely on the replying affidavit and did not file any submissions.
11. I have considered the application, the rival affidavits as well as the annexures thereto and the submissions by the Applicants' counsel.
12. From the rival affidavits and annexures thereto, it is clear to me that both parties have addressed me at length on the merits of their respective claims to the suit land. In the process, they have given little attention to the Notice of Motion dated 22nd June 2023 which is essentially seeking the main prayer of stay of execution pending appeal. For instance, in paragraphs 3 to 9 of his supporting affidavit, the 1st Applicant has confined himself to the following issues: that the parties fathers owned 6 and 2 acres respectively of the suit land long before the adjudication process. that the Applicants continue to occupy 6 acres and the Respondents 2 acres. that without regard to that occupation, the Respondents filed a succession cause being High Court P&A Cause No 90 of 2013 and obtained a grant without informing the Applicants or taking into account the correct position on the ground. that the Respondents, having obtained that grant, proceeded to distribute the suit land without taking into account the Respondents' interest in the suit land. that it is in the interest of justice that the status quo is maintained otherwise they will suffer irreparable loss and their appeal will be rendered nugatory.

On their part, the Respondents through the replying affidavit of the 1st Respondent have made reference to the impugned judgment of this Court, the Succession Cause, that the Applicants are not beneficiaries in the said Succession Cause and that there is no order of stay of execution issued in those succession proceedings. In short, the parties appear to be re-agitating their respective claims to the suit land before me. That is a matter that was heard and determined by another Court of concurrent jurisdiction. It cannot be raised again before me as I am not sitting on appeal against that judgment.

13. This Court's jurisdiction to issue orders of stay of execution is governed by the provisions of Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules. It 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.
- It is clear from the above that a party seeking an order for stay of execution pending appeal must satisfy the following threshold:



1. Show sufficient cause.
2. Demonstrate that unless the order is granted, he will suffer substantial loss.
3. File the application without unreasonable delay.
4. Offer security.

14. The jurisdiction of this Court while considering an application such as this one was circumscribed by the Court of Appeal in the case of *Vishram Ravji Halai & Another -v- Thornton & Turpin* (1963) Ltd 1990 KLR 365 where it was held:

“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.”

The importance of establishing substantial loss was reiterated by Platt Ag. J.A (as he then was), in the case of *Kenya Shell - V- Benjamin Kibiru & Another* 1980 KLR 410 where he said:

“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”. Emphasis mine.

On the issue of “substantial loss”, the 1st Applicant has deposed in paragraph 8 of his supporting affidavit that:

8: “That the Respondents are in the process of registering the Certificate of Confirmation of Grant at the Busia Land Registry and thereafter proceed to sub-divide the suit property which will completely change the status quo as it is and will render the appeal nugatory thus making us suffer irreparable loss.”

I have no doubt in my mind that if the suit land is sub-divided and even disposed off, the Applicants will suffer substantial loss as the said land will cease to exist. The Applicants also filed their Notice of Appeal within the required time as set out in Rule 75 (2) of the *Appellate Jurisdiction Act*. Therefore, the Applicant has satisfied the first two requirements of Order 42 Rule 6 (2) *Vishram Ravji Halai & Another -v- Thornton & Turpin* (1963) Ltd (*supra*).

15. The Applicants were however required to meet all the conditions set out in Order 42 Rule 6(2) of the *Civil Procedure Rules*. Not only some of them. The third condition was to file the application “without unreasonable delay”. The judgment sought to be stayed was delivered on 6th October 2021. This application was filed on 23rd June 2023 some 2 years and 8 months later. I consider that delay to be unreasonable. Moreover, no explanation has been offered for the delay. This Court therefore has no evidence upon which to exercise my discretion even if I was minded to do so. It is that evidence that opens the door for the exercise of such discretion. On that basis alone, this application must collapse.



16. The Applicants were also required to offer security “for the due performance of such decree or order as may ultimately be binding” on them. As was held in Wycliffe Sikuku Walusaka -v- Philip Kaita Wekesa 2020 eKLR, such offer of security:

“... must of course come from the Applicant himself as a sign of good faith to demonstrate that the application for stay of execution pending appeal is being pursued in the interest of justice and not merely as a decoy to obstruct and delay the Respondent’s right to enjoy the fruits of his judgment.”

No such offer of security has been offered by the Applicants. And neither have they stated that they are ready to abide by any conditions which this Court may impose for the grant of the order of stay of execution. Instead, at page 4 of his submissions, counsel for the Applicants has cited the locus *classicus* case of *Giella -v- Cassman Brown* 1973 E.A 358. Counsel has then proceeded to address the Court on the merits of the Applicants’ claim to 6 acres of the suit land by way of adverse possession and/or customary or constructive trust an issue which is now really water under the bridge and should await the pending appeal. This Court cannot now purport to consider for instance, whether the Applicants have established a *prima facie* case with a probability of success arising out of a decision of a judge of concurrent jurisdiction.

17. The up-shot of all the above is that the Notice of Motion dated 22nd June 2023 is devoid of merit. It is accordingly dismissed with costs to the Respondents.

BOAZ N. OLAO

JUDGE

23RD SEPTEMBER 2024

RULING DATED, SIGNED AND DELIVERED ON THIS 23RD DAY OF SEPTEMBER 2024 BY WAY OF ELECTRONIC MAIL AND WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE

23RD SEPTEMBER 2024

Explanatory notes:

This ruling was due for delivery on 28th February 2024. However, I was out of station attending to my ailing step-mother who, unfortunately, passed away two weeks later. I then proceeded on my pre-scheduled annual leave followed thereafter by the vacation. That caused the delay in the delivery of this ruling. The same is sincerely regretted.

BOAZ N. OLAO

JUDGE

23RD SEPTEMBER 2024

