



REPUBLIC OF KENYA



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

**Ocharo & 2 others v Ogindi & 2 others (Environment and Land Appeal  
E025 of 2022) [2023] KEELC 17956 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17956 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT AND LAND APPEAL E025 OF 2022**

**MN KULLOW, J**

**MAY 25, 2023**

**BETWEEN**

**MICHAEL OCHARO ..... 1<sup>ST</sup> APPELLANT**

**SAMWEL OKELLO MITIAWRE ..... 2<sup>ND</sup> APPELLANT**

**JARED OMONDI MITIAWRE ..... 3<sup>RD</sup> APPELLANT**

**AND**

**ROSEBELLA OTAYI OGINDI ..... 1<sup>ST</sup> RESPONDENT**

**JOSHUA ODHIAMBO OKENDO ..... 2<sup>ND</sup> RESPONDENT**

**MOURICE OCHIENG OENDE ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. By Notice of Motion dated November 25, 2022, the Appellants/ Applicants sought for the following orders: -
  - a. Spent.
  - b. That this court do issue an order of stay of execution of the orders issued in Migori CMELC Case No.E051 of 2022 on the 05/10/2022 pending the hearing and determination of the instant Application.
  - c. That this court be pleased to issue an order staying Migori CMELC Case No. E051 of 2022 on the 05/10/2022 pending the hearing and determination of the instant Application.
  - d. That this court do issue an order of stay of execution of the orders issued in Migori CMELC Case No.E051 of 2022 on the 05/10/2022 pending the hearing and determination of the Appeal herein.



- e. That this court be pleased to issue an order staying Migori CMELC Case No. E051 of 2022 pending the hearing and determination of the Appeal herein.
  - f. That costs of this Application be provided for.
2. The application is premised on the 13 grounds thereof and on the 2<sup>nd</sup> Applicant's Supporting Affidavit sworn on even date, on his own behalf and on behalf of the Co- Applicants and a Further Affidavit dated January 30, 2022. He avers that the Respondents instituted a suit against them vide Migori CMELC No. E051 of 2022 together with an Application dated 16/6/2022, seeking an Order of temporary injunction. In response to the said suit and Application; they filed a Statement of Defence, wherein they raised preliminary objection at paragraphs 10 & 11.
  3. It is his contention that on the October 5, 2022, the trial court delivered its ruling whose effect was to dismiss the Appellants/ Defendants' preliminary objection and to allow the Respondents/ Plaintiffs' Application dated June 16, 2022. Being aggrieved by the said ruling, they instituted the instant Appeal.
  4. It is his claim that the subject of the appeal is purely on the preliminary objection and if the appeal is allowed then the same would serve to dismiss the lower court suit in its entirety hence the need stay the lower court proceedings pending the determination of the Appeal.
  5. He further contends that they stand to suffer substantial loss and the Appeal shall be rendered nugatory if an orders for stay of execution is not granted. He maintained that the Respondents shall not be prejudiced in any way if the orders sought are granted and urged the court to allow the application in the interest of justice.
  6. In the Further Affidavit; he averred that no evidence had been provided by the Respondents to show that there was gold leaching plant installed on parcel No. Suna West/ Wasweta II/1099 or any expert report showing that indeed there was leaching taking place and the dangerous emissions thereof and how the same affected the Respondents.
  7. Further, it was his claim that no evidence had been provided by the Respondents to prove that they are the administrators of the estate of the deceased Anjilina Anyango Mitiawre. He also dismissed the claims by the Respondents that the lower court suit was a public interest suit or that there were exceptions on which orders could be stayed under the *Civil Procedure Rules, 2010*.
  8. The application was opposed; the Respondents filed a Replying Affidavit sworn on January 25, 2023 by the 1<sup>st</sup> Respondent, on her own behalf and on behalf of her Co- Respondents. It is her claim that the Applicants run a gold leaching plant which emits Sodium Cyanide, on parcel No. Suna West/ Wasweta II/1099 neighboring parcel No. Suna West/ Wasweta II/1098.
  9. It was her contention that the issues raised in the lower court case bordered Public Interest litigation and she annexed a memo done by members of the public and directed to NEMA. That upon the said petition by the members of the public, a warning Notice dated 31/5/2022 was issued to the 1<sup>st</sup> Applicant to stop the illegal construction works and maintained that health of the community members was critical.
  10. She maintained that the temporary injunctive orders sought to be stayed was meant to maintain the status quo and aimed at stopping a tort that would cause human harm. It was therefore her contention that the stay orders sought could not apply in the instant case and the Application is a mere delay tactic made in contravention of the provisions of Article 159 of *the Constitution*. She thus urged the court to dismiss the Application with costs.



11. The Application was canvassed by way of written submissions. Both parties filed their respective submissions which I have read and taken into account in arriving at my decision.
12. It is my considered opinion that the issues arising for determination are as follows;
  - i. Whether an Order for Stay of Execution can issue against the ruling and order dated 5/10/2022.
  - ii. Whether an Order for Stay of Proceedings in Migori CMELC No. E051 of 2022 can issue in the circumstances.

### **I. Whether an Order for Stay of Execution can issue against the ruling and order dated 5/10/2022**

13. The purpose and objective of an order for stay of execution is to preserve the substratum of the appeal by ensuring that the appeal is not rendered nugatory and the Appellant's right of Appeal is safeguarded. See Consolidated Marine. v Nampijja & Another, Civil App. No.93 of 1989 (Nairobi).
14. Order 42 Rule 6(1) of the Civil Procedure Rules outlines the conditions to be considered in an Application for stay of execution. These conditions are couched in mandatory terms and must all be satisfied by an applicant to warrant the grant of the said Order of Stay of Execution. The section provides as follows: -
  - (2) 2) No order for stay of execution shall be made under sub- rule (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.
15. The first ground to be established is whether substantial loss may result unless an order for stay of execution is granted and the Applicants are duty bound to clearly state what loss they stand to suffer. Substantial loss has been defined as that which has to be prevented by preserving the status quo as it were before the judgment. The same was further defined in James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, where the court expressed itself as follows: -

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
16. The onus is on the Applicant to demonstrate a sufficient cause to enable the court exercise its discretion in granting the orders sought in his favor. It is not sufficient to merely state that substantial loss may occasion without any explanation and demonstration of the loss and/or damages that would be suffered. (See Kenya Shell Limited v Kibiru [1986] KLR410 at page 417.)
17. The Applicants herein contends that they stand to suffer substantial loss since all their activities on their rightful parcel of land No. 1099 have been halted whereas the Respondents continue to enjoy



occupation of their neighboring parcels. It was also their claim that the Appeal would be rendered nugatory if the orders sought are not granted.

18. The Respondent on the other hand maintained that there was nothing grave and fundamental raised by the Applicant to warrant the stay of the orders issued in the trial court. It was their contention that the temporary injunction orders issued was aimed at stopping a tort that would cause human harm and further that the application did not meet the requirements outlined under Order 42 Rule 6(2) of the Civil Procedure Rules.
19. I have critically considered the rival positions taken by both parties in respect to the issue of substantial loss. I am also alive to the fact that this is still an active matter at the subordinate court and I am mindful not to comment on the merits of the substantive claim or the main appeal at this interlocutory stage.
20. It is my considered opinion that the Appellants have sufficiently demonstrated the substantial loss they are likely to suffer as a result of the discontinued activities on their parcel of land No. 1099. The effect of the order of temporary injunction issued on the 05/10/2022 is to stop the Applicants from conducting further activities on their land parcel No. Suna West/ Wasweta II/ 1099. The Respondents in their submissions confirmed that what is in dispute is not the ownership of land occupied by either party but on the environmental pollution.
21. The Application herein was filed on 25/11/2022 whereas the trial court order was issued on 05/10/2022; which period is more than the 30days. The applicants have not given any explanation for the over 30 days' delay in filing of the instant Application.
22. The last element to be considered is the deposit for the security for costs for the due performance of the decree. The trial court order which seeks to be stayed is an order of temporary injunction; restraining the Appellants from using the installed gold leaching plant on land parcel No. Suna West/ Wasweta II/ 1099 emitting sodium cyanide, which has hazardous effect on the neighboring community. The Applicants have not demonstrated any willingness and readiness to provide any security as may be ordered by the court.
23. In view of the foregoing, despite sufficiently demonstrating the substantial loss that they are likely to suffer, the Applicants did not offer any explanation for the delay in filing the instant Application nor demonstrated their willingness and readiness to deposit any security for costs for the due performance as the court may direct.
24. Be as it may, I have noted the critical nature of the cause of action herein, the same being on environmental pollution and the emission of hazardous/ poisonous gas and its effect on the Respondents and other residents within the said area. This court therefore takes judicial notice that sodium cyanide is a killer chemical and the effect of stay of execution orders as sought herein, would amount to continuous harm. Thus, even though I recognize the effect of the temporary injunction order and the possible loss of revenue, I also acknowledge that the life and health of people is of greater importance and overrides everything and I am further guided by the provisions of Article 42 and 70 of *the Constitution*.
25. Therefore, in the interest of justice, I find that the orders sought for the stay of execution of the orders temporary injunction issued on 05/10/2022 cannot be granted in the circumstances.



## II. Whether an Order for Stay of Proceedings in Migori CMELC No. E051 of 2022 can issue in the circumstances

26. The Applicants contend that the appeal is primarily based on the preliminary objection and maintained that it would be a waste of judicial time if the suit continues in the subordinate and the Appeal succeeds, which would serve to dismiss the lower court suit in its entirety.
27. The Respondents on the other hand contend that the issues raised in the trial court borders public interest litigation. It is their claim that the Appellants run a gold leaching plant on land parcel No. Suna West/ Wasweta II/ 1099, which emits sodium cyanide. It is further their claim that they have reported the matter to NEMA, warning notices were issued but the Appellants activities on the neighboring land are still ongoing.
28. An Applicant seeking an Order for stay of proceedings pending Appeal must satisfy the court that he has an arguable appeal and that the appeal would be rendered nugatory unless the stay order is granted. An arguable appeal is one that is predicated on a point that is not frivolous. (See Court of Appeal decision in David Morton Silverstein v Atsango Chesoni [2002] eKLR.)
29. Ringera J (as he then was) expressed himself on the jurisdiction to grant an order for stay of proceedings pending appeal in Re Global Tours & Travel Ltd HCWC No. 43 of 2000 as follows:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”
30. I have reviewed the grounds of preliminary objection as contained at paragraphs 10 and 11 of the Appellants Statement of Defence and I do note that the said touches on the locus standi of both the Respondents/ Plaintiffs to institute the suit and the Appellants/ Defendants to be sued in the proceedings. I have also considered the effect that Appeal would have in the subordinate court proceedings if the same is allowed. Therefore, it is necessary to have the said proceedings stayed pending the hearing and determination of the Appeal.

### Conclusion

31. In the upshot, I accordingly find that the Application dated 25<sup>th</sup> November, 2022 is partially merited and is hereby allowed on the following terms: -
  - i. An Order of Stay of Proceedings in Migori CMELC Case No. E051 OF 2022 be and is hereby issued pending the hearing and determination of the Appeal herein.
  - ii. Costs of the Application to abide the Appeal.
  - iii. The Record of Appeal having been filed, I hereby direct that the Appeal be canvassed by way of written submissions. The Appellants to file their submissions within 7 days from the date



of this Ruling. The Respondents to have corresponding 7 days to file their submissions within 7 days after service.

- iv. Mention on 20/6/2023 to confirm compliance and take a judgment date. Parties are advised to strictly comply with the set timelines given the nature of the suit and in the interest of justice.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 25<sup>TH</sup> DAY OF MAY, 2023.**

**MOHAMMED N. KULLOW**

**JUDGE**

**Ruling delivered in the presence of: -**

-----for the Appellants/ Applicants

-----for the Respondents

Court Assistant- Tom Maurice/ Victor

