



Okech (Suing as the Legal Representative to the Estate of Boaz Okech Okech (alias Okech Okech Owuor (Deceased)) v Ombago (Sued in his Individual Capacity and as Legal Representative of the Estate of Ombago Ogongo (alias Alex Ombago Ogongo (Deceased)) & another (Environment & Land Case E002 of 2023) [2025] KEELC 4104 (KLR) (30 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4104 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E002 OF 2023**

AE DENA, J

MAY 30, 2025

BETWEEN

ONYANGO OKECH PLAINTIFF

**SUING AS THE LEGAL REPRESENTATIVE TO THE ESTATE OF BOAZ
OKECH OKECH (ALIAS OKECH OKECH OWUOR (DECEASED))**

AND

**CLEOPAS OMONDI OMBAGO (SUED IN HIS INDIVIDUAL CAPACITY AND
AS LEGAL REPRESENTATIVE OF THE ESTATE OF OMBAGO OGONGO
(ALIAS ALEX OMBAGO OGONGO (DECEASED)) 1ST DEFENDANT**

DIOCESE OF KISUMU TRUSTEES 2ND DEFENDANT

RULING

1. Vide a Notice of Motion dated 19/09/2024 the Applicant seeks the following orders;-
 1. That the honourable court does stay the proceedings in this matter pending the hearing and determination of Civil appeal No. E 183 of 2024 at the Court of Appeal at Kisumu.
 2. That the costs of this application be provided for.
2. The application is premised on the grounds on its face and the affidavit sworn by Onyango Okech the application. It is deponed that the applicants application dated 10/11/23 seeking the court to strike out the defendants counterclaim was dismissed by the court. Aggrieved the applicant filed Civil Appeal No. E 183 of 2024 at the Court of Appeal Kisumu which was pending. That on advice by counsel on record for the applicant the same could take some years to be heard and determined. It was necessary



to stay these proceedings so as not to render the appeal nugatory which was strong and arguable with high chances of success.

3. According to the applicant the subject of these proceedings is ancestral land whose loss to the estate of the deceased Boaz Okech Okech cannot be adequately compensated in monetary terms. A copy of the Memorandum of Appeal and payment receipts thereof are annexed.
4. The application is opposed by the replying affidavit of Rev. Fr. Vincent Ouma Odundo on behalf of the 2nd defendant. It is deponed that on advice of the 2nd defendant's counsel on record the application is misconceived, bad in law and a delay tactic to prevent the suit from being determined to conclusion. The applicant failed to seek or apply for stay of the ruling of Hon Justice A. Koross but went ahead to file appeal herein. That the Appeal was filed out of time without the requisite leave of the court making it void ab initio. The present application has been filed 7 months after the impugned ruling without giving reasons for the delay.
5. It is further deponed that merely stating that the appeal will take time to be heard thereby warranting this court to stay its own proceedings is mischievous. That no facts have been presented as to why the appeal will be rendered nugatory should the stay not be granted. That the ruling was sound, the respondents were not party to the consent and were still the registered owners of the suit and there was nothing wrong to counterclaim for a declaration of ownership. That the counterclaim raises triable issues which ought to be heard and determined by this court. The applicant was forum shopping and must not be entertained to enable saving of court time. The applicant should be awaiting the judgement of the court to appeal it.
6. In a further supporting affidavit sworn by counsel for the applicant. In response to the allegation of delay tactics it is deponed the appellant is merely exercising his constitutional right to appeal under Article 23 of *the Constitution*. That is not mandatory to first seek stay before filing an appeal. That under Rule 5(2)(b) of the Court of Appeal rules an application for stay of appeal is independent and can be filed separately. That pursuant to Rule 77 of the same rules the appeal is not time barred as it was filed within the stipulated 14 days from the date of the delivery of the ruling. That related documents were filed within the 60 days stipulated in Rule 84. That under rule 86 the respondent is estopped from raising objection on late service for failing to raise an objection thereto within the stipulated 30 days. That the defendant has no valid claim as there is no time limit for filing an application for stay of proceedings provided the appeal is filed without inordinate delay. It is further deponed that the consent order remains a valid consent as long as it has not been appealed against and cannot be wished away. On the allegation of filing multiple applications it is deponed that a party has a right to bring as many applications as it might deem necessary. On the proposal to await for judgement and file appeal it is deponed it is up to a party to decide how to prosecute its case.

Submissions

7. The application was heard by way of submissions. The applicant's submissions are dated 2/03/2025 and the respondents 5/03/2025. The court has considered the submissions.

ANALYSIS AND DETERMINATION

8. Having considered the application the responses thereto and the submissions of the parties, the main issue that commends determination is whether the Applicant has met the threshold for grant of stay these proceedings pending appeal.
9. The application is brought under the provisions of Sections 1A, 1B, 3A of the *Civil Procedure Act* and Order 42 Rule 6(1) of the Civil Procedure Rules.



10. The power to stay proceedings is donated by the provisions of Order 42 of the Civil Procedure Rules. Order 42, rule 6. (1) which provides;-

‘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.’

11. The considerations upon which courts should stay proceedings have been enunciated in many judicial decisions. I will highlight a number of them.

12. In the case of *Global Tours & Travels Limited; Nairobi HC Winding up Cause No. 43 of 2000* cited by the respondents Ringera J, (as he then was) had this to say ;-

“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 cases, 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”.

13. In the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR the court referred to an excerpt from the Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332, as follows;

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will not be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity.’

14. Arising from the above pronouncements the question whether or not to grant an order for stay of proceedings lies with the discretion of the court. That since the discretionary power must be exercised judiciously the court has to consider if it will be in the interests of justice to grant the same. Also, the threshold for grant of orders of stay of execution clearly has been set very high and this is why an applicant must demonstrate exceptional circumstances to warrant stay of proceedings.



15. However, In the case of David Morton Silverstein vs. Atsango Chesoni [2002] eKLR, the Court of Appeal citing Kenya Commercial Bank Ltd vs. Benjoh Amalgamated Ltd & Another [1998] eKLR held that it is not the law that stay of proceedings cannot be granted but that each case depends on its own facts.
16. I have also seen the principles set down in the case of William Odhiambo Ramogi & 2 Others Vs. Honorable Attorney General & 3 Others (2019) cited by the respondents some of which I will address later in this ruling including the need to demonstrate exceptional circumstances and that the appeal would be rendered nugatory.
17. Guided by the above caselaw I will proceed to determine whether the reasons or grounds advanced by the applicant in support of the application will suffice.
18. One of the emerging grounds for the application is that the appellant has an arguable appeal with high chances of success, which might be rendered nugatory if stay of these proceedings is not granted. I have seen the robust depositions by the applicant on the arguability of the appeal. These center around the validity of the consent order. At this juncture the court ought not to consider the merits of the appeal which seems to be what both parties want to do in this forum, which is wrong.
19. But I must state that at this juncture the orders of stay of proceedings are being sought from the court that rendered the ruling. It would therefore be misplaced to consider whether or not the appeal is arguable. This would be the preserve of the Court of appeal were the application to be made before that court. But as long as the decision appealed is of this court then I cannot purport to comment on the decision of this court and as to the likelihood of success of the appeal.
20. The other reason relied upon by the applicant is that the appeal filed before the Court of appeal could take years to be heard and determined and therefore a likelihood of the present case being determined in the intervening period. I hear this to be the basis for rendering the appeal nugatory. In response the respondent contend that even if a judgement on the main suit will be delivered, it is capable of being stayed and the appeal be heard as one as opposed to piece meal determinations. The respondent has referred the court to the case of Makena Vs Nalwa (2024) KEHC 13086 (KLR) a determination by Aburili J.
21. I have read the decision. The court indeed was of the view that while there was justification to allow the application for stay for the reason that the appeal was based on a preliminary objection on the jurisdiction of the lower court and therefore if the said court was left to proceed and the appeal were to be upheld then the proceedings of the trial court would be rendered otiose since jurisdiction is everything, the learned judge however guided by various authorities preferred to deal with issues raised at once in the appeal before her. I'm persuaded and resonate by this later trajectory which frowns at piece meal determination.
22. But let me state that I find no justification or special circumstances that would warrant the present proceedings to be stayed. Most of the arguments raised are based on the merits of the appeal and the fate of the consent order. Further the main prayer in the application was for striking out the defendants counterclaim dated 17/8/2023. The appeal is being made at interlocutory stage. The defence and counterclaim have not been struck out. All the issues raised are still open and alive for determination in the main suit. The parties still have opportunity to be heard on merits and judgement to be rendered. The ruling is not a final determination and nothing stops the appellant from raising the issues during the full hearing and the same to be weighed on the scales of justice. The ensuing judgement can be appealed by any aggrieved party with an opportunity for cross appeal for any emerging issues to be dealt again under one roof by the appellate court.



23. The above approach in my view is the course that I find will carry the lower risk of injustice. It will accord all the parties substantive justice. and within the confines of Sections 1A, 1B, and 3A of the Civil Procedure Act. and Articles 2(1), 50(1), 159, & 259(1) of the Constitution which call upon courts of law to do justice to all and sundry that come before them. It is also the duty of a court of law to guide and lead parties and even counsel towards a fair and just resolution of a cause.
24. It is submitted by counsel for the applicant that the appellant will suffer immense loss if the application is not allowed since the appellant has a valid court order which has not been lawfully challenged in an appeal. That this order has been disparaged, ignored and insulted by the respondents causing him mental and psychological anguish. But before I proceed further I think Counsel is putting words into his clients mouth. At paragraph 7 of the supporting affidavit the loss is attributed to the land being ancestral which loss cannot be compensated in monetary terms and not psychological torture. I will therefore disregard this aspect.
25. Be that as it may it has been urged the loss under order 42 has not been limited to pecuniary loss. I have looked at the provision of order 42. The requirement to demonstrate substantial loss is embodied under Order 42 Rule 6 (2)(a) which provides as follows;-
- (2) No order of 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.....
26. My understanding of the above provision as read in the totality of the entire order 42 Rule 6 is that there are two limbs namely stay of execution and proceedings. However the criteria on substantial loss attaches only to stay of execution. It is therefore pertinent not to confuse stay of proceedings and stay of execution of an order of the court. The appellants submission in this regard would not suffice for purpose of stay of proceedings. I will therefore not belabor the issue of substantial loss.
27. The above interpretation is also echoed by Aburili J in the case of Makena Vs Nalwa supra thus;-
- ‘Both parties cited the conditions set out under order 42 Rule 6 of the Civil Procedure Rules. Although the Sub-rule 1 mentions both the stay of execution and stay proceedings, the conditions given under Sub-rule 2 apply solely to stay of execution pending appeal and not stay of proceedings.’
28. It has been submitted that the appeal was filed out of time without leave of the court and therefore is void abnatio and that there is no appeal as required by order 42 Rule 6. For me the Memorandum of Appeal is already before the court of appeal and the attendant documents filed. The matter is not within the jurisdiction of this court. It is not in my place to render a finding on whether the appeal is properly before the Court of Appeal. The right forum for consideration of this issue is the Court where the appeal has been filed and these grounds should be addressed within the proceedings at the court of appeal in Kisumu. I say no more.
29. The court has noted the contention by the respondent in opposition to the current application that the applicant did not seek or apply for stay of ruling before this court before filing the appeal. It is submitted by the applicant that it is not a mandatory requirement to first seek stay before filing an appeal. Counsel for the respondent has referred to the case of William Odhiambo Ramogi & 2 Others (supra) where the court stated that thus; -
30. I think the answer lies in the interpretation of the provisions of order 42 Rule 6. The law has made provision for an applicant to have two bites at the cherry if I may say so. The first to apply for stay



before the court that has delivered the impugned decision or apply for the same at the Court of appeal where the decision is being appealed. There is no evidence before this court that an application for stay of proceedings has been filed in the proceedings filed at the Court of Appeal in Kisumu.

31. I think I have demonstrated why the application dated 19/09/2024 is not merited. The application is hereby dismissed with costs to the Respondent who has participated in this application.

DELIVERED AND DATED AT SIAYA THIS 30TH DAY OF MAY 2025

HON. LADY JUSTICE A.E. DENA

JUDGE

30/05/2025

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Charles Gachichio for the Plaintiff /Applicant

Ms. Marucha for Defendant

Court Assistant: Ishmael Orwa

