Kisoso v Kimamet & Totona (Suing as the Legal Representatives of Kiporot Ole Totona alias Singo Arap Totona - Deceased) & 3 others (Environment & Land Case 267 of 2017) [2025] KEELC 3928 (KLR) (22 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3928 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE 267 OF 2017

MAO ODENY, J

MAY 22, 2025

BETWEEN

PRISCILLA JERUTO KISOSO ..... PLAINTIFF

AND

LETEMA TOTONA KIMAMET & FREDRICK TOYONGO TOTONA (SUING AS THE LEGAL REPRESENTATIVES OF KIPOROT OLE TOTONA ALIAS SINGO ARAP TOTONA - DECEASED) ..... 1ST RESPONDENT

TUNGO TOTONA ..... 2ND RESPONDENT

LEDEMA TOTONA ..... 3RD RESPONDENT

RONALD TOTONA ..... 4TH RESPONDENT

RULING

1. This ruling is in respect of the 1st, 2nd and 3rd Defendants/Respondents Notice of Preliminary Objection dated 25th November, 2024 on the following grounds:

    1. That looking at the entirety of the application, it is fundamental to note that the substratum of the application for stay of proceedings before this Honourable Court (denovo hearing) with a hearing date already fixed, is that the applicant is saying that she has moved the Court of Appeal to restore the Judgment dated the 19th January, 2023 and therefore for all purposes and intends their appeal was before the Court of Appeal.

    2. That the above being the case, then this Honourable court is functus officio of the matter because already the Court of Appeal is seized of the matter with the requisite jurisdiction under Rule 5 (2) (b) of the Court of Appeal Rules to grant the stay of proceedings, stay of execution and injunction as the case may be. That therefore to invite the ELC Court to grant a stay of

proceedings over a matter which had been appealed to the Court of Appeal would contravene the principle of judicial hierarchy by inviting this court to consider matters already under the jurisdiction of the Court of Appeal.

3. In the case of case of the Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited [1989] KLR 1 Nyaragi, JA expressed himself as follows and we quote in part that:

"…. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction……."

4. In the case of Samuel Kamau Macharia v KCB & 2 Others, Civil Application No 2 of 2011 the Supreme Court of Kenya stated thus:

"….A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law could only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which was conferred upon it by law…. Where *the Constitution* exhaustively provided for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor could Parliament confer jurisdiction upon a court of law beyond the scope defined by *the Constitution*…."

5. That it is trite law that the stay of proceedings is a serious grave and the defendants/respondents reliance is placed in the case of Peter Njuguna Gitau v Daniel Kiprono Kiptum & 3 others [2022] eKLR; where the court held;

"……Halsbury's Law of England, 4th Edition. Vol. 37 pages 330 and 332, sheds more light on stay of proceedings and states thus:

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. The Applicant for a stay on this ground must show not merely that the Plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case……"

6. That for the defendants/respondents, the Judgment rendered herein on the 19th January, 2023 has been set aside, vacated and the matter ordered to start denovo vide a ruling rendered by the ELC Court (Mwangi Njoroge ELC Judge) on the 21st February, 2024 and the party aggrieved (that is the applicant herein) had rushed to the Court of Appeal and therefore the jurisdiction under Section 3A, Section 79G of the Civil Procedure Rules and Order 42 rule 6 of the Civil Procedure Rules, Order 50 rule 6 and order 51 rule 1 of the Civil Procedure Rules and all other enabling provisions of the law cannot be invoked as was done in the instant case and the Honourable Court is divested of jurisdiction because there is an express procedure and Rules to be invoked under Rule 5 (2) (b) of the Court of Appeal Rules, 2022 which states and we quote:

".....Subject to subrule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may:

a. .....

b. In any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just....."

7. In the case of Speaker of National Assembly v Karume [1992] KLR 21, the Court of Appeal held:

".....Where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures....."

8. That in heeding the Speaker of National Assembly v Karume case Supra, it is crystal clear, beyond a peradventure that the applicant herein had a clear procedure of redress and that procedure must be strictly followed. It was not followed in the instant case making the application dated the 28th October, 2024 fatally defective, dead on arrival and had "no legs to stand on" because in law jurisdiction is everything.

9. The defendants/respondents places reliance in the Arabic saying "Trust in God but tie your camel."

1st, 2nd And 3rd Defendant's Submissions

2. Counsel for the Defendant filed submissions dated 30th January, 2025 and submitted that courts of law have adopted a policy in favour of an application for stay of proceedings being handled in the court to which an Appeal is preferred. Counsel submitted that the mere point that an appeal has been filed is not a condition for stay of proceedings of this court and therefore the application before court claiming the same should fail in limine.

3. Counsel submitted that the Plaintiff having filed a Notice of Appeal in the Court of Appeal, then it is the right court to file an application for stay of proceedings Counsel relied on Rule 5 (2) (b) of the Court of Appeal Rules and the cases of William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslim for Human Rights & 2 others (Interested Parties) [2020] eKLR, Interim Independent Electoral Commission v Paul Waweru Mwangi [2011] eKLR, Ngatho & Another v Moki Savings Co-operative Society Ltd & 21 others [2023] KEELC 901, Montague Charles Ruben & 9 others v Peter Charles Nderito & another [1989] KECA 70 (KLR), Githunguri v Jimba Credit Corporation Ltd [1988] KLR 838, Timothy Kisina Kithokoi v Elijah Kitele & Another [2022] eKLR, Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 others [2015] eKLR, Kenya Wildlife Service v James Mutembei [2019] eKLR, Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others (2009) eKLR and Karia v Keshe (6th March 2024).

4. Mr. Arusei submitted that the Applicant should have filed the Application for stay of proceedings in the Court of Appeal and not in the ELC as it is functus officio. Counsel urged the court to uphold the preliminary objection and dismiss the Application.

Plaintiff's Submissions

5. Counsel for the Plaintiff filed submissions dated 22nd January, 2025 and identified the issue for determination as: whether the preliminary objection dated 25th November is merited. Counsel submitted that the Defendants want to mislead this court by stating that this court is functus-officio.

6. Counsel further submitted that this court ought only to restrict itself by granting the orders of stay of proceedings pending the appeal and urged the court to dismiss the Defendants preliminary objection.

7. On what preliminary objection entails, counsel relied on the cases Kyule v Gitaari [2024] KEHC 5819, Hassan Nyanje Charo v Khatib Mwashetani & 3 others [2014] eKLR, Independent Electoral 7 Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR, Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR, Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR, John Gilbert Ouma v Kenya Ferry Services Limited [2021] eKLR ,Margaret Njeri Gitau v Julius Mburu Gitau & 2 others [2022] eKLR, Omari Ifire & 4 others v Town Clerk Mumias Municipal Council [2006] eKLR and Access Bank Kenya PLC v Mengich & another (Civil Appeal E003 of 2024) [2024 KEHC 5682 (KLR) and submitted that the preliminary objections lacks merit and should therefore be dismissed with costs.

Analysis And Determination

8. The issue for determination is whether the Notice of Preliminary Objection dated 25th November, 2024 is merited. It is noted that the Notice of Preliminary objection is very wordy and sounds like submissions with authorities/cases to boot. The notice was too verbose and mixed the preliminary objection and the application and yet the Applicant had indicated that the preliminary objection was to be heard first.

9. This ruling therefore will only deal with the preliminary objection that this court is functus officio and that the right court for making an application for stay of proceedings is the court of Appeal

10. In the case of Oraro v Mbaja 2005 1 KLR 141 the court held thus:

> " A 'Preliminary Objection', correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection and yet it bears factual aspects calling for proof, or seek to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed."

11. It is trite that a preliminary objection should raise pure points of law and should not deal with undisputed facts or derive its foundation from factual information. This case has a long history where many Judges have handled it. It has gone to the Court of Appeal and back and it is now heading back to the Court of Appeal.

12. The gist of the 1st, 2nd and 3rd Respondents Notice of Preliminary objection is that this Honourable court is functus officio of the matter as the Court of Appeal is seized of the matter with the requisite jurisdiction under Rule 5 (2) (b) of the Court of Appeal Rules to grant the stay of proceedings, stay of execution and injunction as the case may be.

13. The doctrine of functus officio was expounded in Election Petitions Nos. 3, 4 & 5 Raila Odinga & Others v. IEBC & Others [2013] eKLR by the Supreme Court of Kenya where they cited with approval

an excerpt from an article by Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," [2005] 122 SALJ 832. The excerpt is that:

> " The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

14. The doctrine envisages the principle of finality and once a decision in the process of adjudication is made by the court then it cannot revoke or vary the same unless it is for review, which is allowed by the law and procedure.

15. This is a matter that is still pending hearing as the court ordered that it be heard de novo, which is the subject of the appeal in the Court of Appeal. The fact of filing a Notice of Appeal is not an automatic stay of execution or stay of proceedings. That is why, when parties are dissatisfied with a decision of a court, they have to file an application for a stay of execution, for an injunction and a stay of proceedings to preserve the substratum of the case.

16. It would therefore be procedurally incorrect to find that this court is functus officio because the Plaintiff has filed a Notice of Appeal in the Court of Appeal. Counsel for the Respondents further submitted that the grant of stay of proceedings over a matter which had been appealed to the Court of Appeal would contravene the principle of judicial hierarchy which the court respectfully disagrees with. This matter is still pending before this court and there would be no harm in hearing the application for stay of proceedings. If the Applicant had chosen to file it in the Court of Appeal, the same could also have been heard there.

17. I have considered the preliminary objection, the submissions by counsel, and find that the same lacks merit, and is therefore dismissed with costs. This is an old matter that parties should see it upon themselves to fast track to come to a conclusion. There are too many applications back and forth from the Court of Appeal and back. Even though parties have a right to file appeals when they are aggrieved by a decision, parties should also consider alternative dispute resolution mechanisms to save on time and expense.

18. The Applicant to fix the application for stay of proceedings within 30 days from the date of this ruling.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 22ND DAY OF MAY 2025.

M. A. ODENY

JUDGE