



REPUBLIC OF KENYA



**KENYA LAW**  
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**Oyoo & 7 others v Oyoo & 6 others (Environmental and Land Originating  
Summons 37 of 2020) [2025] KEELC 456 (KLR) (11 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 456 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 37 OF 2020  
SO OKONG'O, J  
FEBRUARY 11, 2025**

**BETWEEN**

**THOMAS OCHELE OYOO ..... 1<sup>ST</sup> APPLICANT  
KEPHAS OKINYI OYOO ..... 2<sup>ND</sup> APPLICANT  
SAMSON ODOYO OYOO ..... 3<sup>RD</sup> APPLICANT  
LABAN OMBECH OYOO ..... 4<sup>TH</sup> APPLICANT  
MARTIN OMONDI OYOO ..... 5<sup>TH</sup> APPLICANT  
NASHON OKWAMA OYOO ..... 6<sup>TH</sup> APPLICANT  
STEVEN OJWANG OYOO ..... 7<sup>TH</sup> APPLICANT  
JAEI AUMA OYOO ..... 8<sup>TH</sup> APPLICANT**

**AND**

**ROBERT OLANG OYOO ..... 1<sup>ST</sup> RESPONDENT  
JERIM OTIENO OYOO ..... 2<sup>ND</sup> RESPONDENT  
CLAUDIUS MATENGO OYOO ..... 3<sup>RD</sup> RESPONDENT  
CALEB OCHIENG OYOO ..... 4<sup>TH</sup> RESPONDENT  
ELLY OKOTH OYOO ..... 5<sup>TH</sup> RESPONDENT  
GLADIS MIGEGE OYOO ..... 6<sup>TH</sup> RESPONDENT  
JOYCE ATIENO OYOO ..... 7<sup>TH</sup> RESPONDENT**



## RULING

1. The full facts of this case are set out in the judgment of this court delivered on 24<sup>th</sup> October 2024. In summary, the Applicants instituted this suit by way of Originating Summons dated 20<sup>th</sup> May 2020. The Applicants claimed that they were in adverse possession of all those parcels of land known as Kisumu/Kabodho West/ 2266, 2273, 2282, 2265 and 1227 (hereinafter together referred to as “the suit properties” and individually as “Plot Nos. 2266, 2273, 2282, 2265 and 1227” respectively). In the alternative, the Applicants claimed that the said parcels of land were being held by the registered owners thereof in trust for them. In their Originating Summons, the Applicants sought the following orders;
  1. A declaration that the Applicants had acquired an interest by way of adverse possession in the suit properties and were entitled to the suit properties or the subsequent subdivisions thereof if any.
  2. In the alternative, a declaration that the suit properties were held in trust for the family and therefore the Applicants were entitled to inherit a portion of the suit properties.
  3. An order that both the Applicants and the Respondents be registered as the owners of the suit properties,
  4. The costs of the application.
2. The Applicants averred that they were the sons of Jeconia Oyoo Andere (deceased) (hereinafter referred to only as “the deceased” where the context so permits) who had two wives with whom he had 15 sons and 3 daughters. The Applicants averred that all the deceased’s children were adults and that the suit properties were ancestral land, the deceased having inherited the same from his forefathers. The Applicants averred that a mistake occurred during land demarcation when the suit properties were registered in the names of the Respondents. The Applicants averred that the Respondents were taking advantage of the said mistake to disinherit the Applicants who were their brothers of their rightful shares in the suit properties. The Applicants averred that the Respondents connived and started subdividing and sharing the suit properties among themselves. The Applicants averred that they had had uninterrupted occupation of the suit properties for over 50 years and had even buried their relatives on the properties. The Applicants averred that the Respondents had illegally transferred the suit properties into their names and were even sharing the same amongst themselves without taking out valid letters of administration in respect of the estate of the deceased and/or involving all the beneficiaries of the deceased’s estate.
3. The Respondents opposed the Originating Summons. The Respondents averred that the subdivisions complained of by the Applicants were being undertaken by the registered owners of the suit properties. The Respondents averred that a suit that was brought against them by the deceased over the suit properties was dismissed and the deceased advised to discuss the dispute over the suit properties with registered owners of the said properties. The Respondents averred that the Applicants were all living on the Respondents’ mother’s homestead and not on the parcels of land registered in the names of the Respondents and as such their adverse possession claim against the Respondents was unsustainable.
4. At the hearing of the suit, the parties gave evidence in support of their respective cases. The court delivered its judgment on the matter on 24<sup>th</sup> October 2024. In the judgment, the court found the Applicants’ adverse possession claim over the suit properties and the alternative claim based on trust



not proved. In conclusion, the court dismissed the Applicants' Originating Summons dated 20<sup>th</sup> May 2020 with costs to the Respondents.

5. What is now before the court is the Applicants' Notice of Motion application dated 4<sup>th</sup> November 2024 seeking a stay of execution of the judgment delivered on 24<sup>th</sup> October 2024 pending the hearing of determination of the appeal that the Applicants intend to file in the Court of Appeal against the said judgment. The application that was supported by the affidavit of Thomas Ochele Oyoo was brought on the ground that the Applicants were dissatisfied with the said judgment and had opted to appeal against the same to the Court of Appeal. The Applicants averred that they had in the meantime been served with an eviction notice by the Respondents. The Applicants averred that they were at risk of being evicted from the suit properties forcibly thereby rendering their intended appeal nugatory.
6. The application was opposed by the Respondents through a replying affidavit sworn by Robert Olang Oyoo. The Respondents averred that the eviction notice that they served upon the Applicants was served in the exercise of their rights as the owners of the suit properties and in line with the judgment of the court. The Respondent averred that the application was brought after an inordinate delay and that the intended appeal was not arguable. The Respondents contended further that the Applicants had not demonstrated that they stood to suffer substantial loss if the stay sought was not granted. The Respondents termed the application frivolous, vexatious and an abuse of the court process.
7. The application was argued by way of written submissions. The Applicants filed submissions dated 4<sup>th</sup> January 2025 while the Respondents filed submissions dated 20<sup>th</sup> January 2025. I have considered the Applicants' application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the Respondents in opposition to the application. The Applicants' application was brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 51 Rule 1 of the Civil Procedure Rules. Stay of execution is however provided for under Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6(2) of the Civil Procedure Rules provides that:
  - (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 ultimately be binding on him has been given by the applicant.
8. In *Kenya Shell Limited v. Karuga* (1982–1988) I KAR 1018 the court stated that:

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 stay.”
9. In its judgment delivered on 24<sup>th</sup> October 2024, the court merely dismissed the Applicants' suit. Apart from the order for costs, this court did not make any positive order against the Applicants capable of execution. As rightly submitted by the Respondents, the notice of eviction served upon the Applicants was issued by the Respondents in the exercise of their rights as the registered owners of the suit properties. The same was not issued in the execution of a judgment of the court. In *Kanwal Sarjit Singh Dhiman v. Keshavji Jivraj Shah* [2008] eKLR, the Court of Appeal stated as follows:

The 2<sup>nd</sup> prayer in the application is for stay (of execution) of the order of the superior court made on 18<sup>th</sup> December, 2006. The order of 18<sup>th</sup> December, 2006 merely dismissed the



application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus a negative order which is incapable of execution save in respect of costs only.”

10. The same reasoning was applied by Makhandia J. (as he then was) in *Raymond M. Omboga v. Austine Pyan Maranga Kisii HCCA No 15 of 2010*, where he stated that:

The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order.”

11. In my view, there is no order in the judgment of 24<sup>th</sup> October 2024 capable of being executed save for the order on the costs of the suit. The Applicants have not persuaded me that they are likely to suffer substantial loss if they pay the costs that were ordered against them in the said judgment.

### **Conclusion**

12. In conclusion, I find no merit in the Applicants’ Notice of Motion application dated November 4, 2024. The application is dismissed with costs to the Respondents.

**DELIVERED AND DATED AT KISUMU ON THIS 11<sup>TH</sup> DAY OF FEBRUARY 2025**

**S. OKONG’O**

**JUDGE**

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

N/A for the Applicants

The Applicants in person

The Respondents in person

Ms. J.Omondi-Court Assistant

