



Owiti & another (Suing in their capacity as the officials of Obunge Youth Soccer Community Based Organization) v Imala & 4 others (Environment and Land Appeal E047 of 2025) [2025] KEELC 5063 (KLR) (3 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5063 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E047 OF 2025
SO OKONG'O, J
JULY 3, 2025**

BETWEEN

VICTOR JUMA OWITI 1ST APPELLANT

JOHN OMONDI OKELLO 2ND APPELLANT

**SUING IN THEIR CAPACITY AS THE OFFICIALS OF OBUNGE YOUTH
SOCCER COMMUNITY BASED ORGANIZATION**

AND

MUSA ISXMAIL HAJI IMALA 1ST RESPONDENT

SALIM OMBIMA 2ND RESPONDENT

**RATIB AHMED BOITON (SUED IN THEIR CAPACITY AS THE OFFICIALS OF
THE KISUMU MUSLIM ASSOCIATION) 3RD RESPONDENT**

COUNTY GOVERNMENT OF KISUMU 4TH RESPONDENT

CITY MANAGER, KISUMU CITY 5TH RESPONDENT

RULING

1. What is before me is the Appellants' application, brought by way of a Notice of Motion dated 18th June 2025, seeking a stay of execution of the judgment delivered by Hon. G.N. Barasah, SRM on 16th June 2025 in Kisumu MCELC No. E007 of 2024 (hereinafter referred to as "the lower court suit") pending the hearing and determination of the appeal herein. The application is supported by the affidavit of the 2nd Appellant sworn on 19th June 2025.
2. The Appellants averred that all that parcel of land known as Title No. Kisumu Municipality/Block 4/162 (hereinafter referred to as "the suit property") is owned by the Government of Kenya and is the



only available public ground within Obunga Slums used for sports activities and other public meetings and gatherings. The Appellants averred that members of the larger Obunga Community have had unrestricted access to the suit property for the said activities since 1971. The Appellants averred that they were officials of Obunga Youth Soccer Community Based Organization (hereinafter referred to as “the CBO”), which undertakes various activities on the suit property towards the realisation of the CBO’s main objectives of attaining behaviour change and related goals such as youth empowerment through education and sports. The Appellants averred that the CBO’s motto is “Sports and Education for Behaviour Change”. The Appellants averred that the CBO had conducted its activities on the suit property for over 20 years and had used sports and education activities as tools to empower the youth in Obunga Slums by engaging them in sporting activities mainly soccer and promoting their education thus keeping them busy and away from drugs and associated crime which are rampant in Obunga Slums.

3. The Appellants averred that they sought joinder in the lower court suit which was brought by the 1st, 2nd and 3rd Respondents (hereinafter referred to only as “the Association”) against the 4th and 5th Respondents. The Appellants averred that they were joined in the suit as interested parties on 11th April 2024 after the court found that they had demonstrated an interest in the suit property as some of the direct users thereof. The Appellants averred that the lower court delivered judgment in the lower court suit on 16th June 2025, in which the court allowed the Association’s claim to the suit property, which was public land. The Appellants averred that the suit property was public land held by the 4th Respondent on behalf of the public for use as a cemetery. The Appellants averred that the suit property could not be allocated to the Association without following the law and the laid down procedure. The Appellants averred that the lower court judgment had the effect of allocating public land to the Association contrary to the law.
4. The Appellants averred that as soon as the lower court delivered its judgment, the Association immediately entered into the suit property and blocked the access thereto. The Appellants averred that the execution of the said judgment had the consequence of gravely affecting the rightful access and use of the property by the members of the Obunga Community, thereby exposing the youths engaged in activities therein to danger of drugs, crime and violence, among other ills. The Appellants averred further that the impugned judgment had the immediate effect of halting the activities of the CBO and Obunga FC which could not undertake their daily trainings on the suit property. The Appellants averred that their appeal had high chances of success, and as such, it was necessary for the court to preserve the substratum of the appeal pending the hearing and determination of the appeal. The Appellants urged the court to allow the application.
5. The application was opposed by the Association through a replying affidavit sworn by Musa Ismail Haji Imala on 25th June 2025. The Association averred that the Appellants were not undertaking any activity on the suit property as alleged. The Association averred that the suit property was private property that had already been alienated by the Government in 1919 for use by people of Islamic faith as a cemetery and registered in the name of the Municipal Council of Kisumu to hold in trust for the Mohamedan Cemetery. The Association averred that the use of the suit property by other groups and persons, including the Appellants, had been with the permission of the Association. The Respondents averred that, as found by the lower court, the Appellants’ claim that the CBO, which was registered in 2019, had been using the suit property for over 20 years was not proved. The Respondents averred that the Appellants’ appeal did not raise any arguable point to warrant the grant of the stay sought.
6. The Association averred that its members had always been in active use of the suit property as a cemetery and for other religious purposes even before it filed the lower court suit and secured access to the property with a gate. The Association averred that there was no way in which their continued



possession and use of the suit property would affect the members of the Obunga Community. The Association averred that there was no evidence that the CBO and Obunga FC had been using the suit property for their daily activities. The Association averred that in any event, there was no evidence that the user of the suit property had changed from a cemetery to a sports centre. The Association averred that there were several alternative public venues which the CBO and Obunga FC could use for their activities. The Association averred that the substratum of the appeal could not be lost since what the appeal was challenging was the lower court's confirmation that the suit property belonged to the Association. The Association averred that it had no intention of disposing of, parting with possession or changing the user of the suit property. The Association averred that the Appellants had not met the threshold for granting a stay. The Association averred that the Respondents were not challenging the lower court's dismissal of their counterclaim regarding the suit property, and as such, their appeal had no chance of success. The application was argued orally on 26th June 2025.

Analysis and determination

7. I have considered the Appellants' application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the 1st, 2nd and 3rd Respondents (the Association) in opposition to the application. Finally, I have considered the submissions by the advocates for the parties. The Appellants anchored their application on several provisions of the law, including Articles 159 and 162(2)(b) of *the Constitution* of Kenya 2010. In my view, the application was brought principally under Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provides as follows:

8.

- (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 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."

9. 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 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.”



10. The Appellants' application was brought 3 days after the judgment of the lower court. The application was therefore brought without unreasonable delay. I am, however, not satisfied that the Appellants are likely to suffer substantial loss if the stay sought is not granted. The Appellants were joined in the lower court suit as interested parties and not as substantive defendants. This court has not yet received the lower court file. From a copy of the judgment of the lower court annexed to the Appellants' affidavit in support of the application, the lower court made a declaration that the suit property was private property and that it belonged to Kisumu Muslim Association (the Association). The court also issued an injunction restraining the 4th and 5th Respondents from conducting public participation meetings on the utilisation of the suit property and the developments thereon. The 4th and 5th Respondents were also restrained from interfering with the user and ownership of the suit property. Finally, the lower court dismissed the 4th and 5th Respondents' and the Appellants' counterclaims against the Association.
11. It is clear from the foregoing that the only order made by the lower court against the Appellants was the order dismissing their counterclaim against the Association with no order as to costs. That was a negative order and as such not capable of being stayed. In *Kanwal Sarjit Singh Dhiman v. Keshavji Jivraj Shah* [2008] eKLR, the Court of Appeal stated as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th 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.”
12. 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 as follows:

“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.”
13. The order dismissing the Appellants' counterclaim against the Association cannot, therefore, be stayed. In any event, as rightly observed by the Association, the Appellants' appeal is not against the dismissal of their counterclaim. The positive orders made by the lower court were directed at the 4th and 5th Respondents, who were the defendants in the lower court. The 4th and 5th Respondents have not appealed against the said orders. The orders were not directed at the Appellants and did not require the Appellants to do or refrain from doing anything. The Appellants have not persuaded me that they stand to suffer substantial loss if the orders which were issued against the 4th and 5th Respondents are not stayed.
14. At page 5 of the copy of the lower court judgment annexed to the Appellants' affidavit in support of the application, the lower court stated that the Appellants admitted at the trial that they stopped using the suit property 10 years earlier and were not in possession of the property. The lower court stated further that the Appellants also admitted that they sought and obtained the permission of the Association to use the suit property. Since the Appellants have not challenged the dismissal of their counterclaim in the present appeal, these statements by the lower court are not contested. In addition, the Association stated in its replying affidavit that the Appellants were not undertaking any activities on the suit property. The Appellants did not respond to this contention by way of a supplementary affidavit and did not place any evidence before the court showing that they were using the suit property



before the judgment of the lower court delivered on 16th June 2025. Given the admissions said to have been made by the Appellants in the lower court which have not been denied or challenged and the absence of any evidence showing the Appellants use of the suit property before the judgment of the lower court, I am not satisfied that the Appellants would suffer substantial loss if the stay sought is not granted. I also agree with the Association that the Appellants have not demonstrated that they are unable to get an alternative public ground or venue to carry out their sporting activities pending the hearing of the appeal.

Conclusion

15. The upshot of the foregoing is that the Appellants' Notice of Motion application dated 18th June 2025 has no merit. The application is dismissed with costs to be in the cause. In the interest of justice and to preserve the suit property pending the hearing of the appeal, I order that the Land Registrar, Kisumu County shall register an inhibition against the register of all that parcel of land known as Kisumu Municipality/Block 4/ 162 inhibiting the registration of any other or further dealings with the property pending the hearing and determination of the appeal.

DELIVERED AND SIGNED AT KISUMU ON THIS 3RD DAY OF JULY 2025

S. OKONG'O

JUDGE

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

The Appellants in person

Mr. P.D.Onyango for the 1st, 2nd and 3rd Respondents

N/A for the 4th and 5th Respondents

Ms. J.Omondi-Court Assistant

