



**Ogutu v Achieng & another (Environment and Planning Appeal
E001 of 2025) [2025] KEELC 5034 (KLR) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 5034 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND PLANNING APPEAL E001 OF 2025**

AE DENA, J

JUNE 30, 2025

BETWEEN

SUSAN CAROLEAN OGUTU APPELLANT

AND

IRENE ACHIENG 1ST CROSS APPELLANT

DANCAN OWINO OKOA 2ND CROSS APPELLANT

*(Being an Appeal from Judgment of the Chief Magistrate's Court at Siaya, by
Hon. Margaret Wambani) on 13th February 2025 in MCELC E101 OF 2024)*

JUDGMENT

1. The Applicant has brought an application dated 26th February 2025 by way of Notice of Motion. The applicant seeks the following orders;-
 1. That there be an order for a stay of execution of the ruling delivered on 21st February 2025 by Hon. Wambani in MCELC 101/2024 and/or the status quo be maintained pending the hearing and determination of the appeal and cross -appeal.
 2. That the exhumation order of the deceased's body from the suit parcel with the help of OCS Yala Police Station stay to prevent irreparable damage and emotional distress to the Cross Appellants/Applicants and their families.
 3. That the costs of this application be provided for.Which Application is supported by the grounds set out hereunder, the annexed affidavit of Irene Achieng, and such further grounds to be adduced at the hearing hereof:
2. The application is premised on the grounds that Magistrate's court lacked jurisdiction to grant exhumation order after rendering judgment in favour of the 1st and 2nd Defendant/Cross Appellants on



- 13th February 2025. The Court was functus officio and could not reopen the case to revise its decision. That the ruling dated 21st February 2025 was issued without affording the Cross-appellants/Applicants an opportunity to respond adequately to the contempt of Court application, which was argued orally without proper pleadings or supporting evidence.
3. The application is supported by the affidavit of Irene Achieng the 1st Cross Appellant sworn on 26/02/2025. The deponent avers that following the judgment delivered on 13th February 2025 in her favour as the Defendant in the MCELC 101/2024, she proceeded to bury her son on 16th February 2025 at 2 p.m.
 4. The deponent states that a three-day stay of execution order had been issued, but she was in financial and emotional distress due to prolonged burial delays, necessitating the burial. That on 17th February 2025, the Appellant/Respondent filed an application for contempt, seeking and exhumation order, which was granted on 21st February 2025 without affording her a fair hearing. That her counsel on record was served on 18th February 2025 at 5 pm with the said application and she was not given a proper opportunity of 15 days to respond to the contempt application as required by the law which was argued orally without supporting evidence.
 5. That on counsels advise, the lower court erred in law by reopening the suit and issuing the exhumation order as the court was functus officio after delivering final judgment in her favor as Cross-Appellants on 13th February 2025. Further that the Respondents/Appellants have already filed an appeal dated 15th February 2025 against the Judgment of 13th February 2025, which is pending determination and the exhumation order prejudices the appeal process.
 6. The applicant depones that unless a stay of execution is granted, she and her family will suffer irreparable harm and emotional distress, and the dignity of the deceased son will be violated. She prays for a stay of execution of the ruling issued on 21st February 2025 and/or the status quo to be maintained pending the hearing and determination of the appeal and cross -Appeal.
 7. The respondent responded to the application by filing grounds of opposition as follows:-
 1. The Applicant has made reference to evidence/documents and materials that did not form the proceedings in trial court.
 2. The cross Appellants have no rights or audience before this court having been found guilty of contempt of court orders; as such, they cannot seek favours or address before this court or any other court till they right their wrongs i.e purge the contempt.
 3. The Cross Appellants are guilty of misleading this court.
 4. The application has been filed by persons who have no regard or respect for the rule of law and more so his court.
 8. The respondents also filed a replying affidavit sworn by Susan Carolean Ogotu who averred that it is not in dispute that she is still the rightful and registered owner of South Gem Wagai 805.
 9. That the applicant is not the administrator of the Estate herein , since no such letter have ever been obtained by her. That the deponent conducted a successful and all-inclusive Succession Process over the her brother estate vide Kisumu Chief Magistrate's Court Succession Cause no. 37 of 2027 Estate of Esther Akwomo Ogotu. That since the grant was issued in 2018 (more than six years ago), the deponent has not been served with any application for Revocation over the same. As such the Cross Appellants averment that there is a revocation application already filed in court over the same is false and misleading.



10. That the court having heard the application, it granted interim orders stopping the illegal intentions of the Cross Appellant. That the Birth Certificate was never admitted as evidence in court. That during the hearing at the trial court, counsel objected to its production and at page 23 of the Proceedings the court upheld the objection. The idea of the Cross Appellant introducing the said Document is meant to mislead the court. At the delivery of the judgment, on 13th February 2025, by consent of our Advocates, the respondent was granted three days to file appeal and further applications.
11. It is deponed as soon as she left court, the Cross Appellant went and began making plans of burying the deceased on the land, a fact which the deponent communicated to my counsel and sought his advice. That Counsel in turn made frantic efforts to reach counsel for the cross appellant to inform her of the intended wrongs of her client. Letters sent via email and whatsapp on 14.02.25 before the burial went uncompiled with.
12. That from the reading of Paragraph 6 of the Affidavit by the Cross Appellant, the Cross Appellant confirms that she was aware of the Three days stay period but she still moved ahead and buried the deceased on the appellant's land. The Cross Appellant blames her actions on financial and emotional duress due to prolonged burial delays which does not justify the actions of the Cross Appellants disobedience of the court orders. That from this averment, the cross Appellant confirms that she was aware of what not to do, but still went ahead and did. The Cross Appellant is therefore guilty of the offence of contempt. ____ That the Cross Appellants Counsel Misss Onono is as guilty as the Cross Appellant since, she was aware of the intended contempt of the Cross Appellant but chose to keep silent. As an officer of the court, she was mandated to protect and uphold the rule of law by advising her client of the repercussions and consequences of the disobedience of the court orders.
13. It is deponed the matter came up on 20.02.25 when Counsel failed to attend on the issue of contempt and that the court had to have the matter adjourned to 21.2.25 where the court allowed the counsel for the Cross Appellant to respond orally on the Application. As at the time of moving to court, the Cross Appellant had not sought leave to file a response to the contempt Application; which again was never opposed at the trial court.
14. That the trial court was not functus officio at the time of the application for contempt was filed since the matter had been slotted for mention on 20.02.25 for further orders. The court still was alive on the issues that pertained this case. It would therefore be misleading for Counsel for Cross Appellant to even state the court was functus.
15. That the appeal is a nonstarter since at the time of going to court, the Cross appellant had not filed any Response to the Application despite being served with the same. It is averred the application by the Cross Appellant is opposed since the Appeal touches on the intended illegality of burying the deceased on the plaintiffs land. It would be of grave loss and waste of judicial time, if I proceed with appeal over a matter or is that has already been done. That the applicants case was for stopping the interment of the deceased on the land; and if the same has already been done illegally by the Cross Appellant, then there is nothing to be argued on the appeal.
16. It is deponed that court orders are meant to be obeyed, no matter how aggrieved one is. Once a party disobeys a court, then he may not have a good standing before any other court to seek indulgence. The Cross Appellants hands are already dirty and as such they do not deserve any leniency or from this court, till they purge the orders of 13.02.25 of the trial court.
17. In further response to the grounds of opposition above the applicant swore an affidavit on 10/03/2025. It is further stated that the Appellant/Respondent's claim that the production of the birth certificate was objected by her counsel during the trial is misleading, as the Pre-trial conference was conducted on



28th November 2024, and no objection to the production of the birth certificate or other documents was raised by the Respondent's counsel at that stage.

18. That the birth certificate of the deceased is a crucial document in proving the applicants relationship with the deceased, and it was only objected to by the Appellant/Respondent at the last stage to suppress the truth. That even though the objection for the birth certificate of the deceased was upheld, it was wrongly upheld, and the lower court demonstrated immense bias as per the rules and procedures of the law.
19. It is stated that the Appellant/Respondent fraudulently acquired the suit parcel through succession in 2018, without including all rightful beneficiaries, including the applicant and her children, even though they have lived on a portion of the suit land Number South Gem Wagai/805 for over 20 years even before the applicants husband the Appellant's brother died.
20. The applicant asserts that she only learnt of the succession issue when the Appellant served her with a Court Order for an injunction to stop the burial of the deceased on 4th October 2024 that neither were her other nephews and nieces aware of the succession.
21. That at the time the fraudulent succession was filed, the children of the late Mathew Ogutu, who is the Appellant's other brother and the applicants brother in-law, were adults, the children being Sydney Ogutu and Sylvester Ogutu. Therefore, their inclusion as minors was a deliberate misinterpretation of facts aimed at disinheriting my children and me from the ancestral land
22. Additionally that the Appellant's claim that she is the rightful owner is in bad faith, as there is a ripe application for revocation of grant, which is yet to be filed by FIDA Kisumu Office under reference number FIDA/KSM/MATT/7726/2024, after I lodged a complaint upon discovering that my children and I were disinherited.
23. It is stated that the Appellants succession proceedings were defective, as the chief who wrote the introductory letter for the succession was from Kisumu, whereas the deceased's grandmother was a resident of Gem Wagai in Siaya County.
24. It is deponed on advise of counsel that the title alone is not proof of ownership, and especially if it has been acquired fraudulently, it can be revoked. Therefore, it is baseless for the Appellant to rely on title acquired fraudulently to support her case.
25. The applicant depones she was aware that the Magistrate's Court had issued a 3-day stay order on 13th February 2025 when judgment in the applicants favour was delivered, but she genuinely believed that it lapsed on 16th February 2025, which is why she proceeded with the burial on that date. That the burial was not conducted in defiance on the Court Order but was done in good faith, based on her understanding that the stay order had expired. It was never her intention to disobey the Court but to give her son a dignified burial after his body had remained in the mortuary for several months, causing financial and emotional distress to my family
26. It is stated that the proper avenue for the Appellant was to challenge the judgment through an appeal, which she had already filed on 15th February 2025, and not to seek new orders after the judgment was delivered. That the exhumation order issued on 21st February 2025 was irregular, Illegal and should not be enforced, as it reopens a matter already concluded.
27. That the Appellant's allegations that the applicants advocate was in contempt of Court are legally unfounded, as an advocate is not a party to a suit but rather a legal representative of their client.



28. It is deponed that the balance of convenience favour granting the stay orders pending the appeal as allowing the exhumation would undermine the dignity of the deceased, interfere with pending appeals, and cause irreparable prejudice to the applicant and her family.

Submissions

29. The application was disposed by way of written submissions which parties filed and exchanged. The applicants' submissions are dated 17/03/2025 while the respondents are dated 24/03/2025. The parties also highlighted orally on 25/03/2025. In the proceedings Ms. Onono appears for the applicant and Mr. Ondego for the plaintiff in the trial court who is also the appellant and respondent for purposes of the present application. The court has considered the submissions which I have rehashed to the extent necessary in this determination.

Analysis and Determination

30. I have considered the application dated 26/02/2025, the supporting affidavits, the rejoinder thereto by the respondent and the submissions filed. The main issue that commends determination is whether the orders sought by the applicant should issue.
31. The powers to order stay of execution of decree or order of the court are conferred under the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*, as follows:
- (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 subrule (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.
32. Three essential principles arise from the above provisions namely, substantial loss may result to an applicant if stay is not granted, the application is made without unreasonable delay and the applicant has given such security as the court orders for the due performance of such decree. There also must be an appeal. The appeal was heard admitted on 19/2/2025. There is also the Cross Appeal dated 28/2/2025.
33. The above provisions have also been subject of further elucidation by the courts as follows; -
34. The Court of Appeal in *Visbram Ravji Halai v Thornton & Turpin* Civil Application No. Nai 15 of 1990 [1990] KLR 365, had this to say; -

“whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 (sic) rule 6 of the *Civil Procedure Rules*



is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.’

35. Substantial loss was further explained in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, thus: -

“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.”

36. Applying the law and principles I will proceed to review the application and whether it has satisfied the same.
37. I will start with substantial loss being the cornerstone of grant of orders of stay of execution. The subject of the orders for stay arise out of the ruling of Hon Wambani delivered on 21/2/2025 which the applicant is aggrieved with and has filed the present application. Before this the trial court had also delivered judgement in the trial suit which was in favour of the defendant therein who is the applicant but the plaintiff appealed the judgement before this court. The appeal was admitted on 19/2/2025 before the present application and there is also the cross appeal.
38. The ruling granted an order of exhumation of the body of Darren Asaso (deceased) from the suit property. It is contended that the trial court had no jurisdiction to grant such orders as the court was *functus officio* having delivered judgement in favor of the applicants herein in the main suit. The applicant desires that the order of exhumation be stayed and or the status quo be maintained pending the hearing and determination of the appeal and cross appeal.
39. The applicants submit that the exhumation of the deceased body would inflict profound emotional and psychological trauma on the applicant and her family, constituting irreparable harm that cannot be remedied by monetary compensation. The court has been referred to the case of *Concelia Ondieki v Grace Achieng Otieno & Ano* (2019)KEHC 6240.
40. It has been urged by counsel for the respondent that the applicant must first purge the contempt. The respondent’s contention is that what she tried to prevent in her suit in the trial court has occurred and therefore her appeal will be rendered nugatory. Mr. Ondego for the respondents reiterated this in his oral submissions before court. It is further submitted that it will be an academic exercise for the appellant to proceed with an appeal whose subject matter has already been overtaken by events. It is submitted that the applicant was aware of what not to do but still went ahead and did it against the orders of the court and despite prior warnings. The court was referred to the case of *Kenneth Gathura Kimani v Grace Njeri Macharia* (2018)eKLR where the learned judge cited *Econet Wireless Kenya Ltd v Minister For Information & Communication of Kenya & Ano.* (2005)1 KLR emphasizing that a contemnor would have no right of audience unless he is punished or purges the contempt.
41. The respondent further referred this court to the decision in *EAM v PAA* (2017) eKLR . My learned brother Onyiego J addressed whether a party who has been held in contempt must first purge the



contempt before they are heard. I have also noted the holding in *Miwani v Mawani* (1977) eKLR which had been cited in the said proceedings where the court held thus:-

“a fact that a party to a cause has disobeyed an order of the court is not of itself a bar to being heard unless the contempt complained of impedes the course of justice and that the court will exercise its discretion”.

42. Indeed therefore to hear a contemnor or not depends on the circumstances and merits of each case and therefore falls within the discretion of the court. Looking at the above persuasive dictum there is one test that is clear and this is whether the contempt complained of impedes justice. This will be tied to the issue of the appeal being rendered nugatory because this is where the justice in my view lies.
43. Will the appeal be rendered nugatory? This court appreciates the uniqueness of the circumstances herein on the above point as indeed the body lies in the very place the Plaintiff respondent suit tried to stop, that is in the suit property. The plaintiff in the trial court has already appealed the judgement of the trial court which found in favor of the defendant who is the applicant in the present case. This court has seen the grounds raised in the Memorandum of appeal and I will not delve into its merits or otherwise.
44. The plaintiffs appeal could be affirmed or it may be set aside. There is still the possibility of the reversal or otherwise of the judgement of the trial court. The effect of reversal would therefore be an order for the body of the deceased to be removed/exhumed from the place it is lying. I would therefore state that the stay would not impede the course of justice in the circumstances and regardless of the contempt proceedings. The appeal therefore has not been rendered nugatory.
45. I have noted that both parties have extensively argued on the ruling of the trial court as to the contempt proceedings culminating to an invitation from the plaintiff respondent that I must confirm the finding of the trial court. The issue of the contempt proceedings and the purging of the same are intertwined with appeal and cross appeal because at the end of the day as I have noted should the plaintiffs appeal succeed then the body must be exhumed. Even assuming the judgement is upheld it does not mean that the issue of contempt will not be revisited by this court as it is live before this court through the cross appeal. A contempt can also be punished by other means. I will therefore reserve my findings on the issue of the contempt proceedings and the outcome thereof for concurrent determination together with the appeal and cross appeal herein.
46. I have noted the robust arguments and submissions of the parties on the birth certificate, proceedings to be filed by FIDA, documents allegedly admitted unprocedurally among others. I have also seen the averments on whether the deceased was the son of the respondent's brother and including the ownership of the suit property pursuant to the grants of administration as well as the allegations of fraud. I must state all these issues touch on the merits of the appeal and cross appeal herein. The issue of jurisdictional error among other grounds raised on the contempt proceedings are also reflected in the cross appeal. It is noteworthy at this point parties should not urge on the merits of the appeals. I will therefore steer off this discourse and focus on the application for stay of execution.
47. Back to the application and the requirement for the applicant to demonstrate substantial loss will be suffered by the applicant should the orders not be granted. I have read the ruling of Aburili J in *Concelia Ondieki v Grace Achieng Otieno* (*supra*). The court stated thus:-

“64. An order for exhumation of the remains of a deceased person is a drastic and unpleasant order, grant of which should only be made in special, unique



and compelling circumstances. This is so because, exhumation is offensive to cultural and religious beliefs and practices, and it may cause public outrage.’

48. Justice Aburili further cited the case of *Eliud Kingwara Adawo v Philip Achieng John & another* [2015] eKLR where the court stated thus;-

“Due to the foregoing, I am not inclined to make an order for the exhumation of the body of the deceased at this stage. Although, I have found that the burial of the deceased on the suit property was carried out illegally, I would for the reasons that I have given above defer the order for exhumation until the hearing and determination of this suit when final orders would be made with respect to the rights of the parties over the suit property. The remainder of the body of the deceased on the suit property would in no way prejudice the plaintiff’s claim or rights herein. On the other hand, if the body was to be exhumed and it turns out after the trial that the plaintiff has no right over the suit property, the body of the deceased would have been disturbed unnecessarily and may have to undergo a second burial ceremony on the suit property. I am not satisfied that there are very compelling reasons that would justify the exhumation of the body of the deceased from the suit property at this stage. I have said enough to show that an order for the exhumation of the body of the deceased from the suit property is not for granting in the present application.’

49. This court is persuaded by the above observation’s dictums. I have already noted elsewhere in this ruling the special circumstances of this case with regard to the main prayer in the suit filed at the trial court. I have also made a finding that the appeal has not been rendered nugatory since should the plaintiffs appeal succeed then an order of exhumation should follow suit. Even with the alleged contempt this court cannot close its eyes to the circumstances of this case. There is the deceased body which will not rest until the final determination of the appeal and cross appeal. Exhumation is not only unpleasant and messy and should be carried out only where necessary.
50. For me the balance of convenience tilts in avoiding an exhumation at this stage of the proceedings. In my view the balance tilts in favor of maintaining the status quo and in as much as possible let there be only one exhumation if at all for the sake of the deceased and his family.
51. The other requirement provided by law is on deposit of security. None of the parties addressed me on the issue. The rule is two fold an applicant may propose and the court on the other court may also give orders as to such security. It is the discretion of the court and this being a burial dispute and should there be an exhumation the expense will still lie against the applicant. I will therefore leave the matter at that.
51. The upshot of the foregoing is that the application dated 26th February 2025 succeeds to the extent that I have found the necessity of maintaining the status quo for the reasons rendered.
52. It is therefore hereby ordered that the status quo shall be maintained to the extent that the body of the deceased shall remain temporarily interred in the suit property pending the hearing and determination of the appeal against the judgement of the Chief Magistrates Court at Siaya on 13th February 2025 in MELC No. E101 of 2024 *Susan Carolean Ogutu v Irene Achieng & Another* as well as the cross appeal herein.
53. The costs of the application shall abide the outcome of the appeal and cross appeal.

Orders accordingly

DELIVERED AND DATED AT SIAYA THIS 30 DAY OF JUNE 2025



HON. LADY JUSTICE A.E. DENA

JUDGE

30/06/2025

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

Ms. Onono for the Applicant

Mr. Ondego for the Respondent

Court Assistant: Ishmael Orwa

