



REPUBLIC OF KENYA



KENYA LAW
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**Odhiambo v Ndiri & 2 others (Land Case 4 of 2023)
[2025] KEELC 4779 (KLR) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4779 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
LAND CASE 4 OF 2023
AE DENA, J
JUNE 26, 2025**

BETWEEN

GEORGE ODHIAMBO PLAINTIFF

AND

CHARLES NDIRI 1ST DEFENDANT

ROSE ONYANGO OWALA 2ND DEFENDANT

GEORGE OMONDI OWALA 3RD DEFENDANT

RULING

1. The subject of this ruling is the Notice of Motion Application dated 28th February 2025. The application seeks the following orders: -
 1. Spent
 2. That pending hearing and determination of this application inter-partes, there be a stay of execution of judgment, proceedings and orders issued on 14th November, 2024 by Honourable Lady Justice A. Y. Koross, Judgment and decree of 18th October 2006 and the eviction of the applicants from land parcel No. EAST GEM/NYAMNINIA/736.
 3. That the Honourable Court be pleased to issue any other order for purposes of maintaining the status quo.
 4. That costs of this application be in the cause.
2. The application is premised on the grounds on its face and the supporting affidavit of Rose Anyango Owalla. It is deponed that on 14th November, 2024 the Honourable Lady Justice A. Y. Koross delivered a ruling which was in favour of the respondent. A copy of the order is annexed as "ROA-1". That being



- dissatisfied with the ruling, an appeal was lodged vide a Notice of Appeal dated 22nd November, 2024. A copy is attached as “ROA-2” together with a letter requesting for the typed proceedings and decree.
3. The applicant states that the appeal will be rendered nugatory if the ruling is not stayed and she is likely to suffer irreparable loss. The deponent deposes she is ready and willing to offer security for cost, as directed by this Honorable court, which is requirement for stay orders to be granted.
 4. That the respondent is desirous to execute the judgment and decree of 18th October 2006 that was subject of the ruling delivered on 14th November, 2024. That the respondent will not suffer any prejudice should the orders be granted.
 5. The application is opposed by the respondent’s affidavit dated 10th March 2025 sworn by George Omondi Owala. Rehashing the history of the matter starting with filing of the suit in 1992, the judgement delivered in 2006 and the various applications filed and their outcome culminating into the impugned orders of 12/10/2023 the subject of this ruling, it is submitted that litigation must come to an end. The court is urged not to aid the applicants in their abuse of the court process. That the application has not been filed within reasonable time (4 months after the ruling) with no merited explanation offered.
 6. It is deposed that no evidence has been provided to show the applicant would also loss that cannot be cured by monetary damages. Further that no substantive appeal had been filed and time for filing a memorandum of appeal had lapsed. Thus, no appeal would be rendered nugatory if the court dismissed the application. It is deposed that the defendants were out to frustrate the deponents to execute the decree of 18/10/2006. That the application was also a ploy to circumvent the judicial system and all the various decisions of the courts that have addressed this suit to be in vain. The court is urged to dismiss the application in the interest of justice.
 7. In response to the above and further to the supporting affidavit dated 26th February 2025, the applicant states that the affidavit dated 10th March 2025 is filed by ICK Law Advocates LLP a law firm that is not properly on record in this matter. That the said firm has neither sought the leave of the Honourable Court nor filed a consent permitting them to have audience before this honourable court. The affidavit dated 10th March 2025 therefore runs amok of Order 9 Rule 9 of the Civil Procedure Rules and must be expunged from record.
 8. It is deposed that the crux of the appeal is that the respondent herein fraudulently registered the applicant’s ancestral land in his own name and now wants to evict them from their only home. That the respondent herein attempts to evict his brother’s wife and children from their ancestral land and that several families, including the family of the applicants have established homes on the suit land. Attached are copy of pictures of the various homes and houses “ROA-1”.
 9. It is further deposed that the land also hosts the family burial grounds, wherein the respondent’s brother Charles Indiri, the 1st respondent’s husband as well as other deceased family members are buried, including the respondent’s father and other brothers. Annexed is a photo showing a group of the various graves “ROA-2”.

SUBMISSIONS

10. The application was disposed by way of written submission.
11. The applicant’s submission are dated 20/3/2025. The applicant identified three issues for determination namely 1) will the appeal be rendered nugatory if the application is not allowed, 2)



what elements must be satisfied before judgement can be stayed and 3) whether the firm of ICK law advocates LLP are properly on record.

12. It is submitted that the applicant has an arguable appeal with good chances of success. It is contended that applicant lives on suit property together with her family and which is the only home they know. That they have nowhere else to go. That the respondent failed to disclose that several families including the family of the applicants have established homes in the suit property including grave sites. Demolition will make them have not recourse even if the applicant wins the appeal. The Court is referred to the case of Michael Ntauthi Miteu Vs Abraham Kivondo Musau (1921) eKLR where the Case of Samvir Trustee Limited is Vs Gurdian Bank Nairobi (Milimani HCC 795 of 1997 is cited.
13. That the applicant will also suffer irreparable loss should the stay not be granted as the respondent will transfer the suit property into his name rendering the appeal nugatory. Refence is made to the case of James Wangalwa & Another Vs. Agnes Naliaka chesoto (2012) eKLR on the centrality of substantial loss.
14. Enumerating the elements to be satisfied before judgement can be stayed as stated in the case of Butt vs. Rent Restriction Tribunal (1982) KLR 417 as cited with authority in Amal Hauliers Limited Vs Abdulnasir Abubakar Hassan (2017) eKLR, it is submitted the applicants have met the said threshold including the need for security for costs.

PARA 15.

Reiterating the provisions of order 9 Rule 9 of the Civil Procedure rules it submitted that the respondent having failed to comply with the said provisions as to leave even after the court gave them a chance to regularize the record, the firm of ICK law advocates are not properly on record and therefore the affidavit dated 10/3/2025 must be expunged.

Respondents Submissions

16. The Respondent filed their submissions on 25/03/2025. The submissions identify one issue for determination whether the defendants have met the test for grant of an order for stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules.
17. It is submitted that the nature of the orders being sought are discretionary and the court is called to consider the special and unique circumstances of each case in order to sway its discretion. That the unique circumstances of this case have lasted 33 years since Kisumu High Court case No. 197 of 1992.
18. Referring to the respondents affidavit wherein the history is given, it is submitted that the judgment of this case was delivered on 18th October 2006. An appeal was preferred by the defendants which appeal was dismissed on 3rd October 2007. An order for eviction was issued on 17th September 2013 and executed on 2nd November 2013. The defendants have been defiant in obeying court orders and have in the circumstances filed all manner and a myriad of applications with the intent of frustrating the decree-holder. A recent ruling dated 12th October 2023 dismissed an application for ownership of the suit property on a claim for adverse possession.
19. On whether the defendants have established sufficient cause referring to the depositions of Rose Anyango Owala in the affidavits sworn on 26th February 2025 and 17th March 2025 and the annexed copies of the filed Notice of Appeal dated 22nd November 2024 it is submitted that mere filing of Notice of Appeal is not enough to establish sufficient cause. That there must be Memorandum of Appeal to provide cogent evidence of existence of sufficient cause. Reliance is placed on the case of OGM (Suing as the father of KGW) v FG & another [2020] eKLR and Central Watch Company Limited & another v Embu Gatari Housing Co-operative Society Limited (Environment and Land



- Appeal E029 of 2023) [2023] KEELC 18684 (KLR) (13 July 2023) (Ruling). That therefore the defendants cannot state that an appeal will be rendered nugatory where none has been filed and orders cannot issue orders in vain and defiant to the principles of equity.
20. On whether the defendants will suffer substantial loss referring to the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, as well as paragraph 4 of the supporting affidavit sworn on 26th February 2025 and paragraph 12 of the further affidavit it is submitted that defendants have not demonstrated the irreparable or substantial loss they will suffer if at all which cannot be cured by monetary award.
 21. Citing the case of *Chege v Gachora (Civil Appeal 265 of 2023)* [2024] KEHC 1994 (KLR) (29 February 2024) (Ruling) it is urged that the applicant has only referred to the repercussions they will suffer through their submission. It is submitted that the applicant ought to have raised the contention in her affidavit to give the respondent a chance to respond. It should therefore be considered that the applicant has not demonstrated substantial loss she stands to suffer.
 22. Whether the application was made without unreasonable delay, it is submitted that the application has been filed about 4 months after the issuance of the ruling. The delay in is termed inordinate and this application is an afterthought. The court is referred to the case of *Rishard Abdulrehman Khator versus Idha Marie Ahmed & 2 Others* [2020] eKLR That in the present case, the circumstances surrounding this suit are dire, and if at all the defendants were keen to preserve the status quo, the same would have been sought immediately.
 23. Whether the firm of ICK Law Advocates LLP is properly on record it is submitted that on 13th March 2025 the plaintiff's advocates ICK Law was granted leave by the court to rectify their appearance on record by filing the consent for change of advocates which was to be executed by the plaintiff's current and previous advocates. That inspite of challenges in getting the previous counsel to execute the consent, a duly executed consent was however filed on 21st March 2025. The plaintiff's advocate complied with the directions of the court and the prayer to strike out the plaintiff's affidavit of 10th March 2025 is unmerited. The court is invited to be guided by the spirit of Article 159 (2) (d) of *the Constitution* of Kenya 2010 enjoining the courts to determine cases without undue regard to technicalities as held in *Nur Abdirahman Mohamed v Ahmed Abdirahman Mohamed and others* [2022] eKLR.
 24. The plaintiff prays that the application dated 28th February 2025 be dismissed with costs to the plaintiff.

ANALYSIS AND DETERMINATION.

25. Having considered the application, the response thereto and the submissions on record the issues that commend determination is Whether the failure to comply with the procedural requirements under Order 9 Rule 9 as to leave warrants the striking out of the Respondents affidavit dated 10/3/2025 and whether the application is merited.
26. An invitation has been made by the applicant for the court to strike out the affidavit sworn by the respondent on 10/3/2025 for the reason that the law firm representing the respondents is improperly before court. This is on the basis of the provisions of Order 9 Rule 9.
27. Order 9 is on Recognised Agents and Advocates. Order 9 rule 9 reads as follows; -

Change to be effected by order of court or consent of the parties (order 9, rule 9)



Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgement has been passed, such change or intention to act in person shall not be effected without an order of the court –

- a. upon an application with notice to all parties or
- b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

28. For me I think it is pertinent to appreciate the intention behind order 9. In my view looking at the entire order 9 herein the substantive intention it appears to me is safeguarding the interests of a lawyer who has completed proceedings on behalf of a client to be in the knowledge that the client intends to take further action in court such as appeal or review of the final orders that were rendered in the finalised proceedings but that they will be deploying a different counsel. This must have been intended to ensure that outstanding issues or agreements between the outgoing lawyer and the instructing client are resolved at a point when the lawyer still has enough control to ensure that the client obliges as opposed to when the client is already enjoying the services of the incoming lawyer. In the latter there would be no incentive for them to settle outstanding arrangements most of which is professional fees.
29. Therefore I do not think the provisions were intended to be employed as a procedural technicality to strike out an affidavit as is the case in these proceedings.
30. I'm emboldened by the Court of Appeal in the case of Tobias M. Wafubwa v Ben Butali [2017] eKLR . The court had this to say about the application of Order 9 Rule 9 herein;-

there is no question that the objective of rule 9 is to not only serve as notification to the court in ongoing proceedings that there has been a change of counsel for the parties, but also to safeguard the interests of the outgoing counsel. In this case, Kituyi and Company Advocates having taken over representation of the respondent from Kweyu and Company Advocates, we see no prejudice that would be visited upon Mr. Sifuma's client, save to ensure the expeditious and just disposal of justice'.

31. The consent as between the previous law firm and the current law firm acting for the plaintiff respondent has now been filed. Moreover, striking out is not given as consequence for non-compliance to the provisions of order 9. It would be a miscarriage of justice to strike out the affidavit which in itself is not flawed. This court therefore declines the invitation to strike out the affidavit sworn in response to the application and opts for substantive justice as enjoined by article 159 (2)(d) of *the Constitution* to dispense justice without undue regard to technicalities.
32. Back to the substance of the application which is the grant of orders of stay of execution of judgment, proceedings and orders issued on 14th November, 2024 by Honourable Lady Justice A. Y. Koross, Judgment and decree of 18th October 2006 and the eviction of the applicants from land parcel No. EAST GEM/NYAMNINIA/736.
33. The application has been brought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, which reads:
- (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.
34. In the case of *Amal Hauliers Limited v Abdulnasir Abukar Hassan* [2017] eKLR W. Korir J cited the Court of Appeal dictum in *Butt v Rent Restriction Tribunal* [1982] KLR 417 where guidance on how a court should exercise discretion to grant stay of its own judgement or order thus:-
1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
35. It is also trite that 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. This is because execution is a lawful process – see *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR,
36. Having noted the provisions of the law and the elements the court should consider when exercising its discretion to grant or deny stay of execution of its decree or order, there is an underlying ingredient which is the existence of an appeal. This requirement is the opening phrase in Order 42 Rule 6(1) above.
37. Is there an appeal? Ground No. 2 of the application states that the applicant dissatisfied with the ruling appealed against it lodging a Notice of Appeal dated 22/11/2024. Ground 3 is to the effect that the appeal shall be rendered nugatory if the judgement is not stayed. Paragraph 3 annexes a copy of the Notice of appeal. Is a Notice of Appeal an appeal?
38. The question of when a Notice of Appeal may be deemed an appeal was addressed by the Court of Appeal in the case of *Multi Choice (Kenya) Limited Vs. Wananchi Group (Kenya)Ltd & 2 Others* (2020) eKLR. Though the case dealt with application for review under the provisions of Order 45 I find that it offers useful guidance on the issue raised by the respondent/plaintiff as to non existence of an appeal herein.



39. The Court of Appeal stated thus:-

It is the notice of appeal, evincing the aggrieved party's intention to challenge, in this Court the impugned decision, that gives jurisdiction to the courts to entertain applications under Rule 5(2)(b) and Order 42 rule 6(4), respectively. For the purposes of the latter, an appeal to the Court of Appeal is "deemed to have been filed when under the Rules of that Court notice of appeal has been given". This is the only instance, as far as I am concerned, where the notice of appeal is treated as an appeal, yet strictly speaking, the two are distinct. It has been explained before that a notice of appeal will be treated as an appeal only for the very specific and limited purpose of enabling a party who has lost in the superior courts below to seek an order of stay of execution, or of proceedings, or an injunction before this Court.

40. Put differently a Notice of appeal will not be deemed as an appeal except for purposes of triggering the jurisdiction of the Court Appeal to exercise powers to grant a stay of execution pending appeal. In the present case it is noteworthy that it is not the Court of Appeal that is being moved to grant the orders of stay but rather the court that issued the impugned orders which is this court.

41. What about this court, would the Notice of Appeal suffice to be treated as an appeal. The dictum above is very clear that the above instance is the only scenario when A Notice of Appeal would be treated as an appeal.

42. The Court of Appeal in Multi Choice Supra further stated thus:-

An appeal is preceded by lodgment of a notice of appeal. If appeal is not instituted within the appointed time above, the notice of appeal will, by the provisions of Rules 83 and 84 be deemed to have been withdrawn or struck out, as the case may be.

43. Applying the above it would then appear that there has been no further action since the Notice of Appeal was filed in November 2024. I say so because no Memorandum of Appeal has not been placed before this court. So which appeal will be rendered nugatory? None.

44. The applicant has also averred at paragraph 8 that she has an arguable appeal against the respondents with overwhelming chances of success. In the absence of a Memorandum of Appeal the court has nothing upon which to weigh this averment. In any case this would only be applicable if the stay were being sought at the Court of Appeal level, this is so because this court cannot purport to comment on its own ruling/judgement.

45. Having stated the foregoing this court respectfully agrees with the plaintiff respondent that there is no appeal that will be rendered nugatory. On this basis alone the application should fail.

46. The orders issued by Land Justice A.Y Koross are two fold a) the plaintiff application dated 30/5/2024 is hereby struck out with no orders as to costs b) matter to be mentioned on 4/02/2025 for further directions on execution of the decree. Looking at these two orders the first order is in the negative and is not capable of being stayed -see the case of Kaushik Panchamatia & 3 Others...Vs...Prime Bank Limited & Another [2020]eKLR.

47. But I must again interpret the orders sought. The application also seeks to stay execution of Judgement and decree of 18th October 2006 and the eviction of the applicants from the parcel No. East Gem/ Nyamninia/736. Having considered the history of the matter as highlighted in the replying affidavit of the respondent decree holder herein I took time for the abundance of caution to see if there have been previous invitations of this nature in relation to the said decree.



48. My answer is in the positive. In a ruling delivered by Justice A.Y. Koross on 17/3/2023, on the applicant's application for interim orders of injunction restraining the defendant, his servants inter alia from evicting the plaintiffs, demolishing structures on the suit property was dismissed. The defendants vide an application dated 11/2/2015 sought for orders of stay of execution of the eviction orders issued on 17/9/2013 which application was dismissed. An application dated 19/01/2022 seeking orders restraining the plaintiffs from evicting the defendants was dismissed. This was not controverted by the applicant. All the rulings were annexed in the affidavit sworn on 10/3/2025 and are available on record.
49. I must state that the genesis of all the above applications is the judgement and decree of 18/10/2006 and the invitation to stay the execution of the judgement and its attendant decree is in my view res judicata and must not be revisited unless on appeal to the Court of Appeal. On this basis I would down my tools.
50. Assuming this court is wrong on the above findings as to res judicata and which I'm persuaded I'm not, I will now review special circumstances as a consideration for grant of orders of stay of execution.
51. The history is said to put the present case as one of a special kind/circumstance. Indeed, this is a consideration in exercising discretion of the court. It is established that each case must be decided on its own facts and merits and there is no one jacket fits all.
52. The history is enumerated in paragraph 4 of the affidavit sworn on 10/3/2025 by George Andrew Odhiambo the Plaintiff decree holder which enumerates the various applications and proceedings filed by the applicant. I will not rehash them.
53. Clearly for Thirty-three (33) years since inception the decree holder has not been able to enjoy the fruits of its judgement. Wouldn't any reasonable man see this as a mockery of justice. The court should not only consider the interest of the applicant but has also to consider, in all fairness, the interest of the respondent who has been denied the fruits of his judgement. See Attorney General vs. Halal Meat Products Ltd Civil Application No. Nai. 270 of 2008;
54. The Court of Appeal in Women Microfinance Limited Vs Martha Wangari Kamau 2020 eKLR, stated as hereunder: -
29. In Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that 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 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. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Civil Procedure Act or in the interpretation of any of its provisions.
55. I think justice cuts both sides and it would amount to a travesty of justice to allow a stay of execution of the judgement in this case. The present case is a perfect fit to concur with the dictum of Kuloba, J in the case of Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63: The learned judge stated;-

to be obsessed with the protection of an appellant or intending appellant in total disregard or fitting mention of the so far successful opposite party is to flirt with one party as



crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

56. The upshot of the foregoing is that the application dated 28th February 2025 be and is hereby dismissed. Let each party bear their own costs.

DELIVERED AND DATED AT SIAYA THIS 26TH DAY OF JUNE 2025

HON. LADY JUSTICE A.E. DENA

JUDGE

26/06/2025

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

Ms Koech for the Plaintiff

Mr Sala for defendant/Applicant

Court Assistant: Ishmael Orwa

