



**Onyango & another v Omondi & 2 others (Environment and Land Appeal E014 of 2024) [2025] KEELC 4597 (KLR) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4597 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL E014 OF 2024**

**AE DENA, J  
JUNE 19, 2025**

**BETWEEN**

**MARY AWUOR ONYANGO ..... 1<sup>ST</sup> APPLICANT**

**CHARLES ODHIAMBO OKELLO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**BOAZ WYCLIFE DANIEL OMONDI ..... 1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR, SIAYA ..... 2<sup>ND</sup> RESPONDENT**

**THE HON. THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before court is the Notice of Motion application dated 22/10/2024. It seeks the following orders;-
  1. Spent
  2. That pending the hearing and determination of this application, the Honourable court do issue temporary ex parte injunctive orders staying execution of the lower court judgement
  3. That pending the hearing and determination of this appeal, the Honourable court do issue temporary ex parte injunctive orders staying execution of the lower court judgement
  4. That the costs of this application be provided for
2. The application is premised on the grounds on its face and the supporting affidavit of Charles Odhiambo Okello sworn on 22/10/2024 the second appellant/applicant.
3. It is deponed that in the judgement delivered on 24/04/2024, an order was made that the 1<sup>st</sup> and 2<sup>nd</sup> defendant stop dealing with the suit properties. That the 1<sup>st</sup> respondent had commenced execution proceedings against the deponent vide contempt proceedings on the basis that the 1<sup>st</sup> appellant was



still in occupation of one of the suit parcels. A copy of the application for execution is annexed as COO-1. That the applicant will be committed to civil jail yet she has preferred an appeal against the said judgment.

4. The applicant avers that she has an arguable appeal as the High court has already delivered a judgement over the suit parcels which the lower court judgement contradicts. A copy of the High court decision is attached as C.O.O-1. That the High Court judgement supersedes the lower court judgement.
5. The application is opposed by the 1<sup>st</sup> respondent through grounds of opposition dated 11/12/2024. That the applicant has not established the conditions for grant of orders of stay of execution provided under the provisions of Order 42 Rule 6. That the application is defective not supported by any law or facts and should be dismissed with costs to the respondent.
6. In addition to the grounds above the respondent also swore a replying affidavit on 14/03/2025. It is not clear under what circumstances this affidavit was filed way out of time without leave- see the record of proceedings on 5/02/2025. I proceed to strike out the same. I'm also emboldened by the fact that the same is not mentioned in the respondents submissions.
7. The application was canvassed by way of written submissions which parties filed and exchanged. The applicants' submissions are dated 11/02/2025 and the 1<sup>st</sup> respondent's submission 31/01/2025. The court has considered the submissions.

### **Analysis and Determination**

8. I have considered the application, the response thereto and the submissions of the parties. I must however state from the outset that the court has noted the respondents submissions which have concentrated mostly on orders of injunction pending appeal. While the prayers mention temporary injunction the application is largely seeking stay of execution. The court will analyse the application on this basis. The main issue for determination therefore is whether the application meets the threshold for granting the orders of stay of execution of the judgment pending Appeal.

The application has been brought under the provisions of Order 42 Rule 6 of the [Civil Procedure Rules](#).

9. Order 42 Rule 6 of the [Civil Procedure Rules](#), provides 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.

10. 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.’ Emphasis is mine.

11. The above is also reiterated in the case of *Antoine Ndiaye v African Virtual University* (2015)eKLR cited by the applicant.

12. Has the applicant established that she will suffer substantial loss should the stay not be granted. In the present case the main reason advanced by the applicant is that the 1<sup>st</sup> respondent has commenced execution proceedings pursuant to the judgement of the trial court by filing an application for contempt. The application for contempt has been adduced before court. My review of the same indeed confirms that the decree holder has made efforts at getting the applicant to release the title documents to him for purposes of effecting the decree to no avail, thus the said application for contempt.

13. The respondents submission is that an applicant must show existence of special circumstances that warrant the grant of stay. The applicant does not expound much on this but further contends that the prejudice to be suffered has not been demonstrated.

14. It is important to note 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 under Order 42 Rule 6 since execution is a lawful process. This was the position taken by the court in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR. The court further enunciated that an 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.

15. The applicant’s submission on the test of substantial loss is that the substratum of the suit is land and must be sustained. That ownership and possession will be at the core of the appeal. Basically the applicant seems to suggest that the register must be preserved as well as occupation pending determination of this appeal. The case of *RWW Vs EKW* (2019)eKLR is cited to buttress this argument and which I have read and agree with the dictum cited.

16. I have already observed hereinbefore that the commencement of the process of execution alone does not suffice for purposes of establishing substantial loss. But I must look at what is at stake in the present proceedings.

17. The judgement of the trial court made an order reversing all subsequent entries on parcel Siaya/ Kochieng B/762,671,672 and 673 reverting the land to the plaintiff the respondent herein. Further an order of prohibition directed at the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants from dealing with the land in any other manner save as directed by the court. Firstly, I would be more worried with the later order.

18. The applicants submitted he has built his home on the land and which I thought would be a sufficient reason. I thus revisited the supporting affidavit of the applicant. There was no deposition to this effect. I then looked at the application for contempt which the applicant attaches and depones was filed on the basis that the applicant was still in occupation. The supporting affidavit to the said application



- sworn by the decree holder rehashes at paragraph 5 the various letters that the applicant has been served with to surrender the title deeds which the applicant defied. I noted one letter dated 6/8/2024 which refers to ploughing and planting which again is said to have been ignored.
19. Still on the above supporting affidavit paragraph 6 addresses the nature of occupation as continuing to use, plough, plant crops and or retaining possession. While there is no mention of a home, based on the depositions in the application for contempt the court is persuaded that the applicant is largely in possession.
  20. It has also been urged that were the plaintiff to be put to civil jail, this is not compensable by way of damages. My considered view is that contempt proceedings can have huge ramifications including sending someone to jail and it is the psychological effects that as court I would be worried about and how this could be capable of quantification by way of damages. I would therefore agree with counsel for the applicant.
  21. I think a consideration of all the circumstances of this case points toward the need to maintain the status quo by preserving both the ground status as well as the register pending the appeal.
  22. The court has discretion to order security. It has been submitted that the claim is unliquidated and therefore security for costs is not necessary. The law has two limbs in this regard. Firstly that a party seeking stay either offers such security for the due performance of the orders as may ultimately be binding on the appellant. The other limb is for the court to order such terms as to security as it may deem necessary. The orders largely revolve around the transfer of the land. In the present circumstances I think the best security would be for the titles to be deposited with the court which in my view strikes a balance between the interests of the parties especially the decree holder.
  23. The upshot of the foregoing is that the application dated 22/10/2024 is hereby disposed in the following terms:-
    1. That the status quo in parcels Siaya/Kochieng B/762,671,672 and 673 shall be maintained. The Applicant shall not undertake any further constructions, sale, subdivision pending the hearing and determination of the present appeal.
    2. That the applicant shall deposit the titles of parcels Siaya/Kochieng B/762,671,672 and 673 with the Deputy Registrar ELC Court Siaya within 21 days of these orders, for safe custody pending the hearing and determination of this appeal.
    3. The costs of the application shall abide the outcome of the appeal.

**DELIVERED AND DATED AT SIAYA THIS 19<sup>TH</sup> DAY OF JUNE 2025**

**HON. LADY JUSTICE A.E. DENA**

**JUDGE**

**19/06/2025**

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

Mr. Ooro F. for the 1<sup>st</sup> and 2<sup>nd</sup> Appellants

Boaz Wycliffe Daniel Omondi on behalf of the Respondent

Ms. Mwenda Holding brief for Ms. Essendi for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Court Assistant: Ishmael Orwa

