

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMABAY
ELC CASE NO. 002 OF 2023

**GRACE ACHIENG AYADO (*Suing on her own behalf s a married woman and as the Administrator of the estate of Ndege Jowi*)
(Deceased)PLAINTIFF**

VERSUS

**BENARD WAFULA WANGWE.....1ST
DEFENDANT**

**LAWRENCE OCHICH OLIECH MBAKA..2ND
DEFENDANT/APPLICANT**

RULING

The Application

1. The 2nd Defendant/Applicant herein filed a Notice of Motion dated 27th January 2025, which application is expressed to be brought under Article 159 (2) (a) and (d) of the Constitution of Kenya, 2010, Section 63 (e) of the Civil Procedure Act cap 21 Laws of Kenya, Order 42 Rule 6 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. He seeks orders THAT:

- a) ...spent.
- b) ...spent.
- c) ...spent
- d) This Honourable Court be pleased to stay the execution of the ruling and order of the Honourable G. A. Ongondo J. dated and delivered herein on 17th December 2024

pending the hearing and determination of the appeal that the 2nd defendant/applicant intends to file at the Court of Appeal at Kisumu.

- e) This Honourable Court be pleased to stay further proceedings in this case pending the hearing and determination of the appeal that 2nd defendant/applicant intends to file at the Court of Appeal at Kisumu.
- f) The costs of this application be awarded to the 2nd defendant/applicant.
- g) This Honourable Court be pleased to grant any other or further orders as may be deemed just in the circumstances.

2. The application is premised on several grounds contained on the face of the application as well as the depositions in the Replying Affidavit of George Otieno Ochich. In a nutshell, the Applicant filed earlier a Notice of Motion application dated 17th October 2023 seeking to strike out and/or expunge several documents from the court record. The court, in its ruling dated 17th December 2024, dismissed the application with no order as to costs. Also, it dismissed as not merited the application dated 24th July 2024 by which the Plaintiff had sought the punishment of the 2nd and 3rd Defendant for contempt of court allegedly for failure to comply with the orders of the Court granted on 3rd June 2024.

3. The 2nd defendant/applicant was aggrieved by the ruling and order and appealed against, by lodging a Notice of Appeal and filing the appeal in Kisumu. Thereafter he filed the instant application.
4. The 2nd Defendant averred that his intended appeal was meritorious and has overwhelming chances of success. He also averred that the file in this matter remains open and active. He feared that further proceedings would be taken in furtherance of the above stated ruling.
5. In addition to the foregoing, the he maintained that it would be prejudicial for the court to carry on with the proceeding when the propriety or the lack thereof of the pleadings remained challenged at the Court of Appeal. He also stated that since pleadings were foundational to a suit, and it would be wrong and improper for the case to proceed on the strength of proceedings whose propriety or the lack thereof was pending before an appellate court.
6. The application was also grounded on the need to bring clarity of the exact pleadings, which clarity he said, would only come out after his intended appeal was heard and determined.
7. Further to the above, the applicant also averred that he stood to suffer substantial and/or irreparable loss and detriment if execution of the impugned proceedings was not stayed. He equally stated that allowing further proceedings in this matter would render his intended appeal nugatory and a mere academic exercise, in the instant suit was concluded before the

hearing and determination of the intended appeal. He added that it was in the interest of justice that the execution of the ruling and order of the court as well further proceedings in the instant suit be stayed since by so doing, the court would have preserved the substratum and integrity of the intended appeal.

8. Lastly, the applicant maintained that it would be absurd for the court of appeal to fault this court's order after the instant case having been concluded on the strength of the impugned pleadings. He also averred that the application had been brought without unreasonable delay and that he was willing to furnish such security as may be ordered by this court.
9. The supporting affidavit filed by George Otieno Ochich replicated the same grounds as those contained in the application save for the annexures to the affidavit. These annexures included: a copy of the Notice of Motion application dated 17th October 2023 marked GOO-1, a copy of this court's ruling dated 17th December, 2024 marked GOO-2, a Copy of Notice of Appeal marked GOO-3 and a copy of a Memorandum of Appeal marked GOO-4.

The Response

10. The plaintiff/respondent filed Grounds of Opposition in which she raised several grounds. Foremost, she opposed the application on the ground that stay of proceedings is a very drastic and draconian measure that could only be ordered in exceptional circumstances.

11. The plaintiff/respondent averred that the 2nd defendant/applicant had not demonstrated that he had an arguable case with an overwhelming possibility of success of owing to several reasons as outlined hereunder:

- i. The 2nd defendant's Notice of Motion application dated 22nd January 2025 had not been served upon the Attorney General contrary to Rule 79 of the Court of Appeal Rules.
- ii. The amendment of the plaintiff's pleadings was affected correctly and was so found by the honorable judge.
- iii. The honourable judge had correctly given the 2nd defendant leave to amend his pleadings and to file any other or further documents to support his case if he so wished.
- iv. The second defendant had not demonstrated the prejudice he would suffer as a consequence of the impugned ruling.
- v. the Notice of Motion was not supported by the affidavit of the 2nd defendant/applicant.

12. The plaintiff also opposed the application on the ground that the 2nd defendant/applicant had resorted to tactics aimed at buying time with the intention of denying the plaintiff/respondent her right to a fair hearing as well as the right to effective access to local judicial remedies by bringing the Notice of Motion application dated 27th January 2025 in

contravention of articles 10, 25, 48, 50 and 159 of the Constitution of Kenya 2010.

13. The plaintiff averred that this court lacked the jurisdiction to sit on appeal against the ruling of the honourable judge dated 17th December 2025 as the ruling had already been referred to the Court of Appeal by the 2nd defendant.
14. Lastly, the plaintiff averred that the balance of convenience tilted in her favor since she was entitled to a fair and speedy hearing of the case without the delays occasioned by the 2nd defendant/applicant who was at liberty to move the Court of Appeal under Rule 5(2) (b) of the Court of Appeal Rules; which the plaintiff/ respondent dared the 2nd defendant/applicant to utilize in making an application to the Courts of Appeal.
15. On the basis of the aforestated grounds, the plaintiff prayed that the application be dismissed with costs and that she be granted directions for the fair disposal of the suit.

The party's Submissions

16. The 2nd defendant/applicant filed his submissions dated 27th February 2025 in support of his application. He submitted that the conditions that must be met when seeking stay of execution and stay of proceedings are outlined in Order 42 rule 6 (1) and (2) of the Civil procedure rules 2010. Accordingly, such orders are granted by the courts for sufficient cause, particularly where a court is satisfied that the applicant may

suffer substantial loss if the orders sought are not granted and where the applicant gives such security as may be ordered by the court. He also submitted that the application must be brought without undue delay

17. Reliance was placed on **Chris Munga N. Bichange v Richard Nyagaka Tongi & 2 others [2013] eKLR**, where the Court of Appeal established that the that the applicant's appeal or intended appeal should be arguable, that is to say it is not frivolous; and that the appeal, were it to succeed, would be rendered nugatory.
18. The 2nd defendant/applicant further submitted that he has lodged a notice of appeal and that his appeal is arguable. It was also his submission that intended appeal would, if successful, be rendered nugatory unless further proceedings herein are stayed. He equally submitted that the he would suffer substantial and/or irreparable prejudice, loss and detriment if this court does not stay the execution and proceedings in this suit.
19. The 2nd defendant /applicant argued that the application was made timeously and offered to provide such security as this court may direct, but also relied on several cases to argue that that furnishing of security is not mandatory and prayed that this court exercises its discretion in this respect.
20. Lastly, the 2nd defendant/applicant clarified he had since filed a notice of appeal and the there was not need to approached the court of appeal vide Rule 5 (2) (b) as argued by the

plaintiff/respondent. He also maintained that the Attorney General had since been served with the notice of appeal,

21. The plaintiff/respondent filed her brief submissions dated 28th February 2025 and argued that the 2nd respondent/applicant's appeal cannot succeed since the amendment to the plaint, which is the subject of this appeal, was affected without leave of court before close of pleadings. She also submitted that the instant application was made in bad faith, that is, to get the 2nd defendant/applicant more time after the said 2nd defendant/applicant's refusal to produce the documents mentioned in the plaintiff's notice to produce documents.

22. In the alternative, the plaintiff/respondent submitted that that were nothing to stay, as the order whose stay of execution is being sought is negative in nature. To this end, the plaintiff/respondent relied on the Court of Appeal decision in **Kaushik Panchamatia & 3 others v Prime Bank Limited & another [2020] eKLR** as well as **Julius Mugo Muchiri v Njiru and another [2021] eKLR**.

23. On 28th February 2025, the 2nd defendant/respondent filed rejoinder submissions and clarified that the Notice of Appeal had since been served upon The Attorney General. He also submitted that, contrary to the plaintiff/respondent's assertion that the impugned order was negative in nature, the said order had a positive effect since it gave validity to what he termed irregular amendments made by the

plaintiff/respondent to her pleading. As such, he submitted the order had a positive effect that is capable of being stayed.

Issues for determination

24. The issue that arises for determination in the instant application is whether the 2nd defendant/applicant is merited. Attendant to it is who to bear the costs of the application.

Analysis

25. The 2nd defendant/applicant herein seeks stay of execution of the ruling and order of this court dated 17th December, 2024 pending appeal. He also prays that the proceedings herein be stayed pending appeal.

26. Order 42 Rule 6 of the Civil Procedure Rules, 2010 provides for stay of proceedings and stay of execution in the following terms:

(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 may ultimately be binding on him has been given by the applicant.

27. The conditions that must be met by an applicant seeking stay of execution pending appeal have also been elucidated in several decisions, including, **Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013] KECA 378 (KLR)** where the Court of Appeal held that the appeal must be arguable and that that failure to grant stay orders would render the appeal nugatory. This Court now discusses the sub issues that the applicant raises in his application.

Whether stay of execution should be ordered

28. The plaintiff/respondent raised a critical concern touching on the nature of the impugned order, which I believe should be accorded priority. If indeed the order cannot be stayed as argued by the plaintiff/respondent, then there would be no

need to determine whether the application meets the test for grant of stay of execution pending appeal.

29. I have examined the order that the 2nd defendant/applicant herein seeks to stay. The court found the 2nd defendant's applications to be lacking in merit and dismissed the same with no order as to costs. The plaintiff/respondent submitted that this order, by its very nature could not be stayed as there was nothing to stay. The 2nd defendant /applicant filed a rejoinder set of submissions and argued that the order had a positive effect, that is, it gave validity to the amendments made to the plaintiff's pleadings hence making order capable of being stayed.

30. As noted above, the court dismissed the 2nd defendant's/applicant's applications with no order as to costs. At the same time the parties already filed the amended pleadings and served on the others. I concur with the plaintiff/applicant that there was nothing to stay given the nature of the order complained about by the 2nd defendant/applicant. In **Kitonga v Kamau (Environment and Land Appeal 003 Of 2023) [2024] KEELC 4464(KLR)** the court had this to say about a matter where a party sought stay of execution on the on account of his matter being dismissed.

In his second application dated 25.03.2024, the Appellant purported to seek a stay of execution of the decree of the trial court pending the hearing and

determination of the appeal. As indicated before, all the trial court did vide its judgment dated 16.10.2023 was to dismiss of the Appellant's suit. The court takes the view that the dismissal order was a negative order which is incapable of execution in the ordinary manner. It is thus not capable of being stayed as contemplated under Order 42 rule 6 of the Rules.

31. In the **Kaushik Panchayati & 3 others v Prime Bank Limited & another [2020] eKLR**, an authority referred to this court by the plaintiff/applicant, the Court of Appeal stated as hereunder concerning an application for stay of execution following a dismissal of an applicant's application:

*The above finding notwithstanding, we cannot lose sight of the fact that the order that the applicants seek to stay is the order of the High Court issued on 24th June 2020 dismissing their application. This is a negative order. We are guided by the decision in the case of **Western College Farts and Applied Sciences vs. Oranga & Others [1976] KLR 63**, the court whilst considering whether an order of stay can be granted in respect of a negative order and which we fully adopt stated inter alia as follows: -*

“But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with

costs. An execution can only be in respect of costs....”

The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction.”

We reiterate the position taken by the Court in the above case that a negative order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by applicants.

32. In the instant case, the court had already allowed the amendments that the 2nd defendant/ applicant now seeks to stay. For reasons that after the amendment being allowed, and the time for it lapsed it is this Court’s view that they took effect and the payers sought were already been overtaken by events. As such, the 2nd defendant/applicant could not seek to stay that which had already perfected. Therefore, the prayer for stay of execution pending appeal does not succeed.

Whether the instant proceedings should be stayed pending appeal

33. The 2nd defendant/applicant was apprehensive that further proceedings in the matter herein would be prejudicial to him, bearing in mind his intended appeal. Stay of proceedings, as was submitted by the plaintiff/respondent, is a drastic measure that is only granted by the courts in exceptional circumstances. This is so because stay of proceedings can impede a party's access to justice, the right to timely disposal of suits as well as the right to a fair trial. For these reasons, the test for stay of proceedings is usually higher and more stringent (compared to stay of execution pending appeal) as was expressed by the court in **Kenya Wildlife Service v James Mutembei, Civil Appeal no. 40 of 2018**, of which I am persuaded. The court determined that:

*[5] ... Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent. See Ringera J in the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** persuasively stated thus;*

"As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to

be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added).

34. Whereas the 2nd defendant /applicant is anxious that failure to stay the proceedings would be prejudicial to him, it is my finding that it is in the best interest of justice that the proceedings herein are not stayed. Article 159 of the Constitution that the 2nd defendant/applicant hinged his application upon mandates a timely disposal of cases. Also, the Civil Procedure Act obligates this Court as much.
35. I have carefully considered the Memorandum of Appeal annexed to the supporting Affidavit. Particularly, I have considered the grounds raised and I see none that is likely to be arguable before the appellate court. For that reason, and given the totality of the circumstances of this matter, I am not convinced that it is in the interest of justice that the suit

proceeds to conclusion as intended. Should the Court of Appeal find that this Court was wrong, in my humble view, there would be no prejudice occasioned by the matter proceeding as it is since it can be started de novo, upon the said ordering so. I am persuaded by the decision of the High Court in **Leo Masore Nyang'au v Suleiman Murunga Civil Appeal no. e270 of 2021**, the court rendered itself as hereunder

15) This court has been urged to stay further proceedings the Advocates Disciplinary Tribunal until the appeal against the order on conviction is heard and determined. The appellant has stated that his appeal will be rendered nugatory if the order for stay is denied. He also stated that he will suffer substantial loss in that a sentence will have been pronounced which may dent his reputation. 16) In an application for stay of proceedings or stay of execution, pending appeal, an applicant must show the substantial loss he would suffer if the order for stay is denied. In the instant application, I am not convinced that the appellant would suffer substantial or that the appeal would be rendered nugatory if the order is denied. 17) First, the appellant still retains the right of appeal against any decision on sentence by the Advocates' Disciplinary Tribunal after receiving mitigating facts from the appellant. 18) Secondly, the appellant still

retains the right to seek for stay of execution of the Tribunal's decision on sentence after pronouncement.

36. The upshot is that the application is lost. It is dismissed with costs to the Respondent. Further, the matter shall be mentioned on for Compliance with Order 11 of the Civil Procedure Rules. Mentioned on 16th October, 2025. Mention Notice to issue.

37. Each party shall bear the own costs.

38. Orders accordingly.

Ruling dated, signed and delivered virtually via the Teams Platform this 30th September 2025

Hon. Dr. *iur* Nyagaka

Judge

In the presence of

Court Assistant: Fiona

Ochich Advocate for the 2nd Defendant/Applicant

No appearance for the other parties though served.