



Okwach (Suing as the Administrator of the Estate of George Okwach Aboge, Deceased) v Othiwo alias Owak Othiwo & another (Environment and Land Case 522 of 2015) [2025] KEELC 6559 (KLR) (30 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6559 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE 522 OF 2015
SO OKONG'O, J
SEPTEMBER 30, 2025**

BETWEEN

**PHELGONA AKINYI OKWACH PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF GEORGE OKWACH
ABOGE, DECEASED**

AND

**MAURICE OURU OTHIWO ALIAS OWAK OTHIWO 1ST DEFENDANT
JOHN ODIYO ADERO 2ND DEFENDANT**

RULING

1. What is before me is the Defendants' application brought by way of a Notice of Motion dated 20th May 2025 seeking a stay of execution of the judgment of this court delivered on 7th October 2022 pending the hearing of the intended appeal to the Court of Appeal. The application is brought on the grounds set out on the face thereof and on the supporting affidavit sworn by the 2nd Defendant on 20th May 2025. The Defendants averred that they were dissatisfied with the said judgment and had filed an appeal at the Court of Appeal against the same. The Defendants averred that the Court of Appeal had already given directions on the hearing of the said appeal. The Defendants averred that while the said appeal was pending hearing, the 2nd Defendant was threatened with eviction from his home pursuant to the said judgment of the court. The Defendants averred that their appeal would be rendered nugatory if the stay sought was not granted. The Defendants averred that they were willing to furnish security as may be directed by the court. The Defendants annexed to the affidavit in support of the application, among other documents, copies of the notice of appeal dated 4th July 2024, and a letter of the same date requesting proceedings.



2. The Plaintiff opposed the application through an affidavit and supplementary affidavit sworn by the Plaintiff's advocate Jude Ragot on 18th June 2025 and 2nd July 2025, respectively. The Plaintiff averred that the Defendants had filed an application for stay of execution pending the hearing of an intended appeal against the judgment of the court dated 7th October 2022. The Plaintiff averred that the court dismissed the application on 22nd November 2023. The Plaintiff averred that after the dismissal of the stay application, the Defendants, on 24th November 2023, withdrew the notice of appeal dated 14th October 2022, which they had lodged against the said judgment of the court.
3. The Plaintiff averred that after the withdrawal of the said notice of appeal, the Defendants filed an application before this court dated 27th November 2023 seeking a review and setting aside of the said judgment of the court delivered on 7th October 2022. The Plaintiff averred that the Defendants' application for review was heard and dismissed by the court on 4th July 2024. The Plaintiff averred that the Defendants filed a notice of appeal against the said ruling of the court dated 4th July 2024 and wrote to the Deputy Registrar requesting for the proceedings. The Plaintiff averred that it was this latest notice of appeal and letter requesting for proceedings that the Defendants had relied on in support of the present application. The Plaintiff averred that the Defendants' application dated 1st August 2024 for a stay of the orders made by the court on 4th July 2024 dismissing their application for review was dismissed by the court on 2nd October 2024.
4. The Plaintiff averred that following the dismissal of their latest application for stay of execution on 2nd October 2024, the Defendants filed a similar application at the Court of Appeal in Kisumu Court of Appeal Civil Application No. E018 of 2025, which was withdrawn by the Defendants when it came up for hearing on 24th June 2025. The Plaintiff averred that after the withdrawal of the said application, the Defendants immediately filed another application dated 18th June 2025 in the Court of Appeal, being Civil Application No. E087 of 2025 under Rule 5 (2)(b) of the Court of Appeal Rules, in which the Defendants have sought orders similar to those sought before this court in the present application. The Plaintiff averred that the application before the Court of Appeal has been certified as urgent and directions regarding the hearing thereof given.
5. The Plaintiff averred that the Defendants' present application was misconceived, frivolous, vexatious, and amounted to an abuse of the court process. The Plaintiff averred that the Defendants have moved both the Court of Appeal and this court seeking similar reliefs. The Plaintiff averred that the Defendants had even managed to obtain an unusual order from the Deputy Registrar on 22nd May 2025 purporting to stay execution of the judgment of this court pending the outcome of Kisumu Court of Appeal Civil Application No. E018 of 2025. The Plaintiff averred that the application was res judicata, a similar application having been considered and dismissed by the court. The Plaintiff averred that the Defendants, having withdrawn the notice of appeal challenging the judgment of 7th October 2022, there was no notice of appeal that would clothe the court with jurisdiction to entertain the present application for stay of execution.

Analysis and determination

6. The application was argued orally on 14th July 2025. I have considered the application together with the affidavit filed in support thereof. I have also considered the replying and supplementary affidavits filed by the Plaintiff/Respondent in opposition to the application. Finally, I have considered the submissions by the advocates for the parties.



7. The Defendants' application was brought under Order 42 Rule 6 of the Civil Procedure Rules and Section 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya. Order 42 Rule 6(1), (2), (3) and (4) of the Civil Procedure Rules provides as follows:

6.

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given."

8. In *Halai & another v. Thornton & Turpin (1963) Ltd* [1990] KECA 65 (KLR), the court stated as follows on the court's power to grant an order of stay of execution pending appeal:

Thus, the Superior Court's discretion is fettered by three conditions. Firstly the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay."

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. As correctly submitted by the Plaintiff, this is the second application by the Defendants seeking a stay of execution of the judgment delivered on 7th October 2022. The Defendants brought a similar



application on 21st November 2022, which was struck out on 22nd November 2023. In the ruling delivered on 22nd November 2023, the court stated as follows in part:

I am persuaded that the Defendants would suffer substantial loss if the stay sought is not granted. It is not disputed that the 2nd Defendant has his home on the suit property where he is residing with members of his family. In the judgment of this court delivered on 7th October 2022, the Defendants were ordered to vacate and hand over possession of the suit property to the Plaintiff within 90 days from the date of the judgment (now past) in default of which they were to be forcefully evicted and their structures on the suit property demolished. This means that if the stay sought is not granted, the 2nd Defendant risks being rendered homeless. Apart from the consequences resulting from forceful eviction, there is also a likelihood of the Plaintiff disposing of the suit property once it is vacant. In such an event, the chances of the suit property being completely put beyond the reach of the Defendants if the stay sought is not granted is real. Due to the foregoing, I am in agreement with the Defendants that the loss the 2nd Defendant is likely to suffer if the stay is not granted would be irreparable. On the issue of delay, I am satisfied that the application was brought without unreasonable delay. With regard to the issue of security, the Defendants have stated that they are willing to abide by any reasonable order on security that the court may make as a condition for granting the stay sought.

11. The Defendants have sought a stay of execution pending the hearing and determination of the Appeal. The Plaintiff has contended that there is no competent appeal filed by the Defendants and as such, the Defendants' application is hinged on a vacuum. Order 42 Rule 6 (4) of the Civil Procedure Rules provides that:

For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”

12. The Court of Appeal Rules dealing with the filing and service of a Notice of Appeal are, Rules 77 and 79 which provide as follows:

77.

- (1) A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.
- (2) Each notice under sub-rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against which the appeal is lodged.
- (3) Each notice of appeal under sub-rule (1) shall state whether it is intended to appeal against the whole or part only of the decision and, where it is intended to appeal against a part only of the decision, shall—
 - (a) specify the part complained of;
 - (b) the address for service of the appellant; and
 - (c) the names and addresses of the persons intended to be served with copies of the notice.
- (4).
- (5).



- (6) A notice of appeal shall be substantially in Form D as set out in the First Schedule and signed by or on behalf of the appellant.”

79.

- (1) An intended appellant shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal:

Provided that the Court may, on application which may be made ex parte, within seven days after the lodging of the notice of appeal, direct that service need not be effected on any person who did not take part in the proceedings in the superior court.”

The Plaintiff has contended that although the Defendants filed a Notice of Appeal within the time provided in the Court of Appeal Rules, the same was not served within the time fixed by the said rules. According to the Plaintiff, failure to serve a Notice of Appeal within the prescribed time renders the appeal defective and incompetent. The Plaintiff argued that a defective appeal cannot support an application for a stay of execution...I am in agreement with the Plaintiff that giving a notice of appeal entails filing and serving that notice. There is no dispute that the Defendants filed a Notice of Appeal and that the filing was done within the time provided in Rule 77 (1) of the Court of Appeal Rules, 2022. What is disputed is whether the said notice was served within the time provided in Rule 79(1) of the Court of Appeal Rules, 2022. In his supplementary affidavit, the 2nd Defendant stated that he did not know if their previous advocates who filed the Notice of Appeal served the same upon the Plaintiff’s advocates... It appears from the foregoing that the Defendants served the Notice of Appeal outside the time provided for service under Rule 79(1) of the Court of Appeal Rules. I am in agreement with the Plaintiff that a Notice of Appeal served contrary to Rule 79(1) of the Court of Appeal Rules is not in compliance with the requirements of Order 42 Rule 6 (4) of the Civil Procedure Rules. Such a Notice of Appeal cannot therefore be deemed as an appeal under Order 42 Rule 6 (4) of the Civil Procedure Rules. It follows that the Defendants did not file an appeal which could form a basis for the stay application. The application was therefore based on a vacuum...

Although the Defendants have made a case for the grant of an order of stay of execution, the stay sought cannot be granted in the absence of a competent appeal. The upshot of the foregoing is that the Defendants’ Notice of Motion application dated 17th November 2022 has no basis. The application is struck out with costs to the Plaintiff.”

13. In the said ruling delivered on 22nd November 2023, this court held that the notice of appeal dated 14th October 2022 had not been served in accordance with the rules, and as such, was invalid and could not support an application for stay of execution. It was on that basis that the Defendants’ application for a stay of execution was struck out. It is not disputed that the notice of appeal dated 14th October 2022 was the only notice of appeal filed against the judgment of the court delivered on 7th October 2022. It is also not disputed that after the ruling striking out the first application for stay of execution, the Defendants withdrew the said notice of appeal dated 14th October 2022. As correctly submitted by the Plaintiff, the withdrawal of the said notice of appeal meant that the Defendants had abandoned the appeal against the judgment of 7th October 2022. That explains why the Defendants applied for a review and setting aside of the said judgment, which application was also dismissed on 4th July 2024.



14. The jurisdiction of this court under Order 42 Rule 6 of the Civil Procedure Rules can only be invoked upon the filing of a valid notice of appeal. The notice of appeal on which the Defendants based the present application is against the ruling of this court delivered on 4th July 2024. It has nothing to do with the judgment of 7th October 2022. This court cannot stay the said judgment based on the notice of appeal challenging the ruling of 4th July 2024. I believe that the Defendants knew that this application had no basis. That explains why they filed Civil Application No. E087 of 2025 in the Court of Appeal under Rule 5 (2)(b) of the Court of Appeal Rules seeking orders with the same effect as the orders sought before this court.

Conclusion

15. In conclusion, I agree with the Plaintiff that the Defendants' application dated 20th May 2025 has no merit and amounts to an abuse of the court process. The application is dismissed with costs to the Plaintiff.

DELIVERED AND SIGNED AT KISUMU ON THIS 30TH DAY OF SEPTEMBER 2025

S. OKONG'O

JUDGE

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

Mr. Ragot for the Plaintiff

Mr. Sala for the Defendants

Ms. J.Omondi-Court Assistant

