



REPUBLIC OF KENYA



KENYA LAW
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**Okode v Ounda (Environment and Land Case 2 of 2020)
[2025] KEELC 6436 (KLR) (25 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6436 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE 2 OF 2020
SO OKONG'O, J
SEPTEMBER 25, 2025**

BETWEEN

JANES ALARO OKODE PLAINTIFF

AND

MAURICE ONYANGO OUNDA DEFENDANT

RULING

1. The Plaintiff instituted this suit against the Defendant on 8th February 2016. The suit was transferred from this court to the lower court and moved back to this court on 4th November 2019. The Plaintiff averred that he was the registered owner of all that parcel of land known as Kisumu/Kadero Got Nyabondo/1493 (hereinafter referred to as “the suit property”). The Plaintiff averred that he was registered as the owner of the suit property on 25th January 2008. The Plaintiff averred that on 15th November 2015, the Defendant entered the suit property without his consent, constructed a temporary structure thereon and started residing therein. The Plaintiff averred that the Defendant’s entry and occupation of the suit property was illegal and amounted to trespass. The Plaintiff prayed for judgment against the Defendant for; a declaration that the Plaintiff was the lawful owner of the suit property, an order of eviction of the Defendant from the suit property, a permanent injunction restraining the Defendant by himself or through his relatives, agents or employees from entering, claiming, occupying, cultivating or in any other manner interfering with the Plaintiff’s quiet possession and ownership of the suit property, and costs of the suit.
2. The Defendant filed a statement of defence and a counterclaim against the Plaintiff on 2nd August 2016. The Defendant denied that the Plaintiff was the registered owner of the suit property. The Defendant denied entering the suit property without the Plaintiff’s permission and constructing a structure thereon. The Defendant denied trespassing on the suit property. The Defendant averred that he had occupied the suit property since 1982 and that the Plaintiff’s title to the property, if any, had been extinguished by operation of law.



3. In his counterclaim, the Defendant averred that the suit property was sold to his grandfather, Yare, by Alfred Ouya Adongo in 1975 and that his family had occupied the suit property since then. The Defendant averred that the suit property belonged to his family. The Defendant averred that his parents entered the suit property in 1982 and had enjoyed uninterrupted occupation of the same for over 12 years. The Defendant averred that his parents acquired the suit property lawfully. The Defendant averred that the title held by the Plaintiff for the suit property was acquired fraudulently. The Defendant prayed for judgment against the Plaintiff for a declaration that the Defendant was the registered (sic) owner of the suit property by adverse possession, a permanent injunction restraining the Plaintiff and those claiming through him from dealing with the suit property, and the costs of the suit.
4. The court heard the suit and delivered a judgment on 13th February 2025. The court stated as follows in the concluding part of the judgment:

“In conclusion, I find the Plaintiff’s case against the Defendant proved on a balance of probabilities and the Defendant’s counterclaim not proved. I therefore enter judgment for the Plaintiff against the Defendant for;

- a. A declaration that the Plaintiff is the lawful proprietor of the parcel of land known as Kisumu/Kadero Got Nyabondo/1493.
 - b. An order that the Defendant shall vacate the parcel of land known as Kisumu/Kadero Got Nyabondo/1493 within 120 days from the date hereof in default of which the Plaintiff shall be at liberty to apply for a warrant for his forceful eviction from the property.
 - c. An order of a permanent injunction restraining the Defendant either by himself, his agents, servants, employees or any other person deriving authority or title from him from entering, occupying, cultivating or in any manner interfering with the Plaintiff’s possession, ownership and occupation of Kisumu/Kadero Got Nyabondo/1493 once the Defendant vacates or is evicted from the property pursuant to order (b) above.
 - d. The Defendant’s counterclaim is dismissed.
 - e. Costs of the suit and the counterclaim.”
5. What is now before the court is the Defendant’s Notice of Motion application dated 1st April 2025 seeking the following orders;
 1. That pending the hearing and determination of the intended appeal to the Court of Appeal, an order of a temporary injunction be issued restraining the Plaintiff from evicting, selling, transferring, subdividing, constructing on, fencing, and/or disposing of the suit property.
 2. That execution and the proceedings to enforce the decree and/or order appealed from be stayed pending the hearing and determination of the intended appeal.
 6. The Defendant’s application which was brought under Sections 1A, 1B, 3A, and 3B of the [Civil Procedure Act](#), Order 40 and Order 42 of the Civil Procedure Rules and Sections 3 and 13(7) (a) of the [Environment and Land Court Act](#) 2011 was brought on the grounds set out on the face thereof and on the affidavit of the Defendant sworn on 1st April 2025. The Defendant averred that he was aggrieved with the judgment of the court delivered on 13th February 2025 and had preferred an appeal against the same. The Defendant averred that the time granted to him to vacate the suit property was



almost lapsing, and the Plaintiff would be at liberty to evict him from the suit property unless the orders sought were granted. The Defendant averred that his appeal would be rendered nugatory if he were evicted from the suit property. The Defendant averred that he had occupied the suit property with his family for over 50 years. The Defendant annexed to his affidavit in support of the application copies of the notice of appeal filed against the judgment of 13th February 2025, a letter requesting for the typed proceedings, and photographs of his homestead on the suit property.

7. The Plaintiff opposed the application through the grounds of opposition dated 20th June 2025. The Plaintiff contended that the application had no merit as the court had no jurisdiction to entertain the same. The Plaintiff averred that the application could only be entertained by the Court of Appeal under Rule 5 (2) (b) of the Court of Appeal Rules. The Plaintiff averred that, without the Defendant offering any security, the application was not worth consideration by the court. The Plaintiff averred that no valid grounds had been put forward by the Defendant to warrant a stay of execution of the judgment of the court in favour of the Plaintiff.
8. When the application came up for hearing on 24th June 2025, the advocate for the Defendant relied entirely on the affidavit in support of the application. He added that the Defendant was willing to furnish security if imposed as a condition for the stay sought. The advocate for the Plaintiff also relied entirely on the Plaintiff's grounds of opposition.
9. I have considered the Defendant's application together with the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the Plaintiff in opposition to the application. The Defendant's application has two limbs. The first limb is seeking an injunction pending appeal, while the second limb is seeking a stay of execution pending appeal. Order 42 Rule 6 (6) of the Civil Procedure Rules empowers this court to grant a temporary injunction pending the hearing of an appeal pending before it. It provides as follows:
 - (6) Notwithstanding anything contained in sub-rule (1) of this rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from subordinate Court or tribunal has been complied with."
10. I agree with the Plaintiff that this court has no jurisdiction to grant an injunction pending the hearing of an appeal pending before the Court of Appeal. Such an order can only be granted by the Court of Appeal under Rule 5(2)(b) of the Court of Appeal Rules 2022. In the exercise of this discretion, the Court of Appeal must be satisfied that the appeal before it is arguable and that the appeal will be rendered nugatory if the order sought is not granted and the appeal succeeds. This court is not in a position to say whether an appeal pending before the Court of Appeal is arguable and whether it would be rendered nugatory should the injunction sought not be granted. The limb of the Defendant's application seeking an injunction pending the hearing of an appeal before the Court of Appeal is erroneous and has no merit in the circumstances.
11. The second limb of the application is seeking a stay of execution pending appeal. Although not expressly stated, the stay was sought under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules. Order 42 Rule 6 (2) of the Civil Procedure Rules provides that:
 - (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.”

12. 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 stay.”

13. I am persuaded that the Defendant would suffer substantial loss if the stay sought is not granted. It is not disputed that the Defendant has his home on the suit property. As mentioned earlier, the court ordered the Defendant to vacate the suit property within 120 days from the date of the judgment, in default of which he would be forcibly evicted from the property. The Defendant has a right of appeal against the judgment of this court against him. The court has a duty to protect that right. The court does this by preserving the subject matter of the suit and the prevailing status quo, so that the Defendant does not suffer substantial loss should he succeed in his appeal to the Court of Appeal. There is no doubt that the eviction of the Defendant from the suit property would subject the Defendant to substantial loss. If the Defendant succeeds in his appeal to the Court of Appeal, the loss and damage suffered through forcible eviction would be irreparable. The Defendant has therefore made a case for the grant of an order for stay of his eviction from the suit property pending the hearing of his appeal to the Court of Appeal. The stay would, however, be conditional. The court had made a finding that the Defendant is a trespasser on the suit property. Until the findings of the court are overturned by the Court of Appeal, the Plaintiff is entitled to immediate possession of the suit property. The Plaintiff would continue to incur loss arising from its inability to use the suit property as the Defendant pursues his appeal. There is a possibility that the appeal may not succeed. It is therefore necessary that the Plaintiff is protected from the loss he may incur as a result of the Defendant’s continued occupation of the suit property, should the appeal not be successful.

Conclusion

14. In conclusion, the Defendant’s application succeeds in part. The execution of the orders made on 13th February 2025 for the Defendant to vacate all that parcel of land known as Kisumu/Kadero Got Nyabondo/1493 within 120 days, failure to which he would be forcibly evicted from the property, and for the Defendant to pay the costs of the suit and the counterclaim are stayed pending the hearing and determination of the appeal by the Defendant to the Court of Appeal. The Defendant shall deposit in a joint interest-earning bank account in the names of the advocates on record for the parties a sum of Kshs. 300,000/- as security within 45 days from the date hereof, in default of which the stay granted herein shall automatically lapse without any further reference to the court.

DELIVERED AND SIGNED AT KISUMU ON THIS 25TH DAY OF SEPTEMBER 2025

S. OKONG’O

JUDGE

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

Mr. Anyul for the Plaintiff

Mr. Odhiambo h/b for Mr. Yogo for the Defendant

Ms. J.Omondi-Court Assistant

