



**Miruka v Ombacho (Environment and Land Case 412 of 2013)  
[2025] KEELC 6710 (KLR) (1 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6710 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT AND LAND CASE 412 OF 2013**

**M SILA, J**

**OCTOBER 1, 2025**

**BETWEEN**

**JAMES TONGI MIRUKA ..... PLAINTIFF**

**AND**

**GEORGE MAUTI OMBACHO ..... DEFENDANT**

**RULING**

1. The application before me is that dated 16 May 2025 filed by the unsuccessful defendant. It is an application said to be brought pursuant to Order 9 Rule 9, Order 22 Rule 22, Order 42 Rule 6 of the Civil Procedure Rules, and Sections 1A, 1B and 3A of the *Civil Procedure Act*. The application seeks the following orders :
  1. The Honourable Court be pleased to grant leave to the firm of Nyagaka S.M & Company Advocates to come on record in place of the firm of Monari & Company Advocates for the applicant.
  2. The Notice of Change of Advocates filed herewith be deemed as duly filed and properly on record upon payment of the requisite court fees.
  3. There be a stay of execution of the judgment and orders issued on 29<sup>th</sup> October 2019 and 30<sup>th</sup> September 2021 respectively by Hon. Justice J. Onyango pending the hearing and determination of this application inter partes.
  4. The Honourable Court be pleased to set aside the decree issued on 9<sup>th</sup> July 2020 and the eviction order issued on 27<sup>th</sup> September 2021 together with all consequential orders thereto.
  5. There be a stay of execution of the said judgment and eviction order pending the hearing and determination of an intended appeal.
  6. The costs of this application be provided for.



2. The application is based on grounds that the applicant is in occupation of the disputed parcel of land which is Plot No. 34B Riosiri Market; that there is a valid prohibition order issued by the Sub-County Administrator, South Mugirango, dated 9 June 2022, restraining any fencing or development on the suit land which the respondent has defied; that the decree dated 9 July 2020 and eviction order dated 27 September 2021 were issued without the benefit of proper legal representation in light of new and material evidence now available from Kisii County Government Department of Administration and Corporate Services and stakeholders in South Mugirango Sub-County, the same ought to be set aside in the interests of justice; the decree dated 9 July 2020 and eviction order dated 27 September 2021 were issued without the applicant's full participation due to previous counsel's omission and should be set aside in the interests of justice; the former advocates for the applicant, Sagwe & Company Advocates, filed Civil Application No. 136 of 2020 before the Court of Appeal at Kisumu, but the said firm failed to prosecute or follow up on the matter; the applicant has since instructed new advocates who are desirous of diligently pursuing the matter including an appeal; unless stay is granted, the intended appeal will be rendered nugatory.
3. The application is supported by the affidavit of the applicant. He has deposed inter alia that judgment was delivered on 29 October 2019 in favour of the respondent and a decree issued on 9 July 2020 and further that an eviction order was issued on 27 September 2021. He has deposed that he wants the decree and eviction order set aside to allow him properly ventilate his defence and prosecute an intended appeal which has not been heard on merit due to his former advocate's inaction. He has deposed that his advocates filed Application No. 136 of 2020 before the Court of Appeal at Kisumu but failed to take steps to prosecute the matter. He has added that he has obtained new evidence that goes to the dispute hence the need to set aside the decree and eviction for a fair hearing. He has added that he is still in possession of the suit land.
4. The plaintiff/respondent has filed a replying affidavit to oppose the motion. He has deposed that judgment in the case was delivered on 29 October 2014 (sic) by Mutungi J and he has annexed a copy of the same. He avers that a decree was issued on 22 July 2020 and an eviction order issued on 27 September 2021 which he has annexed. He has deposed that on 13 May 2025 the applicant was evicted from the portion of the suit land that he had encroached into. He has deposed that the applicant is being dishonest as he has been evicted.
5. I have taken note of the foregoing.
6. I have no problem giving the order for change of counsel to M/s Nyagaka S.M & Company Advocates. I grant leave for the said firm to come on record after judgment and a notice of change of advocates can be filed.
7. However, I am not persuaded to grant any of the other prayers sought in the application. First, it is not even clear whether the applicant wants a review of the judgment so as to adduce new evidence or he only wants an order of stay pending appeal to the court of appeal. On one hand he says that he has new evidence which is material but again on the other hand he says that he wants stay so that he can pursue an appeal. I do not see mention of Order 45 which touches on review and I assume that the applicant does not seek review of the judgment. Without seeking review, there would be no basis to set aside the judgment and decree. But even if the application is one for review, I am unable to allow it given that judgment was delivered on 29 October 2019 which is close to 6 years ago (not 2014 as deposed in the replying affidavit). In any case even this so called new evidence has not been exhibited or elaborated. Moreover, by his own confession, the applicant avers that he approached the Court of Appeal and if that is the case he cannot pursue an appeal and review at the same time.



8. In the event that the application is one for stay pending appeal, I would still dismiss it. Yet again the application is filed after an inordinately long period of time. I reiterate that judgment was delivered close to 6 years ago and the eviction order issued about 4 years ago. There is contention whether or not the applicant has already been evicted but to me that is immaterial. If he has not been evicted, I am not persuaded to stop or set aside the eviction order. Yet again, as I have previously mentioned, if the applicant has already approached the Court of Appeal for stay pending appeal, then he cannot run two parallel applications in two different courts and this application would constitute an abuse of the process of court for that reason.
9. Whichever angle you look at it, save for the prayer for leave for new counsel to come on record, the rest of the application is devoid of merit.
10. Before I close, there is mention in the application that the Sub-County Administrator issued a prohibitory order to stop the respondent from fencing the land. For the record, such person has no power to issue a prohibitory order. This court has already pronounced itself on the dispute between the applicant and the respondent and it is actually contemptuous of any person to try to hinder execution of the said judgment without first coming to court. The applicant should not attempt to use other third parties to try and circumvent the judgment of this court.
11. There is no merit in this application and it is hereby dismissed with costs.

**DATED AND DELIVERED THIS 1<sup>ST</sup> DAY OF OCTOBER 2025**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT AT KISII**

Delivered in the presence of :

Mr. Nyariki for the applicant

Mr. Omwega for the respondent

