



Ominde v Odongo; Odongo (Plaintiff to the Counterclaim); Ominde & 3 others (Defendant to the Counterclaim) (Environment and Land Case 300 of 2016) [2025] KEELC 7094 (KLR) (16 October 2025) (Ruling)

Neutral citation: [2025] KEELC 7094 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE 300 OF 2016
SO OKONG'O, J
OCTOBER 16, 2025**

BETWEEN

WALTER EDWIN OMINDE PLAINTIFF

AND

VICTOR OTIENO ODONGO DEFENDANT

AND

VICTOR OTIENO ODONGO PLAINTIFF TO THE COUNTERCLAIM

AND

WALTER EDWIN OMINDE DEFENDANT TO THE COUNTERCLAIM

LAND REGISTRAR, KISUMU COUNTY DEFENDANT TO THE COUNTERCLAIM

LAND SURVEYOR, KISUMU COUNTY DEFENDANT TO THE COUNTERCLAIM

ATTORNEY GENERAL DEFENDANT TO THE COUNTERCLAIM

RULING

1. The full facts of this case are set out in the judgment of this court delivered on 28th January 2025. Plaintiff filed this suit against the Defendant on 15th November 2016. The Plaintiff averred that he was the registered proprietor of all that piece of land known as Kisumu/Nyalenda “B”/1508 (hereinafter referred to as “Plot No. 1508”). The Plaintiff averred that the Defendant owned no land in the neighbourhood. The Plaintiff averred that on or about 11th November 2016, he found the Defendant’s contractor ferrying and assembling building materials on Plot No. 1508 with the intention of fencing off a portion thereof to block the Plaintiff from accessing Plot No. 1508. The Plaintiff averred that the



- Defendant, with the aid of hooligans, threatened to harm the Plaintiff if he made any attempt to enter Plot No. 1508. The Plaintiff averred that the Defendant's aforesaid action was unlawful and amounted to trespass.
2. The Plaintiff sought judgment against the Defendant for an order of a permanent injunction restraining the Defendant from trespassing onto, presenting himself as the proprietor of, dealing with, evicting and/or interfering with the Plaintiff's quiet possession, use and occupation of Plot No. 1508, a declaration that the actions of the Defendant complained of amounted to trespass on Plot No. 1508 and entitled the Plaintiff to damages, and costs of the suit.
 3. The Defendant filed a statement of defence on 22nd September 2017. The statement of defence was amended with leave of the court on 19th May 2022 to plead a counter-claim against the Plaintiff, the Land Registrar, Kisumu County, the Land Surveyor, Kisumu County, and the Attorney General. In his defence and counter-claim dated 19th May 2022, the Defendant denied the Plaintiff's claim in its entirety. The Defendant denied that he had trespassed on Plot No. 1508 and intended to dispossess the Plaintiff of the same. The Defendant averred that he was the proprietor of all that parcel of land known as Kisumu/Nyalenda "B"/1182 ("Plot No. 1182"), which he purchased from one John Odhiambo Onunga.
 4. The Defendant averred that when he was buying Plot No. 1182, the same was abutting Lake Victoria. The Defendant averred that there was no piece of land between Plot No. 1182 and the lake. The Defendant averred that as the owner of land abutting the lake, he was entitled to own any land which became available between Plot No. 1182 and the lake as a result of the recession of the lake water. The Defendant averred that he came to learn that after purchasing Plot No. 1182 and settling thereon, someone created titles for land between Plot No. 1182 and the lake that came about as a result of the lake water recession and registered the same as land parcels Kisumu/Nyalenda "B"/1507, 1508, and 1468. The Defendant averred that the creation of the said parcels of land had the effect of arbitrarily depriving the Defendant of his riparian land right in violation of Article 40 of *the Constitution*. The Defendant averred that the land parcels, Kisumu/Nyalenda "B"/1507, 1508, and 1468, were created from a riparian area and, as such, the titles thereof were not valid.
 5. The Defendant averred in the alternative that he had never entered or occupied Plot No. 1508. The Defendant averred further in the alternative that if the dispute between the parties concerned the boundary between Plot No. 1508 and Plot No. 1182, the court had no jurisdiction to determine the same.
 6. In his counter-claim, the Defendant/Plaintiff in the counter-claim reiterated the contents of his amended defence and averred that he was the owner of Plot No. 1182, which measured approximately 0.3 of a hectare. The Defendant averred that he acquired Plot No. 1182 in 2005 and that the lower part of the property abuts the Lake Victoria riparian area. The Defendant averred that two years before the filing of the suit, he had seen the Plaintiff, in the main suit/1st Defendant in the counter-claim, attempting to reclaim the said riparian land by dumping building waste and murrum thereon.
 7. The Defendant averred that in June 2017, he received a letter from the Plaintiff with an attached court order stopping the Defendant from trespassing on Plot No. 1508. The Defendant averred that when he purchased the Registry Index Map (RIM) for Nyalenda "B" area Map Sheet No. 6, he learnt that the same had been amended following the illegal creation of new land parcels on the lake riparian area. The Defendant averred that the 1st to 3rd Defendants in the counter-claim colluded to illegally and fraudulently create the said parcels of land and to amend the RIM. The Defendant pleaded several particulars of fraud and illegalities committed by the 1st to 3rd Defendants in the counter-claim. The Defendant averred that the 1st to 3rd Defendants in the counter-claim extended the size of the land parcel



Kisumu/Nyalenda “B”/564 (Plot No. 564) to cover a large area that consisted of the Lake Victoria riparian land. The Defendant averred that the 1st to 3rd Defendants in the counter-claim illegally subdivided Plot No. 564 to create Plot Nos. 1467 and 1468, and proceeded to subdivide Plot No. 1468 to create Plot Nos. 1507, 1508, and 1468. The Defendant averred that the 1st to 3rd Defendants in the counter-claim illegally converted riparian land, which was public land, into private land contrary to the provisions of Article 162 of *the Constitution*.

8. The Defendant averred that as a result of the illegal and fraudulent activities by the 1st to 4th Defendants in the counter-claim, the Defendant had suffered loss and damage. The Defendant averred that he had direct access to the lake, which had been encroached on by the Plaintiff. The Defendant averred that he had been denied access to the lake and Plot No. 1182 had lost prestige and value. The Defendant averred that the acts of the 1st to the 4th Defendants complained of were illegal, null, and void.
9. The Defendant sought judgment against the Plaintiff and the other Defendants in the counter-claim for a declaration that Plot No. 1508 was illegally created and that the same was on a lake riparian land, a mandatory injunction compelling the 2nd and 3rd Defendants in the counter-claim to cancel all the entries in the register creating Plot Nos. 1508 and to amend the RIM to revert the riparian land to its original position, a permanent injunction restraining the Plaintiff/1st Defendant in the counter-claim, his agents, servants, employees or anybody claiming through him from interfering with the Defendant’s quiet use and possession of Plot No. 1182, general damages for unlawful conversion, and punitive damages against the 2nd to 4th Defendants. The Plaintiff filed a reply to the defence and defence to the Defendant’s counter-claim dated 6th October 2023.
10. The court heard the suit and the counter-claim and delivered a judgment in the matter on 28th January 2025, in which the court stated as follows in part:
 39. “I agree with the Defendant that in the absence of evidence of re-survey of Plot No. 564, its purported increase in size from 0.15 of a hectare to 0.8 of a hectare was illegal and fraudulent. I agree with Patrick Opiyo (DW2) when he stated in his report that the purported re-survey was mischievous. The Plaintiff did not also persuade me that the whole of the hitherto lake riparian reserve between Plot No. 564 and Plot No. 1182 measuring 0.65 of a hectare belonged to Obala Minala and was wrongly left out of his land during the land adjudication in the 1990s. I agree with the Defendant that part of Plot No. 1507 and the whole of Plot No. 1508 owned by the Plaintiff were fraudulently and illegally created from the hitherto Lake Victoria riparian reserve. I agree with the Defendant that the riparian reserve from which Plot No. 1507 and Plot No. 1508 were created was Government land and could not be acquired through the purported re-survey process by Obala Minala and the Plaintiff. The two had to apply for the same if available for allocation, receive a letter of allotment and meet the conditions thereof. It is common ground that the mysterious increase in the area or size of Plot No. 564 and the subsequent illegal and fraudulent creation of Plot No. 1507 and Plot No. 1508 from Plot No. 1467 which was alleged to be a subdivision of Plot No. 564 took away Plot No. 1182’s lake frontage. The access to the lake riparian reserve that the owner of Plot No. 1182 enjoyed prior to the said illegal activities was taken away. Even if Obala Minala or the Plaintiff had applied to the Government to be allocated the said lake riparian reserve, the same could not have been allocated to them without consulting the owners of the neighbouring parcels of land. In this case, it is common ground that the owners of the neighbouring parcels of land were not consulted or involved in the purported re-survey of Plot No. 564 which resulted in their access to the lake riparian reserve being taken away.



40. For the foregoing reasons, it is my finding that Plot No. 1508 owned by the Plaintiff was created and registered in the name of the Plaintiff illegally and fraudulently. The Plaintiff does not therefore hold a valid title in respect of Plot No. 1508 which can enjoy the protection of the law. The Plaintiff having failed to establish his title over Plot No. 1508, the Plaintiff who is not in possession of Plot No. 1508 cannot maintain an action for trespass. When the court visited Plot No. 1182 and Plot No. 1508 on 5th March 2024, Plot No. 1508 was completely covered with lake water the more reason why it was left as a lake riparian reserve and was not included as part of Obala Minala's Plot No. 564.
 41. ...I find the Plaintiff's claim that the Defendant has trespassed on Plot No. 1508 not proved. The Plaintiff has in the circumstances failed to prove his case against the Defendant to the required standard. The Plaintiff is therefore not entitled to the reliefs sought against the Defendant.
 42. As concerns the Defendant's counter-claim, it is my finding that the Defendant has proved on a balance of probabilities that Plot No. 1508 owned by the Plaintiff was created and registered in the name of the Plaintiff illegally and fraudulently. The Defendant is therefore entitled to the declaratory and injunctive reliefs sought against the Plaintiff. The Defendant has however not made a case for damages."
11. The court made the following final orders in the matter;
- a. "The Plaintiff's claim against the Defendant in the main suit is dismissed with costs to the Defendant.
 - b. Judgment is entered in the counter-claim for the Defendant/Plaintiff in the counter-claim against the Plaintiff /1st Defendant in the counter-claim for;
 1. A declaration that the parcel of land known as Kisumu/Nyalenda "B"/1508 is situated on Lake Victoria riparian reserve and as such was illegally created.
 2. The Land Registrar Kisumu County and the Land Surveyor, Kisumu County shall within 90 days from the date hereof cancel all entries in the register creating Kisumu/Nyalenda "B"/1508 and shall amend the Registry Index Map for Kisumu District, Kolwa Location, Nyalenda "B" Registration Section, Diagram No.6 by deleting the said parcel of land therefrom and restoring it to its original position as lake riparian reserve.
 3. A permanent injunction restraining the Plaintiff in the main suit/1st Defendant in the counter-claim by himself or through his agents, servants, employees or anybody claiming through him from interfering with the Defendant in the main suit/Plaintiff in the counterclaim's quiet occupation, use and enjoyment of the parcel of land known as Kisumu/Nyalenda "B"/1182.
 4. The costs of the counter-claim."
12. What is now before me is the Plaintiff's application brought by way of Notice of Motion dated 19th February 2025, seeking a stay of execution of the judgment delivered herein on 28th January 2025 pending the hearing and determination of the Plaintiff's intended appeal against the same to the Court of Appeal. The application, which is supported by the affidavit of the Plaintiff, sworn on 19th February 2025, was brought on the grounds that the Plaintiff was dissatisfied with the judgment of the court



and had filed a notice of his intention to appeal against the same to the Court of Appeal. The Plaintiff averred that if the stay sought was not granted, the Plaintiff would suffer great loss.

13. The Defendant opposed the application through a replying affidavit sworn on 14th April 2025. The Defendant contended that the application did not meet the threshold for granting a stay of execution set in Order 42 Rule 6 of the Civil Procedure Rules. The Defendant averred that the application was an abuse of the court process and was brought in bad faith.
14. The application was argued on 9th July 2025. I have considered the Plaintiff's application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the Defendant in opposition to the application. Finally, I have considered the submissions by the advocate for the Plaintiff. The application seeks a stay of execution pending appeal. The Plaintiff's application was brought under Order 42 Rule 6 of the Civil Procedure Rules. 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.”



15. In *Halai & another v. Thornton & Turpin (1963) Ltd* [1990] KECA 65 (KLR), the court stated as follows on this 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.”

16. 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.”

17. I am of the view that the Plaintiff’s application has not satisfied the conditions for granting a stay pending appeal to the Court of Appeal. I am of the view that there is no competent appeal filed by the Plaintiff against the judgment of this court delivered on 28th January 2025, on which the Plaintiff’s application can be anchored. Order 42 Rule 6 (4) of the Civil Procedure Rules cited above 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.”

18. Rule 77 of the Court of Appeal Rules dealing with the filing of a Notice of Appeal provides 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.”

19. Form D referred to in Rule 77(6) of the Court of Appeal Rules is reproduced below:

Form D [r. 77(6)]

(Heading as in the proceedings appealed from)

Notice of Appeal

- (1) Delete as appropriate
- (2) Specify part complained of
- (3) Copies of the notice should be served on all persons directly affected by the appeal

Take notice that being dissatisfied with the decision of the Honourable Justicegiven at on the day of, 20....., intends to appeal to the Court of Appeal against the whole of the said decision/such part of the decision (1) as decides that (1) (2)

The address for service is

It is intended to serve copies of this notice on (3)

Dated this.....day of....., 20.....

Signed Appellant

Advocate for the applicant

To:

The Registrar of the High Court of.....at..... lodged
in the High Court ofat thisday of,
20.....

.....

Registrar

20. It is not disputed that the Plaintiff filed a notice of appeal within the time provided in the Court of Appeal Rules. The problem with the Plaintiff’s notice of appeal, which the court pointed out to the Plaintiff’s advocate during the hearing of the application, is that the notice of appeal is against a purported judgment delivered on 28th February 2025. The court pointed out to the Plaintiff’s advocate that the judgment sought to be stayed was delivered on 28th January 2025, and as such, there was a problem with the notice of appeal. The Plaintiff’s advocate’s response, which is on record, was that that was an issue which the Plaintiff will take up with the Court of Appeal.

21. I am of the view that a notice of appeal against a judgment delivered on 28th February 2025 cannot support an application for stay of execution of a judgment delivered on 28th January 2025. The Plaintiff’s notice of appeal is defective if it was filed against a judgment delivered on 28th January 2025. I am of the view that a defective notice of appeal cannot support an application for a stay of execution in that the notice cannot be deemed an appeal under Order 42 Rule 6 (4) of the Civil Procedure Rules, as it does not comply with the Court of Appeal Rules.



22. Even if the application is considered on merit, I am not persuaded that the Plaintiff stands to suffer irreparable loss or harm if the stay sought is not granted. In paragraph 40 of this court's judgment, the court stated as follows in part:

“When the court visited Plot No. 1182 and Plot No. 1508 on 5th March 2024, Plot No. 1508 was completely covered with lake water the more reason why it was left as a lake riparian reserve and was not included as part of Obala Minala's Plot No. 564.”

20. The parcel of land the Plaintiff claims to own, Plot No. 1508, is not occupied by the Plaintiff. The court visited the land and found it wholly under the lake water. The land is a lake riparian reserve as declared by the court. As a riparian reserve wholly covered with water, the same is protected by law and cannot be interfered with by the Defendant or anyone else, as claimed by the Plaintiff. The Plaintiff would be able to recover the land should he succeed on appeal to the Court of Appeal. I am therefore not persuaded that the Plaintiff stands to suffer substantial loss or harm if the stay sought is not granted.

21. In the final analysis, I find no merit in the Notice of Motion application dated 19th February 2025. The application is dismissed with costs to the Defendant.

DATED AND SIGNED AT KISUMU ON THIS 16TH DAY OF OCTOBER 2025

S. OKONG'O

JUDGE

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

Mr. Okal h/b for Mr. Mogusu for the Plaintiff

The Defendant in person

Ms. J. Omondi-Court Assistant

