



REPUBLIC OF KENYA



**Owino v Duberia (Land Case Appeal E019 of 2024)  
[2025] KEELC 4455 (KLR) (12 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4455 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
LAND CASE APPEAL E019 OF 2024**

**AE DENA, J  
JUNE 12, 2025**

**BETWEEN**

**MATHILA ODEMBA OWINO ..... APPELLANT**

**AND**

**JUMA DUBERIA ..... RESPONDENT**

**RULING**

1. This appeal arises from the judgement delivered on 27/06/2024 in Ukwala SPM ELC No. E045 of 2024. The appellant was the plaintiff in the trial court and aggrieved by the said judgement filed the present appeal. Before the Court are two (2) applications; the first application is the Notice of Motion application dated 17/09/2024 and the second dated 30/12/2024 both filed by the appellant. I will first introduce the applications

**Application Dated 17/09/2024**

2. In the application dated 17/09/2024 the applicant seeks an order of stay of execution and or enforcement of the judgement and decree of delivered on 27/06/2024 in Ukwala SPM ELC No. E045 of 2024 pending the hearing of an intended appeal to the Court of Appeal at Kisumu. The grounds for the application rehash the findings of the trial court where the trial court dismissed the applicant's case and found that the property subject of the proceedings East Ugenya/Kathieno/B/36 belonged to the defendant by virtue of adverse possession. The trial court also directed the applicants title to be cancelled and reissued in the name of the defendant/Respondent. That execution of the judgement and decree will adversely interfere with the applicants use and possession of the suit property. That the intended appeal will be rendered nugatory.
3. The application is supported by the affidavit sworn by Mathlida Odemba Owino the applicant on 17/09/2024. Reiterating the foregoing grounds, it is deponed that she had already filed a Notice of Appeal and sought typed proceedings. It is deponed that the trial court inaccurately faulted the



applicant for failing to discharge the burden of proof as regards adverse acquisition of the suit property while disregarding her evidence.

4. The deponent reiterated and expounded the grounds of appeal in the draft memorandum of appeal attached as MOO-2 and that the appeal has high chances of success. That she will suffer immense prejudice and inconvenience should the orders sought be denied. That the respondent will not suffer prejudice as they can be compensated by way of costs. It is also deponed that the application has been made without any unreasonable delay and ought to be allowed in the interest of justice.
5. In opposition to the application the respondent Juma Dubeira swore an affidavit sworn on 14/10/2024 and filed on 22/10/2024. It is deponed that the applicant's suit was dismissed which is a negative order. Consequently, there is no order to stay as the same does not require any party to do or refrain from doing anything and does not in any way confer any relief
6. According to the respondent the grounds in support of the application are insufficient to warrant granting of the orders sought. That no appeal will be rendered nugatory as the applicant has not proved she is in possession or any loss she is likely to suffer. That the application is made in bad faith to deny the respondent the fruits of the judgement. It is deponed that the application is overtaken by events as title has already issued in favor of the respondent – a copy is annexed 'JD1'. The court is invited to dismiss the application.

#### **Application Dated 30/12/2024**

7. The application dated 30/12/2025 moves the court to find the respondent in contempt of the orders of this court made on 17/09/2024 and upon such finding the respondent be arrested and sentenced to serve such prison sentence and time as the court shall deem fit. Also impose such fine or damages to be paid by the respondent and in default the personal properties be attached in recovery thereof. Further orders be made directing the respondent to purge the contempt by transferring the parcel to the respondent (its original state) failure to which the Land registrar Siaya to register the same in the name of the applicant as per the status quo orders.
8. The application is premised on the grounds on its face and the supporting affidavit of the applicant Mathlida Odemba Owino. It is stated that on 17/09/2024 the court gave an order of status quo that the prevailing status on the suit property be maintained pending further directions of the court. That upon receiving the court order and being aware of the applicants claim the respondent went ahead to transfer the suit property into his name. that this was calculated to defeat the said orders, undermine the dignity and authority of the court. That the actions are in contempt of the said orders of the court.
9. The court is urged to allow the application so as to uphold the dignity and authority of the court.
10. The supporting affidavit reiterates the grounds above. Additionally, a copy of a search dated 28/10/2024 is annexed as MOO-2. It is deponed that the respondent was in the process of disposing of the land through sale. That the constitutional and statutory principles decreeing the central role of respect to the courts in the administration of justice are not mere platitudes.
11. The application is opposed through the replying affidavit of Juma Duberia the respondent sworn on 7<sup>th</sup> February 2024 (sic I think it is 2025). I will treat this as an error apparent on the face of the record since I also note the affidavit is stated to be in response to the application dated 30/12/2024. It is deponed that the exparte orders of the court herein were served upon and received by the respondent on 15/10/2024. A copy is annexed as JD1. That having obtained exparte orders on 17/9/2024 the applicant ought to have served them by 20/9/2024 as required by the provisions of Order 40 Rule 4(3). No affidavit of service has been adduced to confirm service was within 3 days from 17/09/2024.



12. It is further deponed that the title to the suit property was issued to the respondent on 8/10/2024 and the orders of 17/09/2024 had not issued by then and there were no orders staying such procedure. That neither were there any orders served on him for which the respondent can be said to be in contempt. That the allegations made by the respondent are without proof. The application is made in bad faith and with insufficient grounds. The respondent states he will suffer irreparable damage as he has not disobeyed any orders issued by this court.

### **Submissions**

13. The applications were heard concurrently by way of written submissions. The respondents' submissions are filed through the firm of Ngala Owino & Co Advocates and are dated 4/3/2025. I however note that these submissions did not address the application for contempt. The applicant appearing in person informed the court she would rely on her supporting affidavits in both applications.

### **Analysis And Determination**

Application dated 17/09/2024

14. I have considered the application dated 17/09/2024, the supporting affidavits, the rejoinder thereto by the respondent and the submissions filed. The main issue that commends determination is whether the orders sought should issue.
15. The powers to order stay of execution of decree or order of the court are conferred under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, as follows:
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 subrule (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.
16. Enumerating further the above provisions the court in the case of Butt & Rent Restriction Tribunal [1982] KLR 417 stated an applicant must satisfy, that substantial loss may result to him unless the stay is granted, the application has been made without delay and the applicant has given security or is ready to give security for due performance of the decree.
17. Also see In re estate of Michael Kiarri Njoroge (deceased) (2019)eKLR cited by the respondents reiterating the three conditions above required to be satisfied by an applicant who seeks to invoke the provisions of order 42 Rule 6(1)(2)



18. Has the applicant demonstrated she will suffer substantial loss were the court not to grant the stay. It has been urged by the respondent that the above conditions have not been met for the reason that the orders issued by the trial court were negative orders incapable of being stayed.
19. It is therefore imperative that we revisit the orders the subject of which the court is being invited to invoke its powers donated as stated hereinbefore. It will also be pertinent to look at what constitutes substantial loss in law and a negative order.
20. The final orders of the judgement in the trial court read; -
- i. The Plaintiffs claim against the defendant fails and the suit is dismissed
  - ii. The land parcel East Ugenya/Kathieno 'B'/36 be and is hereby declared the property of the defendant by virtue of adverse possession
  - iii. The Plaintiffs registration as the proprietor of the suit property East Ugenya/Kathieno 'B'/36 be and is hereby cancelled and the Defendant shall be registered as the proprietor thereof.
  - iv. The relevant Land Registrar to ensure compliance
  - v. Each party shall bear their own costs of both the suit and the counterclaim.
21. What is a negative order? Counsel for the respondent relied on the case of Kenya Commercial Bank Limited Vs Tamarind Meadows & 7 Others (2016)eKLR the learned judge Olga Sewe cited with approval Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah [2008] eKLR, where the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:
- “The 2<sup>nd</sup> prayer in the application is for stay (of execution) of the order of the superior court made on 18<sup>th</sup> December, 2006. The order of 18<sup>th</sup> December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C).”
22. The learned judge went on to further state;
17. The same reasoning was applied in the case of Raymond M Omboga v Austine Pyan Maranga (supra), that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:
- “The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise...”
23. The following pronouncement from the above has caught my attention - ‘By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum’. it would appear that this is not the case with the orders granted by the trial court. Other than dismissing



the plaintiffs suit there were specific orders that were made. The title was to be registered in the name of the defendant probably based on the counterclaim except that it was the Land Registrar to effect the order by dint of his statutory mandate. The orders are capable of being stayed subject to fulfilment of the statutory conditions. This effectively removes the orders issued from the ambit of a negative order.

24. It is therefore the finding of this court that the final orders issued by the trial court on 27/06/2024 are not negative orders
25. I now move to discuss what amounts to substantial loss as one of the requirements set out in law. Indeed, this is where the crux of the application lies.
26. The court in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, had this to say on what constitutes substantial loss; -

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

27. The applicant’s case is that the appeal will be rendered nugatory. The judgement effectively restrained her from further using the suit property as well as declaring the said use unconstitutional. The respondent urges the applicant has failed to prove occupation. I will not delve into this argument as commenting on occupation would be going into the merits of the appeal especially this being an adverse possession claim.
28. But for me I would consider the issue from the point of rendering the appeal nugatory and preserving the status quo as guided by the above dictum. The applicant states she has an arguable appeal. It is trite that an arguable appeal need not be one that must succeed.
29. The court in the case of *Butt & Rent Restriction Tribunal* (supra) further stated thus; -

‘It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal if successful from being nugatory.’

30. The purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties and considering the circumstances of the case. The Court of Appeal in *RWW vs. EKW* (2019) eKLR addressed itself on this as hereunder: -

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is



discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

31. I will now look at the circumstances of the case. What is paramount here is the preservation of the register of the suit property. The applicant states that the respondent was in the process of disposing the property by sale. There was no evidence adduced in proof of this allegation. However indeed if the title is transferred into the name of the decree holder the danger of further mutation by sale or charge is real and could complicate issues. It would be prudent for the court in my view to order stay to prevent the waters from getting mucky. In any event the decree holder has a decree in his favor and I agree with the applicant he can be compensated by way of costs. I would exercise my discretion in favor of staying execution.
32. But there is hurdle. The respondent has deponed that the application came two months after the judgement when he was already in the process of executing the judgement. A copy of a title deed dated 8<sup>th</sup> October 2024 is annexed which reveals that the judgement has been implemented and the suit property registered in the name of the respondent. This is buttressed by a copy of official search adduced by the applicant albeit for purposes of the second application herein.
33. The above effectively means there is nothing to stay the ship having sailed from the harbour. I will add that this also speaks to the issue of undue delay. The judgement was delivered on 27/6/2024, the title was issued on 8/10/2024 indeed there is a lapse of two months I agree. For purposes of this case the applicant is guilty of laches and it is not enough to state he had served her intention of appealing the decision and therefore the respondent was on notice. No.
34. On security for costs the court notes that an applicant has an option to offer, or await the directions on the terms for the same should court grant the orders. None of the parties addressed me on this requirement.
35. The purpose of security was clearly enunciated in *Arun C. Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, where the court stated: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”
36. Security for costs is discretionary depending on the circumstances of each case. One of the principles on which a court exercises its discretion in an application for security for costs as considered in the case of *Keary Development v. Tarmac Construction* (1995) 3 ALL ER 534 cited by F. Tuiyot., J in *Ocean View Beach Hotel Ltd v. Salim Sultan Mollo & 5 Others* (2012) eKLR was that the court must carry out a balancing exercise. On one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim.



37. In exercise of my discretion, I find that in the instant suit, the applicant has already suffered the fate of having their titles cancelled and as such the respondents have an upper hand on their claim of the suit property. In my view no injustice will be suffered by the respondents in the event that security for costs is not granted. The court does not wish to stifle the applicant's chance of pursuing the intended appeal. Consequently, I will not make any orders as to deposit of security.
38. But having stated all the foregoing the court has a duty to maintain the status quo. The status quo is that the suit property is now registered under the respondent. This is the status quo that shall be maintained pending the hearing and determination of the appeal herein. This will also entail possession on the ground. I have noted the respondent has stated in the replying affidavit in respect of the second application that since service with the order of 17/09/2024 he has maintained the status quo.

#### **Application Dated 30/12/2024**

39. This is an application to hold the respondent in contempt of the orders issued by the court on 17/09/2024. The main issue for determination is whether the applicant has proved the contempt to the required standard.
40. First a consideration of the law and judicial precedents on contempt proceedings.
41. Following the declaration in the case of Kenya Human Rights Commission vs. Attorney General & Another [2018] eKLR, where Mwita J declared that the entire Contempt of Court Act No 46 of 2016 to be invalid for lack of public participation, the law now applicable is section 5 of the Judicature Act (Cap 8 Laws of Kenya) which provides; -
1. The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.
  2. An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.'
42. The above legal position was reiterated by the Court of Appeal in the case of Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR.
43. This Court being a court of equal status with the High Court therefore draws its powers to punish litigants and persons that are in contempt of its orders under the provisions of Section 5 (1) above.
44. The nature of contempt proceedings was explained by the court in Gatharia K. Mutikika v Baharini Farm Limited [1985] KLR 227 where the court observed that 'a contempt of court is an offence of a criminal character. A man may be sent to prison.' In addition, the Black's Law Dictionary 9th Edition, defines contempt as:
- The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.
45. Halsbury's Law of England, Vol.9(1) 4<sup>th</sup> Edition defines contempt of court as follows;
- 'Contempt of Court can be classified as either criminal contempt, consisting of words or acts which impede or interfere with the administration of justice or which creates substantial risk that the course of justice will be seriously impeded or prejudiced, or contempt in procedure,



otherwise known as civil contempt consisting of disobedience to Judgment, Orders or other process of Court and involving in private injury’.

46. In the case of *Sam Nyamweya & Others v Kenya Premier League Ltd and Others* [2015] eKLR Justice Aburili stated that: -

“Contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”

47. in *Samuel M.N. Mweru & Others v National Land Commission & 2 others* (2020)eKLR that the test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed deliberately of malafide.

48. In *Titus Musyoki Nzioka v John Kimathi Maingi & Another* (2013) eKLR, J. B. HAVELOCK relied on the case of *Dean v Dean* [1987] 1 FLR 517, where it was stated that an application for contempt of Court or its antecedent orders has to establish clearly and precisely exactly of what the Respondent was in contempt of.

49. Cromwell J, writing for the Supreme of Court Canada in *Carey v Laiken*, 2015 SCC 17 (16<sup>th</sup> April 2015), as was referred in the case of *Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui* [2021] eKLR expounded on the three elements of civil contempt of court which must be established to the satisfaction of the court as follows; -

- i. The order alleged to have been breached “must state clearly and unequivocally what should and should not be done. ....’
- ii. The party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the willful blindness doctrine.
- iii. The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.

50. It is trite that the standard of proof is slightly above that of balance of probabilities. The Supreme Court in *Republic v Ahmad Abolfathi Mohammed & Another* (2018) upheld the standard of proof of contempt as per the holding of the Court of Appeal in the case of *Mutitika v. Baharini Farm Limited* [1985] KLR 229, 234 that the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt.

51. Applying the foregoing principles to the present case I will proceed to determine the main issue. The relevant order reads as follows; -

1. ....
2. For reasons it appears the appellant/s claim was dismissed by the lower court and the respondent/s claim of adverse possession was allowed, this court orders that an order of status quo that is prevailing at the date hereof on land parcel no. Ugenya/Kathieno B/36 be maintained pending further directions from this court.
3. ....

52. The applicant states the respondent received the order. She attached the order without any evidence of service. It is a requirement that an affidavit of service would be filed and copy of the order bearing



evidence of service attached, subject to if the respondent accepted service by signing or otherwise. The respondent states that the orders the subject of these contempt of proceedings were served upon him on 15/10/2024 as evidenced by annexure JD1. That they ought to have been served upon him within three days of the date of the orders that is to say by 20<sup>th</sup> September 2024.

53. I have read the provisions of Order 40 Rule 4(3) of the Civil procedure Rules and clearly the orders were served out of time by more than 10 days in the absence of evidence to the contrary. But is this fatal? Only to the extent that the orders are to be deemed to have automatically lapsed but in the instant case the court extended the orders on 22/01/2025, 5/02/2025 and 17/03/2025.
54. But the issue for consideration is whether there was contempt and if it was deliberate. From the foregoing it is evident the respondent became aware of the orders on 15/10/2024. The title in his name is dated 8/10/2024. Clearly the issuance of the title predated the service of the orders the subject of the these contempt proceedings. The respondent cannot be said to be in contempt of orders he was not aware of. Even the Notice of Appeal cannot suffice for purposes of contempt of proceedings the court cannot infer knowledge by dint of the Notice of appeal. We have already seen that the threshold of proof is slightly higher than the normal standard in civil cases.
55. But I must add that from my review of the order it would appear that the court envisaged the status on the ground and not the register. Had the court intended it as such the orders would be that specific. There is no specific mention of the register. Infact my understanding of the order seems to be echoed by the respondent who depones there were no orders staying such a procedure meaning the procedure of the change of title. The respondent also states at paragraph 10 of his replying affidavit that he has complied with the orders of the court since the said time of service which can only refer to the ground status. Based on the criteria hereinbefore cited this lack of clarity alone would exonerate the respondent as the order must state clearly and unequivocally what should and should not be done.
56. Consequently, the upshot of the foregoing is that I find that the applicant has failed to prove that the respondent was in contempt of the court orders to the required standard.
57. What orders therefore commend to be issued in the circumstances of this case. The application for contempt must be dismissed. I have already given the reasons why the court must preserve the status quo both on the ground and the register.
58. The following orders therefore issue to dispose of the Notice of Motion application dated 17/09/2024 and 30/12/2024.:-

**59. Application dated 17/09/2024 –**

1. That pending the hearing and determination of this appeal the status quo on the suit property Ugenya/Kathieno/B/36 shall be maintained.
2. That pending the hearing and determination of the appeal herein an order of inhibition is hereby issued against the relevant land registrar Siaya county restricting the registration of any disposition, charge or subdivision in the register of parcel No. Ugenya/Kathieno/B/36.
3. Costs shall abide the outcome of the appeal.

**60. Application dated 30/12/2024**

1. The application dated 30/12/2024 is hereby dismissed.



2. Costs shall abide the outcome of the appeal.

**DELIVERED AND DATED AT SIAYA THIS 12<sup>TH</sup> DAY OF JUNE 2025**

**HON. LADY JUSTICE A.E. DENA**

**JUDGE**

**12/06/2025**

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

Ms. Mathilda Odemba Owino the Applicant in person

Ms. Nyakongo for the Respondent

Court Assistant: Ishmael Orwa

