



**Ali v Ashioya (Environment and Land Miscellaneous Application
E009 of 2025) [2025] KEELC 7199 (KLR) (23 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7199 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E009 OF 2025
BN OLAO, J
OCTOBER 23, 2025**

BETWEEN

HASSAN ALI APPLICANT

AND

OYE ASHIOYA RESPONDENT

RULING

1. Hassan Ali (the Applicant), being aggrieved by the ruling of Hon R. Odenyo Senior Principal Magistrate Busia delivered on 19th March 2025 in Busia CMCC NO E056 of 2024 intends to appeal that decision to this Court. It has dawned on him that the time within which to lodge the appeal has since lapsed.
2. The Applicant has therefore first approached this Court vide his notice of Motion dated 14th July 2025. That Motion was however withdrawn.
3. What is pending my determination is the Applicant's Notice of Motion dated 1st August 2025 and filed under certificate of urgency. The same is premised on Rule 3 of the High Court Practise and Procedure Rules, Section 3A, of the *Civil Procedure Act* and Order 22 Rules 31 and 35 of the Civil Procedure Rules. It is based on the grounds set out therein and supported by the Applicant's affidavit of even date.
4. The gravamen of the Motion is that pending the hearing and determination of the Motion dated 7th July 2025 (for leave to appeal out of time and stay of execution) the warrant of arrest issued on or about 24th November 2024 in Busia CMCC NO E056 of 2024 be and is hereby lifted and/or stayed.
5. That this Honourable Court be pleased to make such further or others as may meet the ends of justice.
6. That the costs of this application be provided for.
7. It is the Applicant's case that on 19th March 2025, the subordinate Court in Busia CMCC NO E056 of 2024 (Hon R. Odenyo SPM) issued a ruling requiring him to deposit the entire decretal sum in



the joint interest earning account in the name of counsel for both parties as a condition for stay. He therefore filed an appeal against that ruling but the same was struck out on 4th July 2025 for want of jurisdiction. He therefore filed another application dated 7th July 2025 seeking leave to appeal out of time and stay of execution of the ruling delivered on 19th March 2025. That ruling is coming up on 21st October 2025. That despite the pendency of that ruling, the Respondent has extracted and acted upon the warrant of arrest extracted on 24th November 2024 and he is therefore at risk of arrest and committal to civil jail which will cause him substantial hardship. That although the subordinate Court directed that the decretal sum be deposited in a joint account, he is not aware if such account was ever opened and no communication has been made to that effect. The execution proceedings are therefore not only premature but also unjustified particularly in view of the pending appeal. Hence this Motion which is made in good faith, without delay and the Respondent will not suffer any prejudice.

8. The following documents are annexed to the Motion:
 1. Copy of the ruling delivered by HON R. ODENYO but not dated.
 2. Copy of the warrant of arrest.
9. The Respondent who is an Advocate of this Court filed Grounds of opposition dated 15th September 2025 and a replying affidavit dated 11th October 2025 in opposition to the Motion.
10. In the Grounds of opposition, the Respondent has pleaded that the Motion is an abuse the due process of this Court because the warrant of arrest was executed and the Applicant made a part payment of Kshs.150,000 towards the decree and pledged to pay the balance in 30 days from 15th September 2025.
11. In the replying affidavit, the Respondent has averred, inter alia, that the Motion is without merit and an abuse of the Court process. That the warrant of arrest was successfully executed and the Applicant made a part payment of Kshs.150,000 towards the decree and pledged to pay the balance in 30 days. This Motion should therefore be dismissed.
12. Annexed to the replying affidavit is a copy of a letter dated 1st October 2025 addressed to the Applicant by the Respondent and acknowledging receipt of Kshs.150,000 towards settling the decree.
13. When the Motion was placed before me on 4th August 2025, I directed that it be canvassed by way of written submissions to be filed on or before 16th September 2025 when it would be mentioned to confirm compliance and take a date for ruling. However, by 16th September 2025, no submissions had been filed by any party and Mr Kaptan counsel for the Applicant intimated to the Court the intention to withdraw an earlier Motion dated 14th July 2025. The Respondent told the Court that he would be relying on his Grounds of Objection and replying affidavit only and would not file any submissions.
14. I have considered the Motion, the Grounds of objection and the replying affidavit.
15. I must start by observing that there is no Motion herein dated 7th July 2025. If there is any such Motion, it must have been filed in other proceedings. The first Motion to be filed herein is the one dated 14th July 2025 and it was withdrawn on 16th September 2025 after this Court had issued directions as to it's disposal.
16. The Motion dated 1st August 2025 and which is the subject of this ruling seeks the following main order in the prayer NO 2.
 1. Spent



2. “That pending the hearing and determination of the application dated 7th July 2025 (for leave to appeal out of time and stay of execution), the warrant of arrest issued on or about 24th November 2024 is Busia CMCC NO E056 of 2024 be and is hereby lifted and/or stayed.”
17. Essentially therefore, what the Applicant is seeking is an order of stay of execution of the warrant of arrest issued against him in Busia CMCC E056 of 2024 pending the hearing of his application for leave to appeal out of time filed vide the Motion dated 7th July 2025. As I have already stated above, no such Motion dated 7th July 2025 has been filed herein and even if such application had been filed, it has not been prosecuted. Therefore, no leave has been granted either by this Court or by any other Court to file an appeal against the un-dated ruling delivered by Hon R. Odenyo SPM in Busia CMCC E056 of 2025. And although that ruling is not dated, the fact that an application for leave to file an appeal out of time is being referred to can only mean that indeed such leave was mandatory. In the absence of such leave, it can only also mean that no order of stay of execution can be considered by this Court as there is no appeal filed. That is because, Order 42 Rule 6(1) of the Civil Procedure Rule provides that:
- “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. Emphasis mine.
18. It is clear from the above that only on “appeal or second appeal” can form the basis of an application for stay of execution of any proceedings, decree an order pending an appeal. That is why the Marginal Notes in Order 42 Rule 6 read:
- “stay in case of appeal.”
19. There being no appeal filed in respect to the ruling delivered in the subordinate Court, no order of stay of execution can be issued.
20. Most importantly, the order sought to be stay is the execution of the warrant of arrest against the Applicant. Yet, as already averred by the Respondent in paragraph 4 at his replying affidavit:
- 4: “That there are warrants of arrest in Busia CMCC NO E056 of 2024 which was successfully executed and the Applicant herein did make part payment of Kshs.150,000 towards the decree and pledged to pay the balance within 30 days. I attach a letter dated 1.10.2025 and mark it as OA1.”
21. A stay can only mean a temporary halt on proceedings. If, as is clear from the averments by the Respondent in paragraph 4 of his replying affidavit and without rebuttal:
- 4: “That there are warrants of arrest in Busia CMCC E056 of 2024 which was successfully executed and the Applicant herein did make part payment of Kshs.150,000 towards the decree and pledged to pay the balance within 30 days. I attach a letter dated 1.10.25 and mark it as OA1”, then it follows that there is nothing to stay in these proceedings. Courts do not act in vain and a Court cannot stay what has already been executed and is spent.



22. The up-shot of all the above is that the Notice of Motion dated 15th August 2025 is devoid of any merits. It is dismissed with costs.

RULING DATED, SIGNED AND DELIVERED ON THIS 23RD DAY OF OCTOBER 2025 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO

JUDGE

23RD OCTOBER 2025

