

REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT  
AT KISII  
ELCPET NO. E001 OF 2022

PETER ORENGE MIGIRO ..... PETITIONER

VERSUS

SAMWEL OMAGWA JAMES ..... 1<sup>ST</sup> RESPONDENT

ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT

RULING

1. The application before me is the application dated 26 May 2025, filed by the 1<sup>st</sup> respondent to this petition, seeking the following orders :

- (i) (Spent – Certification of urgency).
- (ii) (Spent- prayer for stay of execution pending hearing of application).
- (iii) (Spent – prayer for injunction pending hearing of application)
- (iv) THAT the Honourable Court be pleased to issue an order of stay of execution of the judgment rendered herein by this Court on 17 September 2024 pending hearing and determination of the intended Appeal.
- (v) THAT the Honourable Court do issue a temporary injunction restraining the respondents, their servants and or agents from selling, charging, disposing off and or otherwise interfering with the suit property Majoge/Magenche/670 and or evicting the applicant therefrom, pending the hearing and determination of the intended appeal.
- (vi) THAT the Honourable Court be pleased to extend time within which the Applicant herein is to lodge an appeal to the Court of Appeal against the Judgement rendered by this Court on 17" September, 2024.
- (vii) THAT the annexed Notice of Appeal exhibited hereto be deemed as having been filed within time.

(viii) THAT the costs of this application be provided for.

2. The application is opposed.
3. To put matters into context, the land in dispute, i.e Majoge/Magenche/670, got registered in the name of Orengi Makori (now deceased) on 10 February 1970 as a first registration. Orengi Makori had purchased the suit land sometime in 1963 from one Osoro Mabumburi, who was a brother to the father of the applicant, one James Nyangoto. The contention of the applicant was that Osoro Mabumburi had no right to sell this land because it belonged to his father. There were events in 2001 which led to Orengi Makori, together with two others, filing the suit Kisii CMCC No. 542 of 2001 against the applicant and judgment was delivered on 18 August 2004 against the applicant. The applicant did not file an appeal against that judgment. Instead, he filed a suit before the Kenya Land Disputes Tribunal, being Kenya LDT Case No. 99 of 2007 putting forth the same contention that the suit land belonged to his late father and Osoro Mabumburi had no right to sell it. The Land Disputes Tribunal decided in his favour vide an award made on 16 July 2008. That award was adopted on 15 November 2011 by the Chief Magistrates' Court at Kisii in the suit Kisii CMCC Miscellaneous Case No. 132 of 2008. There was however no move to execute that judgment in form of transfer of title. In the year 2020 or thereabouts there were attempts made by the applicant to evict the respondent which eventually led the respondent to file this suit seeking the following orders :

(a) A declaration that land parcel Majoge/Magenche/670 is private property registered on first registration in favour of the late Orengi Makori and as such could not be subjected to the jurisdiction of the Kenya Land Disputes Tribunal.

(b) A declaration that the award by the Kenya Land Disputes Tribunal over the land parcel number Majoge/Magenche/670 in Land Dispute Case No. 99 of 2007 is null and void for want of jurisdiction.

(c) An order of judicial review in the nature of certiorari to issue removing to this court and revoking the court proceedings and consequential orders premised on the Kenya Land Dispute Tribunal Case No. 99 of 2007 and specifically as relates to land parcel Majoge/Magenche/670.

(d) An order of permanent injunction against the 1st respondent by himself, his agents, assigns, relatives, family members and anybody claiming through him from

trespassing, claiming, using, occupying and/or evicting the beneficiaries of the estate of the late Orenge Makori from land parcel Majoge/Magenche/670.

(e) Costs of the petition.

4. The applicant appointed the law firm of M/s Ocharo Kaba & Company but never filed anything to oppose the petition. The petition was only opposed by the Attorney General who was sued as the 2<sup>nd</sup> respondent. I heard the case and delivered judgment in favour of the petitioner vide a judgment delivered on 17 September 2024. My view was that the applicant could not have filed a case before the Land Disputes Tribunal so as to try and reverse the findings of the Magistrates' Court which had already decided the matter in the case Kisii CMCC No. 542 of 2001. I also found that the Land Disputes Tribunal could not have had jurisdiction to determine the dispute as it was a land ownership dispute. I allowed the petition and set aside the award of the Land Disputes Tribunal and the subsequent decree and also issued an order of permanent injunction against the applicant as prayed in the petition.
5. I have not seen any notice of appeal lodged within 14 days of the judgment though there was an application dated 9 October 2024, for stay pending appeal, that was filed by the law firm of M/s Mochiemo Gichana & Company Advocates, which was withdrawn on 23 May 2025 and this application was then filed. From the prayers, it will be seen that it is an application seeking leave to appeal out of time and is also an application for stay pending appeal.
6. The supporting affidavit is sworn by the applicant. He has deposed inter alia that he is aware that the court delivered judgment on 17 September 2024; that in the judgment the land was decreed to belong to the estate of Christopher Orenge Makori (deceased); that his entire family has been residing on the suit land following the decision of the Kenya Land Disputes Tribunal; that following the judgment of this court, he is bound to be evicted from the suit land which will render his intended appeal nugatory; that the petitioner has filed a fresh suit at Ogembo Law Courts, the same being Ogembo ELC Case No. E035 of 2024 seeking to enforce the Judgment rendered by this Court so as to evict him and his family from the suit land; that he has noted that his previous advocate on record, who had irregularly come on record in the matter, having taken over from the firm of Ocharo Kaba and Co. Advocates never filed a Notice of appeal in good time and or sought leave of the Court to file the same out of time; that the said firm of advocate proceeded to file an application for stay of execution pending appeal, notwithstanding

that no notice of appeal had been filed; that it is upon advice from his current advocate on record that he instructed him to withdraw the previous application for stay and file the instant one, and also seek proper orders, including an order for extension of time to file an appeal out of time. He continues to depose that he has genuine and compelling reason (s) for failure to file the Notice of appeal in good time, as such failure was wholly occasioned by the mistake of his previous advocate, and the action of taking over of this matter without his express permission, consent and or prior notification. He thus wants this court to extend time to validate the notice of appeal that he has annexed to his affidavit and owing to the imminent threat of eviction, he seeks stay. He thinks that he has good chances of success at the court of appeal and has annexed a draft memorandum of appeal. He avers that if stay is not granted his appeal will be rendered nugatory as there is nothing to prevent the respondent from executing the judgment.

7. The petitioner/respondent filed a replying affidavit to oppose the motion. He has pointed out that judgment was delivered on 17 September 2024 which is now over 8 months later and is of the view that there has been inordinate delay. He has deposed that the law firm of M/s Ochoki & Company, who have filed the present application, are not properly on record as the applicant was previously being represented by M/s Ocharo Kaba & Company Advocates before judgment. He adds that the applicant is abusing the court process as he had filed a similar application dated 10 February 2024. He deposes that after the judgment herein, he filed Ogembo MELC No. E035 of 2024 seeking eviction orders and the court has issued orders of injunction restraining the applicant from entering, constructing, using and/or carrying out any activity on the suit land. He believes that this application is made in response to the orders of the lower Court made on 23 May 2025 and as such amounts to an abuse of the Court process. He avers that if this court issues orders of stay of the judgment, then it will amount to allowing the applicant herein to steal a march on him.
8. I directed counsel to file submissions on the application and I have taken note of the submissions of Mr. Ochoki for the applicant, and Mr. Begi for the respondent.
9. The substantive orders are prayers (iv), (v), (vi) and (viii) which I already set out above and as far as I can see the application has two limbs. The first limb is for stay pending appeal. The second limb, from the manner of drafting of prayer (vi) of the application is for 'extension of time to lodge an appeal before the court of appeal' though I see prayer (vii) is for notice of appeal to be deemed as having been filed within time. For the avoidance of doubt, this court does not have jurisdiction to allow the filing of an appeal

out of time. This court's jurisdiction is only limited to allowing the filing of a notice of appeal out of time pursuant to Section 7 of the Appellate Jurisdiction Act, which provides as follows :

*7. Power of High Court to extend time*

*The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:*

*Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.*

10. I will only therefore consider the second limb of the application as seeking an extension of time to lodge a notice of appeal out of time.
11. However, before I go to the substance of the application, there is an objection raised on the entire application based on the argument that counsel who has filed the motion is not properly on record which I opt to address first for it is akin to a preliminary objection.
12. From the record, the applicant was indeed represented by the law firm of M/s Ocharo Kaba & Company Advocates up to the time of judgment. Without filing an application to come on record after judgment, and even without filing a notice of change of advocates, an application dated 9 October 2024 was filed by the law firm of M/s Mochiemo Gichana & Company Advocates on behalf of the applicant. That was certainly afoul the provisions of Order 9 Rule 9 that require an application for leave to come on record after judgment or a consent between the outgoing advocate and the incoming advocate. I see that on 10 February 2025, the law firm of M/s Ochoki & Company filed a notice of change of advocates to replace the law firm of M/s Ocharo Kaba & Company Advocates but yet again no application to come on record was filed and there was no consent from the said firm of M/s Ocharo Kaba & Company Advocates. I also see that on 23 May 2025, the same law firm of M/s Ochoki & Company filed another notice of change to come on record in place of M/s Mochiemo Gichana & Company Advocates. That notice of change was accompanied by a consent from the law firm of M/s Mochiemo Gichana & Company Advocates.
13. In his submissions, Mr. Ochoki submitted that in accordance with Order 9 Rule 9, his firm filed this particular consent. I am not persuaded that it was the proper consent. Indeed, in

the application itself, the applicant appears to affirm that the law firm of M/s Mochiemo Gichana & Company Advocates never properly came on record. This is what he swore at paragraph 17 of his affidavit :

*17. THAT besides, the Applicant has noted that his previous advocate on record, who had irregularly come on record in the matter, having taken over from the firm of Ocharo Kaba and Co. Advocates never filed a Notice of appeal in good time and or sought leave of the Court to file the same out of time.*

14. Clearly from the above deposition, the applicant has disowned the law firm of M/s Mochiemo Gichana & Company Advocates and all the documents that the said law firm filed for reason that the said firm did not properly come on record. I am now worried that he may just disown the law firm of M/s Ochoki & Company Advocates, and all that the said firm has filed, if I do not insist on strict adherence to Order 9 Rule 9. It is the law firm of M/s Ocharo Kaba & Company Advocates who were on record up to the time of judgment. Thus, any proper change must be from this firm and no other firm and such change needs to be either after an application has been filed or a consent from the said firm. There is none in this case and I must declare that the law firm of M/s Ochoki & Company is therefore not properly on record.

15. For that reason this application is a non-starter and must be struck out. It is hereby struck out with costs to the petitioner/respondent. The status quo orders that I had issued are hereby vacated.

16. Orders accordingly.

DATED AND DELIVERED THIS 28 DAY OF OCTOBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Matara instructed by M/s Ochoki & Company Advocates for the applicant

Mr. Ondieki h/b for Mr. Wabwire, State Counsel, for the 2nd respondent

No appearance on part of Mr. Begi for the 1st respondent

Court Assistant : Michael Oyuko