



**Ochula v Erot (Sued as a Legal Representative of the Estate of Okiru  
Erot (Deceased)) (Environment and Land Appeal E029 of 2024)  
[2025] KEELC 7226 (KLR) (23 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7226 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT AND LAND APPEAL E029 OF 2024  
BN OLAO, J  
OCTOBER 23, 2025**

**BETWEEN**

**LUDAVICUS OCHULA ..... APPELLANT**

**AND**

**PATRICK EKIRU EROT ..... RESPONDENT  
SUED AS A LEGAL REPRESENTATIVE OF THE ESTATE OF OKIRU EROT  
(DECEASED)**

*(Being an appeal from the ruling delivered on 28th November 2024 by  
HON S. MAKILA PM in BUSIA CMC ELC CASE NO 101 of 2019)*

**RULING**

1. The test for an order of stay of proceedings is stringent. In the case of Global Tours & Travel Ltd, Winding Up Cause No 43 of 2001 (NBI) Ringera J (as he then was) describes it thus:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice ... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”



In Halsbury's Law Of England 4<sup>th</sup> Edition Vol 37 pages 330 to 332, that threshold is also illuminated in the following words:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.

This is a power which, it has been emphasized, ought to be exercised sparingly and only in exceptional cases. It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The Applicant for a stay on this ground must show not merely that the Plaintiff might not, or probably would not succeed but that he could not possibly succeed on the basis of the pleading and the fact of the case.”

2. The subject of this appeal which is the land parcel NO Bukhayo/LUPIDA/1293 is pending, or at least was still pending trial in the subordinate Court when Ludavicus Ochula (the Applicant) was aggrieved by a ruling delivered on 28<sup>th</sup> November 2024 dismissing his Preliminary Objection to the effect that the suit by Patrick Erot (the Respondent) was statute barred under Section 7 of the [Limitation of Actions Act](#). Subsequent to that appeal dated 16<sup>th</sup> December 2024 and amended on 21<sup>st</sup> February 2025, the Appellant also filed a Notice of Motion dated 13<sup>th</sup> March 2025 and which is the subject of this ruling.
3. By that Motion which is premised on the provisions of Sections 1, 1A, 3A, 3B and 63(e) of the [Civil Procedure Act](#) as well as Order 42 Rule 6(6) of the Civil Procedure Rules, the Applicant seeks the following orders:
  - 1) Spent
  - 2) Spent
  - 3) That pending the hearing and final determination of the appeal herein, this Honourable Court be pleased to order a stay of any further proceedings in BUSIA CMC ELC NO 101 of 2019.
  4. That this Court does give such further orders as it may deem fit and just in the interest of justice.
  5. That the costs of this application be provided.

The Motion is predicated on the grounds set out therein and is also supported by the Applicant's affidavit of even date.
4. The gravamen of the Motion is that the Applicant raised a Preliminary Objection against the Respondent's suit but the same was dismissed vide a ruling delivered on 28<sup>th</sup> November 2024 by the trial magistrate who then proceeded to list the suit for hearing on 27<sup>th</sup> February 2025 without making any finding on the Applicant's applications for stay of proceedings. The trial magistrate then proceeded to hear the case ex-parte on 20<sup>th</sup> February 2025 thus denying the Applicant an opportunity to be heard as he was not aware about that date.
5. Annexed to the motion are the following documents:
  1. Copy of the ruling delivered on 28<sup>th</sup> November 2024.
  2. Copy of Memorandum of Appeal filed herein.



3. Copy of Motion dated 3<sup>rd</sup> February 2025 and filed in the BUSIA CMCC ELC CASE NO 101 of 2019.
4. Copy of proceedings in BUSIA CMCC ELC CASE NO 101 of 2019.
6. The Motion is opposed and the Respondent has filed a replying affidavit dated 30<sup>th</sup> April 2025 in which he has deposed, inter alia, that the Applicant has not demonstrated any sufficient cause to warrant the orders sought and BUSIA CMC ELC CASE NO 101 of 2019 was conducted procedurally with the Applicant being given an opportunity to be heard. That the Applicant has always been in the tendency of missing Court appearances and it is misleading for him to claim that he was condemned un-heard since all parties were aware of the proceedings. That on that hearing date of 20<sup>th</sup> February 2025, Mr Were was present holding brief for Mr Ouma counsel for the Applicant who had not even paid costs of Kshs.30,000 previously ordered by the trial magistrate. The hearing was fixed for hearing at 12.30pm but Mr Ouma and the Applicant did not attend Court and so the case proceeded to hearing. Since the Applicant has already filed an appeal, an order of stay of proceedings will only delay this matter. It is in the interest of justice that this Motion be dismissed with costs.
7. The Court directed that the Motion be canvassed by way of written submissions. The same have been filed both by Mr Ouma instructed by the firm of B. M. Ouma & Company Advocates for the Applicant and by Mr Calistus instructed by the firm of Calistus & Company Advocates for the Respondent.
8. I have considered the Motion, the rival affidavit and annexures as well as the submissions by counsel.
9. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provides that:
  - 6 (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.”

It is clear from the above that before this Court can grant any orders staying execution or proceedings, it must be satisfied that the Applicant has met the following:

1. Show sufficient cause
2. Demonstrate that unless the order for stay is granted, he will suffer substantial loss.
3. Move the Court without unreasonable delay.
4. Offer security.



Substantial loss, as was held in the case of Kenya Shell Ltd -v- Benjamin Karugu Kibiru 1986 KLR 410:

“... is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the Respondents should be kept out of their money.”

And it is not enough merely to assert that substantial loss will ensue. In the same case, it was held that:

“In an application of this nature, the Applicant should show the damages it would suffer if the order for stay is not granted.”

In this case, the Applicant has merely deposed in paragraph 11 of his replying affidavit as follows:

11: “That if am not granted the orders in the application, I will suffer prejudice as I will have been condemned unheard.”

There is no mention of what substantial loss he will suffer yet that is the cornerstone of such application.

10. With regard to the issue that he will suffer prejudice by being condemned unheard. I have perused the record and when the case came up for hearing on 20<sup>th</sup> February 2025, Mr Were was holding brief for the Applicant’s counsel Mr Ouma who was not in Court but who had requested that the file be kept aside upto 12.30pm. The trial magistrate obliged but when the file was called out at 12.50pm, only Mr Nyegenye counsel for the Plaintiff was present. Neither Mr Ouma nor the Applicant were present whereupon the trial magistrate proceeded to hear the Respondent and his witness. The Applicant cannot therefore claim that he was “condemned unheard” as he has deposed in paragraph 8 of his supporting affidavit. This Court is of course not hearing the appeal at this stage. However, as is clear from Order 42 Rule 6(1), the Applicant was required to demonstrate sufficient cause. The fact is that Mr Were held brief for Mr Ouma on the hearing date of 20<sup>th</sup> February 2025 and requested that the file be kept aside but still failed to appear in Court together with the Applicant. That can only lend credence to the Respondent’s assertion in paragraph 6 of his replying affidavit “that the Applicant has always been in the tendency of missing Court appearances.” A party who, knowing of the date of hearing, fails to turn up and offers no explanation for his absence cannot later complain of being condemned un-heard.
11. The remedy of stay of proceedings is an equitable remedy to be made at the Court’s discretion. Such discretion must be guided by the rules of law and equity. It is not to be exercised judiciously and within the dictates of substantive and procedural law. It is not to be exercised fancifully, arbitrarily or at the whims of the Court. Given the conduct of the Applicant and his counsel on 20<sup>th</sup> February 2025 when the case came up for hearing, I see no reason to exercise my discretion in his favour.
12. The Applicant having approached the Court seeking an equitable remedy, he was also required to do so with clean hands. The Respondent has deposed in paragraph 9 of his replying affidavit, and without rebuttal, that the Applicant had not even paid assessed costs of Kshs.30,000 as ordered by the Court. Among the overriding objectives under Sections 1(A) (3) of the *Civil Procedure Act* is for a party “to comply with the directions and orders of the Court.” This demonstrates the Applicant’s reluctance to comply with Court orders. In the circumstances of this case, it would not be in the interest of justice to stay the proceedings in the trial Court when the Applicant has himself demonstrated scant respect of complying with Court orders.



13. The Applicant has also deposed in paragraph 10 of his supporting affidavit that he has “a good appeal with high chances of success.” I have looked at the memorandum of appeal and the impugned ruling. Again, I am not considering the appeal at this stage. However, the arguability of the appeal is among the considerations which this Court must take into account – Kenya Hotel Properties Ltd -v- A.g. & Others, Supreme Court Application No 27 of 2020 [2020 KESC 6 KLR]. Looking at the memorandum of appeal, the thrust of the Preliminary Objection raised by the Applicant, was that the Respondent’s claim which was founded on trespass was statute barred by virtue of the provisions of Section 7 of the *Limitation of Actions Act*. It is common knowledge that trespass is a continuing tort. It cannot be statute barred. As stated in Clerk & Lindsell On Torts 16<sup>th</sup> Edition paragraph 23-01:

“Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues.”

Given those grounds of appeal, I find it difficult to discern the arguability of the Applicant’s appeal with regard to his Preliminary Objection.

14. Finally, what the trial magistrate did was to dismiss the Applicant’s Preliminary Objection. That was a negative order which is incapable of being stayed. Indeed, counsel for the Applicant appreciates that and has proceeded to submit on that issue as follows:

“Additionally, even if the Respondent contend that the order appealed from was a negative order dismissing the Preliminary Objection, it cannot be stayed. We urge your Lordship to agree that a negative order is incapable of stay. However, there are exceptions including situations where the negative order relates to an injunction and like in the instant case, the stay sought is not against the order of dismissal but for stay of further proceedings. Your Lordship you (sic) hasten to add that the stay as sought here is not against execution but stay of proceedings.”

It is true that the ruling sought to be appealed is a negative order but counsel has not provided any authority for the proposition that “there are exceptions” to the rule that negative orders cannot be stayed. I am aware of the holding in the case of Kanwal Sarjit Singh Dhiman -v- Keshavji Jivraj Shah 2008 eKLR where the Court said:

“The 2<sup>nd</sup> prayer in this 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 aide 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.”

That notwithstanding, the gist of the matter is that the Applicant has not met the threshold of the order of stay of proceedings as set out in the case and text cited at the commencement of this ruling. Further, the conduct of the Applicant, in my view, disentitles him to the equitable relief sought and as I have already demonstrated, I am not persuaded about the arguability of his appeal.

15. The up-shot of all the above is that the Notice of Motion dated 13<sup>th</sup> March 2025 is devoid of merit. It is dismissed with costs.

**RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 23<sup>RD</sup> DAY OF OCTOBER 2025.**

**BOAZ N. OLAO**



**JUDGE**

**23<sup>RD</sup> OCTOBER 2025**

