



**Akech & another (Both Suing as the Personal Representatives of the Estate of Henry Akelo Ongo (Deceased)) v Supreme Ballast Limited & another (Environment and Land Appeal E061 of 2025) [2025] KEELC 18548 (KLR) (18 December 2025) (Ruling)**

Neutral citation: [2025] KEELC 18548 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E061 OF 2025  
SO OKONG'O, J  
DECEMBER 18, 2025**

**BETWEEN**

**SELINA OTIENO AKECH ..... 1<sup>ST</sup> APPELLANT  
CONSOLATA AKUMU ANDIEGO ..... 2<sup>ND</sup> APPELLANT  
BOTH SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF  
HENRY AKELO ONGO (DECEASED)**

**AND**

**SUPREME BALLAST LIMITED ..... 1<sup>ST</sup> RESPONDENT  
SHAJANAND HOLDINGS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

- 1 This is an interlocutory appeal against the ruling of Hon. L.D. Ogombe SPM delivered on 19<sup>th</sup> June 2025 in Kisumu CMC ELC No. E043 of 2025 (hereinafter referred to as “the lower court suit”). The Appellants, who are the Plaintiffs in the lower court, are said to have applied for an injunction restraining the Respondents, who are the Defendants in the lower court, from conducting some activities on all that parcel of land known as Title No. Kisumu/Kadongo/1100, which had been amalgamated with other parcels of land to form a new Title No. Kisumu/Kadongo/4651(hereinafter referred to as the suit property). The Appellants’ application before the lower court was dismissed on 19<sup>th</sup> June 2025, prompting this appeal. The parties have done a great disservice to this court by their failure to annex to the application and/or the replying affidavits filed herein copies of the pleadings filed in the lower court. I am completely at a loss as to the nature of the dispute that the parties have before the lower court, the nature and substance of the application that was before the court, the response that was filed thereto, and the ruling of the court on the application, which is the subject of this appeal. The Appellants noted this deficiency in the application at the submissions stage and sought to mitigate



the same by annexing copies of the pleadings filed in the lower court to the submissions. This, however, did not happen. What the Appellants annexed to their submissions was only the replying affidavit filed by the 2<sup>nd</sup> Respondent in the lower court, which is not useful. Having regard to the principles upon which the court determines applications of this nature, I have to sound a warning at the outset that, due to the said inadequacy in the application, it would be difficult for the court to determine whether the threshold for granting the order sought has been met.

- 2 What is before this court for determination is the appellant's Notice of Motion application dated 4<sup>th</sup> August 2025, in which the Appellants have sought an order of a temporary injunction restraining the 2<sup>nd</sup> Respondent from entering, remaining upon, ploughing or carrying out any works of agricultural or industrial nature, particularly quarrying activities, or from erecting or constructing any structure, whether temporary or permanent, upon Title No. Kisumu/Kadongo/1100 as now amalgamated into Title No. Kisumu/Kadongo/4651 (the suit property) or from any other way interfering with the Appellants' peaceful use and occupation of the said property.
- 3 The application has been brought on the grounds set out on the face thereof and on the supporting affidavit of the 1<sup>st</sup> Appellant sworn on 4<sup>th</sup> August 2025. The Appellants have averred that on 19<sup>th</sup> June 2025, the lower court delivered a ruling in which it dismissed the Appellants' application for a temporary injunction against the 2<sup>nd</sup> Respondent pending the hearing and determination of the lower court suit. The Appellants have averred that they were dissatisfied with the said ruling and have preferred the present appeal. The Appellants have averred that following the delivery of the said ruling, the 2<sup>nd</sup> Respondent has intensified the quarrying and excavation activities on the suit property. The Appellants have averred that the said activities will permanently alter the nature and character of the suit property such that it will be impossible for the Appellants to use the property.
- 4 The Appellants have averred that they will suffer irreparable loss, damage and hardship unless the 2<sup>nd</sup> Respondent is restrained from continuing with the said activities pending the hearing and determination of this appeal. The Appellants have averred that their appeal raises serious points of law and has very high chances of success. The Appellants have averred that the appeal will be rendered nugatory unless the orders sought are granted.
- 5 The Respondents oppose the application. The 1<sup>st</sup> Respondent has opposed the application through a replying affidavit sworn by its legal affairs manager, Elka Motanya on 9<sup>th</sup> September 2025. The 1<sup>st</sup> Respondent has averred that the 1<sup>st</sup> Appellant has not demonstrated that she has the authority of the 2<sup>nd</sup> Appellant to swear the affidavit in support of the application on her behalf. The 1<sup>st</sup> Respondent has averred that it was the lawful registered owner of the suit property. The 1<sup>st</sup> Respondent has averred that it transferred the suit property to the 2<sup>nd</sup> Respondent, on whose instructions the property was amalgamated with others to form Title No. Kisumu/Kadongo/4651. The 1<sup>st</sup> Respondent has averred that the 2<sup>nd</sup> Respondent is now the lawful owner of the suit property. The 1<sup>st</sup> Respondent has averred that the Appellants have not demonstrated that they have a prima facie case against the Respondents to warrant the grant of the orders sought. The 1<sup>st</sup> Respondent has averred that the suit property, having been amalgamated with others, is no longer identifiable, and as such, the order of injunction sought cannot attach to it. The 1<sup>st</sup> Respondent has averred that there is no evidence that the 2<sup>nd</sup> Respondent has intensified quarrying activities on the suit property to warrant the grant of the injunction sought.
- 6 The 2<sup>nd</sup> Respondent has opposed the application through a replying affidavit sworn by its director, Chandrant Devji Chhabhadia on 13<sup>th</sup> October 2025. The 2<sup>nd</sup> Respondent has averred that it purchased the suit property, which has since been consolidated with others to form Title No. Kisumu/Kadongo/4651 from the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent has averred that it purchased the suit property for valuable consideration, free from any encumbrances. The 2<sup>nd</sup> Respondent has averred



that after purchasing the suit property, it has been using the same for commercial purposes. The 2<sup>nd</sup> Respondent has averred that no evidence has been placed before the court in proof of the alleged intensified quarrying activities on the suit property, which is likely to alter the nature and character of the suit property to the prejudice of the Appellants. The 2<sup>nd</sup> Respondent has averred that the Appellants have not met the threshold for the grant of the order sought.

- 7 The application was argued by way of written submissions. The Appellants filed submissions dated 5<sup>th</sup> November 2025. The Appellants have submitted that they have established a prima facie case with a probability of success against the Respondents. The Appellants have submitted that they have also demonstrated that they will suffer irreparable loss if the injunction sought is not granted. The Appellants have submitted that even if the application were considered on a balance of convenience, the balance of convenience tilts in favour of granting the injunction sought.
- 8 The 1<sup>st</sup> Respondent filed submissions dated 12<sup>th</sup> November 2025. The 1<sup>st</sup> Respondent has submitted that the Appellants' application has not met the threshold for granting a temporary injunction. The 1<sup>st</sup> Respondent has submitted that the Appellants have not demonstrated that they have a prima facie case and that they would suffer irreparable loss if the orders sought are not granted. The 2<sup>nd</sup> Respondent filed submissions dated 14<sup>th</sup> November 2025 in which it contended that no valid grounds have been put forward to warrant the grant of the orders sought, which it mistook for a stay pending appeal.

### **Analysis and Determination**

- 9 I have considered the Appellants' application together with the affidavit filed in support thereof. I have also considered the affidavits in reply and the submissions by counsel. The Appellants' application seeks an order of a temporary injunction pending the hearing and determination of this appeal by the Appellants. The Appellants' application was brought principally under Order 42 Rule 6(6) of the Civil Procedure Rules. Order 42 Rule 6 (1) and (6) 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 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) ...
- (3) ...
- (4) ...
- (5) ...
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."



10 I am not persuaded that the Appellants have established sufficient grounds warranting the grant of a temporary injunction pending appeal. The principles that this court applies in applications for temporary injunction pending appeal are not different from those employed by the Court of Appeal on applications for temporary injunction pending the hearing of appeals to that court under Rule 5(2) (b) of the Court of Appeal Rules. As set out in Order 42 Rule 6 (6) of the Civil Procedure Rules, the power to grant an injunction pending appeal is discretionary and is guided by the interests of justice. In the exercise of this discretion, the court must be satisfied that the appeal before it is arguable and that if the order sought is not granted and the appeal succeeds, the appeal will be rendered nugatory.

11 In *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others* [2000] eKLR, the Court of Appeal stated that:

The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

12 In *Stanley Kang’ethe Kinyanjui v. Tony Ketter & 5 others* [2013] eKLR, the same court stated as follows in part:

vi) On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.

vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.”

13 As mentioned earlier in the ruling, the parties have not placed before me the pleadings filed in the lower court. I have not seen the application that was filed by the Appellants in the lower court or the ruling of the lower court thereon. I have perused the Appellants’ eight (8) grounds of appeal against the ruling of the lower court. This court can only determine whether the Appellants’ appeal is arguable or not upon perusing the application that was before the lower court, the response thereto by the Respondents, and the ruling of the lower court. In the absence of these documents, which I am unable to access, it is difficult for me to appreciate the issues raised in the grounds of appeal. I cannot, therefore, determine whether any of the grounds of appeal is arguable. Although the quarrying activities complained of by the Appellants may alter the nature and character of the land in dispute, thereby rendering the appeal, if successful, nugatory, without the Appellants establishing that they have an arguable appeal against the lower court ruling, the court cannot issue an order of injunction pending appeal in their favour.

## **Conclusion**

14 The upshot of the foregoing is that the Appellants’ Notice of Motion application dated 4<sup>th</sup> August 2025 has no merit. The application is dismissed with costs to the Respondents.

**DELIVERED AND SIGNED AT KISUMU ON THIS 18<sup>TH</sup> DAY OF DECEMBER 2025**

**S. OKONG’O**

**JUDGE**



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

Ms. Odhong' for the Appellants

Mr. Mwesigwa for the 1<sup>st</sup> Respondent

Ms. Ogola h/b for Maganga for the 2<sup>nd</sup> Respondent

Ms. J. Omondi-Court Assistant

