

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**

**CIVIL CAUSE NO. 273 OF 2015(OS)**

**THE TRUSTEES OF ACK**

**ST. JOSEPH PARISH NGARA** (*Suing through The Church*

*Commissioners of Kenya*) .....

**APPLICANT/RESPONDENT**

**VERSUS**

**OGURA MESHACK OKOTH T/S**

**OBURA**

**&**

**COMPANY**

**ADVOCATES.....RESPONDENT/APPLICANT**

**RULING**

**(On Motion Dated 18/07/2024)**

1. The Applicant by the **motion dated 18/07/2024** seeks orders:-
  - 1) *Spent*
  - 2) *That there be a stay of execution of the Ruling and any other consequential orders issued on 12/06/2024 pending the hearing and determination of the intended appeal to the Court of Appeal.*
  - 3) *That the Honourable Court do issue and order setting aside the orders issued on 22/12/2020 and all other consequential orders emanating from the said ruling.*

2. The application is predicated upon grounds stated at its face, and amplified in the supporting affidavit of **Obura Meshak Okoth** the Applicant sworn on an even date.
3. It is opposed by a Replying Affidavit of **Rev. Japheth Kathanya** who is the vicar in the Anglican Church of Kenya, St. Joseph parish Ngara, the Applicant herein sworn on 21/01/2025.
4. As evidenced in the reliefs sought by the Applicant the ruling issued on 12/06/2024 was so issued by this court (J. Mulwa J), whereas the order sought to be set aside were issued by the Hon. Justice J. Kamau on 22/12/2020.
5. This court's **ruling dated 12/06/2024** was in respect of the Plaintiff's (Applicant) **motion dated 2/12/2022** in which the Plaintiff sought review orders of the Court (J. Kamau J.) issued on 22/12/2020.
6. This court by its **ruling of 12/06/2024** allowed the motion, and directed that a rectified decree (Annexed Decree) be drawn to reflect the orders of the court. Indeed, an appended Decree was drawn by the Deputy Registrar of this court; it is dated 18/09/2025.
7. On **13/06/2024**, a **Notice of Appeal** was filed by the Respondent (**Obura Meshach Okoth t/a Obura & Co. Advocates**) under **Rule 75 of the Court of Appeal Rules, 2010** against the ruling delivered on 12/06/2024 by this

court. The draft Memorandum of Appeal has been perused. It intends to appeal against the whole decision.

8. The Applicant in the motion under consideration dated 15/07/2024 seeks to stay its execution pending hearing and determination of the intended appeal. By implication therefore, the whole ruling of this court dated 12/06/2024 is the subject t of the intended appeal to the court of appeal (the court has not been informed as to whether they appeal has been filed or not).

### **Determination**

9. In the first instance when the Applicant approached the Court by a certificate of urgency and the motion under review, the court denied grant temporary stay orders of execution of the judgment and the Amended Decree.
10. Whereas the court has inherent powers to grant orders of stay of execution pending appeal as provided at **Order 42 Rule (1) of the Civil Procedural Rules (CPR)**, as well as *Power to make such orders as may be necessary for ends of justice to prevent abuse of the process of the court, this power ought to be judiciously exercised.*
11. The Court of Appeal in **Rose Njoki King'au & Another V. Shaba Trustees Limited & Another [2018] eKLR; Co-operative bank Housing Society v. Juliah Kaguri Ruchugo[2024] and Abubakar Mohamed Al Amid V. Fivdaus Siwa Somo [2018]eKLR and Equity Bank**

**Limited [2-13]eKLR among others** all in unisome held that, (in respect of **Order 42 Rule (1) CPR**) that the principles set out must be complied for the court to exercise its discretion in granting the said stay orders.

- 12.** More importantly **Rule 1** is clear that no appeal or second appeal shall operate as a stay of execution proceedings pending appeal, adding that; *nevertheless the court appealed from may for sufficient cause stay 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 deem just.....
- 13. It is trite that invocation of Order 42 Rule (1) or 6(6) CPR** must be preceded by filing of an appeal, in this case a Notice of Appeal to the Higher Court of Appeal. This is so because all orders of the court cannot be anchored in vacuum; considering that the applicant's prayer for stay of execution pending an intended appeal (as at date of filing the application).
- 14.** The Court of Appeal in the case **Abubakar Mohammed Al-Amin v. Fidaus(supra)**, it was laconically observed that *"the learned judge was correct in holding that in the absence of the appeal there was nothing upon which the stay orders*

sought under **Order 42 of the Civil Procedure Rules** could be anchored and

**15.** Additionally, the **Court of Appeal in Equity Bank Ltd v. West Link Mbo Limited [2013] eKLR**, commending on **Rule 5(2) (b) of the Court of Appeal Rules**, which is substantially similar to **Order 42 rule (1) CPR**, left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after filing on an appeal or a Notice of Appeal, and I may add, during the life of the Notice of Appeal.

**16.** See also Court of Appeal decision in **National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another** and a five bench sitting in **Mombasa High Court Constitutional Petition No. 159 of 2018 William Odhiambo Ramogi & 3 Others V. Attorney General & 6 Others; Muslims for Huma Rights & 2 Others ( Interested parties)[2020] eKLR**, while canvassing on a similar issue rendered:-

*“.....the radical remedy of stay of proceedings cannot be granted merely on the speculation that a properly filed appeal might be in place au futuro.*

*A court can only consider a prayer to stay its proceedings once it is confirmed that an appeal has been properly filed before the Supreme Court....”*

- 17.** As far as this court is concerned and as I have stated earlier, none of the parties has informed this court whether a competent appeal has been filed at the Court of Appeal, leaving the court in darkness. The court will not act on an assumption that there is indeed a competent appeal filed and pending in the Court of Appeal.
- 18.** The Court is also at pains to understand why the applicant did not file this application at the Court of Appeal, this Court having rendered itself in its ruling dated 12/06/2024 upon a Review of the orders of J. Kamau J. dated 22/12/2020.
- 19.** Now that it was dissatisfied with the Review Orders, it would have been proper to move to the court of Appeal bearing in mind that this court cannot sit on appeal of its own orders or of a judge of parallel Jurisdiction.
- 20.** The court of Appeal has unfettered power to stay execution of a decree in a matter pending hearing and determination in its court.
- 21.** In the case of **William Odhiambo Ramogi(Supra)** one of the principles it came up with is that in circumstances as in this matter, there must be an appeal pending in the Higher Court (Court of Appeal); that the Applicant must explain why the say has not been sought in the Higher court, and that such higher court would be in a better position to calibrate any order it gives being seized with the matters among other conditions set out under **Order 42 Rule 6 CPR.**

22. Further the decision whether or not to grant a stay of proceedings or stay of execution of a decree or order appealed from is a matter of judicial discretion, to be exercised in the interest of justice; upon weighing the pros and cons and interest of each party in the proceedings.
23. The court must too consider bearing in mind factors as the need for expeditious disposal of cases, prima facie merit of the intended appeals, whether it will probably succeed or not but whether it is an arguable appeal.
24. Having considered the parties arguments substantively in the application dated 2/12/2022 for review of orders of 22/12/2020 by the Hon. J. Kamau J. in my ruling dated 12/06/2024 it would not be prudent or proper for me to revisit the same issues raised in the intended appeal once more as that would not only be unjust unfair but also an invitation to further review, which this court will not do, as by itself would be sitting on appeal of its ruling and indeed the high court.
25. For the going I decline to substantively evaluate and or interrogate and render a ruling in respect of the application dated 18/07/2024 and instead, direct the aggrieved part the Applicant to seek the reliefs stated in the application hereto at the Court of Appeal, if they so deem necessary.
26. **However, to facilitate seamless transit to the Court of Appeal by the Application, if the option is well taken, I**

hereby grant a temporary stay of execution of this court's ruling dated 12/06/2024 for 30 days.

27. There shall be no costs ordered in respect of the motion for reasons stated in the body of the ruling.

Orders accordingly.

Delivered Dated and Signed at Nairobi this 30<sup>th</sup> day of January, 2026.

.....

**JANET MULWA.**

**JUDGE**