

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**  
**AT SIAYA**  
**LAND APPEAL NO. E033 OF 2025**

**PETER ODUOR MAKEDI (Suing as an  
Administrator of the estate of  
JANES OPOYA ODEMBA (Deceased) .....  
APPELLANT**

**VERSUS**

**LUCY AWUOR MUJOK .....1<sup>ST</sup>  
RESPONDENT**

**JACOB OCHOLA OYUGA..... 2<sup>ND</sup>  
RESPONDENT**

**DISTRICT LAND'S REGISTRAR - SIAYA .....  
3<sup>RD</sup> RESPONDENT**

**HON. ATTORNEY GENERAL ..... 4<sup>TH</sup>  
RESPONDENT**

**RULING**

**Introduction**

1. The subject of this ruling is the Notice of Motion application dated 17<sup>th</sup> July 2025 by the Appellant/Applicant herein seeking the following orders: -
  1. Spent.
  2. Spent.
  3. THAT upon the hearing and determination of this Application, there be stay of proceedings and/or further proceedings and/or hearing and/or any action in Chief

Magistrate Court ELC Case No. E080 of 2021 at Siaya Magistrate Court pending the hearing and determination of this appeal.

4. THAT the cost of this Application be provided for.
2. The application was premised on the grounds on its face and the averments in the Supporting Affidavit of Peter Oduor Makedi sworn on 17<sup>th</sup> July 2025 It is deponed on the 8<sup>th</sup> JULY 2024, the suit subject of the instant appeal being Magistrate Court ELC Case No. E080 of 2021 at Siaya was coming up for cross-examination of the Plaintiff having been stood down in the preceding hearing on the 3<sup>rd</sup> June 2025.
3. The applicant depones that on the same day and during the call over, he was in court together with his counsel who indicated to the court they were ready to proceed with the hearing. The matter was scheduled to proceed for hearing and cross-examination of the Plaintiff at 2.00 PM. That at the hour the applicant was present in court but when the matter was called for hearing his advocate on record my was still engaged in another hearing before the Resident Magistrate in Siaya in Criminal Case No. 676 of 2024 that had gone past the time that was allocated hence could not attend court in Magistrate Court ELC Case No. E080 of 2021 in good time.
4. It is deponed that on the application by the 2<sup>nd</sup> Respondent Counsel, the Honourable Court proceeded to dismiss the Plaintiff case for want of prosecution and proceeded to set down the matter for hearing of the 2<sup>nd</sup> Respondent Counterclaim on

the 28<sup>th</sup> October 2025 notwithstanding that the Plaintiff had given evidence in chief on 3<sup>rd</sup> June 2025 and was only to proceed for cross-examination. A copy of the causelist is annexed as POM.

5. It is deponed in allowing the said Application, the court did not accord the applicant though present in court an opportunity to respond or time to raise or communicate with his counsel before allowing the Application.
6. That the absence counsel at the time was not inordinate or deliberate but occasioned by factors and circumstances that were beyond counsel's control. That under the principle of natural justice and a right to fair trial party should not be condemned unheard. and this court has unlimited discretion to set aside the orders dismissing the suit and to reinstate the same for hearing on merit. According to the applicant he has a good case with prospects of success and it was in the interest of justice and fairness that the same be determined on merit and not through summary dismissal.
7. The applicant undertakes to abide to any conditions for expeditious disposal of this appeal and the suit before the lower court. That his right to fair trial will be prejudiced and the appeal rendered nugatory or mere academic exercise should the orders not issue. Is further deponed that this application has been made without delay and the courts intervention is with good faith.

### **The Replying Affidavit by the 4<sup>th</sup> Respondent.**

8. The application was opposed through the Replying Affidavit sworn by Jacob Ochola Oyuga, dated 29<sup>th</sup> August, 2025 together. The application is termed vexatious, frivolous and intended to waste the court's precious judicial time and meant to delay the timely determination of the matter. That the main suit 2021, has been in court a record of 22 times and the Applicant has demonstrated lethargy in proceeding. The incidences are outlined including the fact that the present application is dated 17<sup>th</sup> July 2025 but was served upon the respondents counsel on the 20<sup>th</sup> of August 2025
9. The Respondent avers that his counsel on record has been willing to proceed with the matter all through, including the 8<sup>th</sup> of July 2025. That no documents to show that counsel was engaged in another matter before another court were adduced. Further that once a party appoints an advocate to handle a matter, the said advocate becomes the full representative of the party and the party will only be allowed to address court under special circumstances and even so, the party wishing to address the court in person must seek audience with the court first. That the applicant never sought audience with the court and the blame is misplaced.
10. It is deponed that the right to fair hearing should not be used to delay this matter and the sudden interest shown by the Applicant in prosecuting this matter is deceptive and contrary to his past conduct concerning the prosecution of this matter. Moreover, it is observed that the order sought to be appealed

has not been annexed hence it is difficult for the court to appreciate all the facts surrounding this matter, further, this application ought to have been made before the trial court at the first instance.

11. The Respondent avers that allowing this application will overly burden him and deny him the right to a timely determination of the suit which is not in the interest of justice.
12. The deponents adds should the application be allowed it should be subject to throw away costs to the applicant assessed at Kshs. 50,000/=, payable before the next hearing date.

### **Submissions**

13. This court issued directions that the application be set down for hearing. The applicant filed submissions dated 17/10/2025 Mr. Otieno for the Respondent relied on his clients replying affidavit herein.

### **Analysis and Determination**

14. Having considered all the foregoing, I have framed two issues for determination namely; - Whether the Notice of Motion application dated 17<sup>th</sup> July 2025 has merit and Who bears the costs of the application.
15. Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 is on stay of proceedings and provides as follows:

**“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.”**

16. It is important to note that this is an application for stay of proceedings in the trial court pending the hearing and final determination of the pending appeal and for stay of execution. In the case of **Kenya Wildlife Service - Versus - James Mutembei 2019 eKLR** the Honourable Judge espoused stay of proceedings as opposed to stay of execution when held as follows: -

*“Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent...”*

17. Ringera J in the case of **“Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000”** persuasively stated 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”.*

18. In **Butt - Versus - Rent Restriction Tribunal [1979] eKLR.**

It was put thus by the Court of Appeal: -

*“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett LJ in Wilson Vs Church (No 2) 12 Ch. D ([1879] 454 at P 459. In the same case, Cotton LJ said at P 458:*

*“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”*

19. Applying the foregoing to the facts of the present case, it is not in dispute there is pending a suit filed by the Applicant pitting both parties to this appeal in Siaya Chief Magistrate Court ELC Case No. E080 of 2021.
  
20. The applicant has enumerated his side of the story that on the said 8<sup>th</sup> July 2025, he was in court together with his advocate when the matter was confirmed for further hearing at 2.00 p.m. The Respondent does not deny this fact except that the applicant was in court but never sought the leave of the court to address it and thus the blame is misplaced. The respondent urges that once a party is represented, he appears through his lawyer. But I must add that a case belongs to the client and not his advocate and there are numerous cases where the courts are unanimous on this position.
  
21. It is not in dispute that the matter proceeded for hearing on 3<sup>rd</sup> June 2025, the Applicant testified in chief and the matter was adjourned to 8<sup>th</sup> July 2025 for purposes of cross-examination. As noted, it is not disputed that the applicant was present in court. Notwithstanding his presence and the fact that his evidence in chief had already been recorded, the trial Court, upon an application by Counsel for the 2<sup>nd</sup> Respondent, proceeded to dismiss the Applicant’s suit for want of prosecution and fixed the 2<sup>nd</sup> Respondent’s counterclaim for hearing on 28<sup>th</sup> October 2025.

22. These are facts that are not disputed. Clearly this demonstrates that the Applicant had already taken substantive steps in prosecuting his case the other instances of adjournment notwithstanding meaning he was desirous of having the same determined on merit.
23. The court is laying emphasis on the undisputed facts because I did not have copies of the proceedings though I recognize that at this early stage the lower court file may not have been called for purposes of the appeal having started with interlocutory matters. I will therefore focus on the progress of the matter where the plaintiff has already given his testimony and if this will warrant stay of the proceedings in the trial court.
24. I note that the central issue raised in the appeal is whether the trial Court properly exercised its discretion in dismissing the Applicant's suit in the present circumstances. In the view of this Court, that issue raises serious and arguable questions relating to the exercise of judicial discretion and the right to fair hearing, which are deserving of interrogation at the appellate stage. At this interlocutory stage, the Court is not required to determine the merits of the appeal conclusively, but only to satisfy itself that the appeal is arguable and will not be rendered nugatory.
25. This Court has also considered the fact that following the dismissal of the Applicant's suit, the trial Court fixed the 2<sup>nd</sup> Respondent's counterclaim for hearing. If the proceedings in the lower Court are allowed to continue and the counterclaim

proceeds to hearing and determination, there is a real likelihood that the entire dispute may be conclusively determined before the appeal is heard and determined. Such a scenario would create a situation where the appeal, if successful, would be rendered nugatory or merely academic, thereby defeating the Applicant's undoubted right of appeal.

26. This Court has further considered whether the present application was filed without unreasonable delay. The order dismissing the Applicant's suit was issued on 8<sup>th</sup> July 2025, and the present application was filed on 22<sup>nd</sup> July 2025 in the CTS. This was a period of approximately 10 days which cannot be termed inordinate.
27. On the balance of convenience, this Court finds that the prejudice likely to be suffered by the Respondent, which is essentially delay in the hearing of the counterclaim, can adequately be compensated by an award of costs. On the other hand, the prejudice likely to be suffered by the Applicant if stay is not granted is far more severe, as he risks losing the opportunity to effectively prosecute his appeal and to have his claim heard on merit.
28. Based on foregoing the applicant has demonstrated that his appeal is arguable, that the application was filed without delay, and that the appeal may be rendered nugatory if stay of proceedings is not granted.

29. Accordingly, this Court finds the Notice of Motion application dated 17<sup>th</sup> July 2025 has merit.
30. On costs it is now well established that the issue of Costs is a discretion of the Court and follows the events pursuant to the provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21. I have seen the respondent's proposal for throw away costs. However, given the circumstances of the case I will not award any costs to either party since the applicant was present in the trial court during the impugned hearing date.
31. The upshot of the foregoing is that application is allowed in the following terms; -

***1) THAT a stay of proceedings in Chief Magistrate Court ELC Case No. E080 of 2021 at Siaya Magistrate Court pending the hearing and determination of this Appeal or until further orders of this Honorable Court.***

***2) THAT the matter be set for mention for further directions on the expeditious disposal of the Appeal.***

***3) THAT each party shall bear their own costs of the application.***

Orders accordingly.

**Dated at Siaya this 19<sup>th</sup> Day of February, 2026**

**HON. JUSTICE A. E. DENA**

**JUDGE**

**19/02/2026**

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

No appearance for Applicant/ Appellant

Mr. Mbeke for 2<sup>nd</sup> Respondent

Mr. Okoth Holding Brief for Ms. Essendi for 3<sup>rd</sup> and 4<sup>th</sup> Respondent

Court assistant: Ishmael Orwa