

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

MISCELLANEOUS APPLICATION NO. E028 OF 2025

**(Originating from Rongo Principal Magistrate’s Court
Environment and Land Case No E038 of 2023)**

**IN THE MATTER OF ARTICLE 50 AND 162 (2) (b) OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF AN APPLICATION FOR STAY AND
TRANSFER OF PROCEEDINGS IN RONGO PM’S ELC CASE NO
E038 OF 2023**

AND

**IN THE MATTER OF SECTION 13(1) OF THE ENVIRONMENT
AND LAND COURT ACT, 2011**

BETWEEN

**HEZRON ODHIAMBO OWINO.....1ST
APPLICANT**

**WALTER JUMA OWINO.....2ND
APPLICANT**

VERSUS

**HENRY OMOLLO SIME.....1ST
RESPONDENT**

**LAND REGISTRAR MIGORI.....2ND
RESPONDENT**

RULING

**(On whether there should be stay of proceedings in Rongo
Principal Magistrate’s Court case ELC no. E038 of 2023
and the transfer of the said suit to this court)**

The application

- 1.** The applicants filed a Notice of Motion application dated 26th August 2025 under certificate of urgency. They sought ORDERS THAT:
 - 1. ...Spent**
 - 2. There be a stay in Rongo principal magistrate's ELC Case no. E038 of 2023 pending the hearing and determination of this application**
 - 3. The applicant's case be transferred to the environment and land court, Migori for hearing and determination in accordance with the appropriate jurisdiction of the court**
 - 4. Any other orders that this honourable court may deem fit and just in the circumstances be granted.**
- 2.** The application was premised on the grounds set out on its face as well as the depositions in the Supporting Affidavit of Hezron Odhiambo Owiti, the 1st applicant, sworn on even date.
- 3.** The Applicants' stated that their case against the 1st respondent is founded on both fraud and adverse possession. They added that the case has already been commenced at the Principal Magistrate's Court at Rongo. They stated that they (applicants) had testified but four of their witnesses were yet to testify.
- 4.** In addition to the foregoing the applicants maintained that they intended to plead advance possession regarding LAND PARCEL

KAMAGAMBO/KOLUOCH/1137 which is the subject of this suit. They contended that they have been in occupation of the suit property for more than 12 years.

- 5.** They prayed that the proceedings in the lower court be stayed pending the transfer of the suit to the Environment and Land Court since the lower court does not have jurisdiction to hear and determine matters relating to adverse possession. They argued that it is the Environment and Land Court that is clocked with the jurisdiction to hear and determine matters relating to adverse possession by dint of Article 162 (2) (b) of the Constitution as well as section 13 (1) of the Environment and Land Court Act.
- 6.** The applicants also argued that unless the proceedings in the lower court are stayed, the magistrate may proceed and determine the issue of fraud thus leaving out the question of adverse possession which the applicants are desirous of pleading hence denying them a fair hearing in the appropriate court.
- 7.** Lastly the applicants stated that it is in the interest of justice, fairness, and the proper administration of justice that the proceedings be stayed and the suit consequently transferred to the Environment and Land Court as prayed.
- 8.** The supporting affidavit sworn by the 1st applicant reiterates the contents of the application save to add that the deponed annexed a copy of the plaint dated 14th November 2023 and filed in the lower court for this court's consideration.

Response

- 9.** The 1st respondent filed a Replying Affidavit dated 20th September 2025 and opposed the application. He stated that the applicants' application is bad in law, incompetent, a nonstarter, frivolous, vexatious and a gross abuse of the court process since the prayers sought are not available to the applicants. He further deponed that the applicants' application is pegged on an intention and he added that intentions do not constitute facts in law. In addition to the foregoing, the 1st respondent also stated that the applicants are inviting the court wade into speculation and wishful thinking and thereby issue orders in vacuum.
- 10.** Further, the 1st applicant deponed that that the applicants filed Rongo ELC case no. E038 of 2023. It had been heard to the trial end except for a few witnesses yet to be testify. He deponed that the instant application was a tactic employed by the applicants to frustrate him by derailing the hearing of the suit against the principle of finality of litigation.
- 11.** The 1st applicant reproduced the prayers sought in the applicants' plaint filed in the lower court and deponed that the magistrate's court has jurisdiction to hear and determine the matters of fraud particularized in the plant. He also stated that he filed an amended defence and counterclaim that is yet to heard and determined by the lower court and annexed the same as annexure marked HOS-02.

- 12.** The 1st applicant maintained further that the respondent has not shown cause why the suit should be transferred to the Environment and Land Court. He stated that transferring a suit where the same has been filed in a court of competent jurisdiction would amount to interference and overreach contrary to Article 165 (6) of the Constitution. He also added that granting the orders sought would amount to validation of abuse of court process since the reasons given by the applicants are frivolous and the same is tantamount to interfering with a legitimate process at the magistrate's court.
- 13.** In addition to the foregoing the 1st respondent deponed the applicants cannot purport to raise an issue of adverse possession over the same title whose validity they are challenging in the lower court. He added that the applicants are actively challenging his title in Rongo ELC Case E038 of 2023 and also maintained that fraud and adverse possession cannot be pursued in the same suit. Moreover, the 1st applicant also asserted that his was a claim of adverse possession but it ought to be based on facts. That an intention to pursue adverse possession should not be a bar to the proceedings at the lower court.
- 14.** The respondent concluded that application was brought prematurely, in bad faith, and that it constitutes abuse of the court process and as such, the same should be dismissed and costs awarded to him.

Submissions

- 15.** The application was canvassed by way of written submissions. It is important at this point do note that the 2nd respondent did not file its written submissions.
- 16.** The applicants filed their submissions dated 28th September 2025 in support of their application. They identified three issues for determination by this court, being whether the Principal Magistrate Court at Rongo has jurisdiction to entertain a claim founded on adverse possession; whether this honourable court should stay the proceedings and transfer the suit to itself; and whether the applicants have demonstrated sufficient cause for the grant of the orders sort.
- 17.** As to whether the lower court has jurisdiction to hear and determine a claim of adverse possession, the applicants relied on Section 38 of the Limitation of Actions Act to argue that such claims should be initiated by way of originating summons in the High Court or at the Environmental and Land Court. As such, they argued that the lower cost does not have jurisdiction to hear and determine matters relating to adverse possession. They relied on the authority of **Owners of Motor Vessel “Lillian S” versus Caltex Oil (Kenya) Limited [1989] KLR** to argue that where a court has no jurisdiction, it should down its tools henceforth.
- 18.** On whether the orders of stay of proceedings as well as transfer of the suit to this court should be granted, the applicants argued that they are seeking to transfer the suit to this court in order to enable them to file an originating

summons for purposes of invoking the jurisdiction of this court. They added that their claim raises mixed questions of law and fact including long continuous occupation of the suit property as well as fraudulent dealings, which questions they maintained, fall within the ELC's statutory jurisdiction.

- 19.** The applicants submitted that, unless the orders sought are granted, they would suffer irreparable harm as the respondent has already disposed the suit property to a third party and the lower court lacks jurisdiction to grant an appropriate relief.
- 20.** Regarding their intention, the applicants maintained that this court made an erroneous reasoning by stating that their intention does not exist factually. They submitted that they seek to amend their pleadings and the file originating summons in this court, which procedure is allowed in law. The applicants sought refuge under Article 159 of the Constitution and submitted that courts have an obligation to administer justice without due regard to procedural technicalities. They maintained that failure by this court to allow their application would undermine their access to justice.
- 21.** Further to the above, the applicants submitted that there was no delay in filing their application since the issue of adverse possession cropped up during the hearing at the lower court and that if their prayers are granted, the 1st respondent would not suffer any prejudice. To this end they maintained that even if there was delay in filing the application, the same is excusable so as warrant the hearing of their matter on merit.

22. Lastly the applicants prayed that this court stays the proceedings in Rongo ELC case no. E38 of 2023, and transfers the said suit to this court for hearing and determination. Besides, the applicants prayed that this court grants them leave to file Originating Summons before this court raising issues of adverse possession. They also prayed for costs of the application.

First Respondent's submissions

23. The 1st respondent filed his submissions dated 6th October 2025. He submitted that prior to the filing of the instant application, the applicants had filed rongo ELC Case no. E038 of 2023 challenging the validity of its title and arguing that the same had been acquired fraudulently.

24. The 1st respondent raised two issues for determination by this court namely whether the proceedings in ELC E038 of 2023 should be stayed, and whether the said suit should be transferred to this court.

25. On whether the proceedings should be stayed the 1st respondent argued that stay of proceedings is a fundamental interruption of a party's litigation and submitted that the same should only be allowed sparingly and where there is unquestionable evidence that allowing the would be necessary. The 1st respondent relied on the case of **Port Florence Health Care versus Crown Health Care Limited [2022] eKLR** to argue that the discretion to allow stay of proceedings should be

exercised judiciously and in very rare and exceptional circumstances.

- 26.** In addition to the foregoing the 1st respondent argued that the applicants have not demonstrated any cause for the grant of stay of proceedings other than merely stating that they wish to plead fraud and adverse possession before this court. They also submitted that an intention is not factual until the same has been actualized and that, should the court grant the stay order sought, the same would remain at large for the applicants.
- 27.** Further, the 1st respondent argued that the prayers before the trial court do not relate to adverse possession stated that the court at Rongo has pecuniary and geographical jurisdiction to hear and determine the suit since the green card record shows that the land measures 3 acres. Moreover, he submitted that staying the proceedings before the trial court would amount to interference and overreach since the lower court has jurisdiction.
- 28.** On the issue of the transfer of the suit to this court, the 1st respondent submitted that such a transfer would contravene the principle of *sub judice*. Equally, he submitted that the applicants want to plead both adverse possession and fraud before this court yet they have never raised objection on the competence of the trial court to determine the matter.
- 29.** The 1st respondent likened the applicants' actions to forum shopping in a bid to knowingly, intentionally and deliberately delay the wheels of justice. He relied on section 18 of the Civil

Procedure act to argue that should consider among others: the motive and nature of the proceedings; the nature of relief sought; and the interest of the litigants among others.

30. The 1st respondent relied on the case of **Abraham Mwangi versus Simon Mbiriri Wanjiku and another [2012] eKLR I** to argue that a suit filed in a court without jurisdiction cannot be transferred to another court since the same is a nullity in law and there is nothing that the court can purport to transfer. He maintained that there is no suit currently lying and pending determination before Rongo Magistrates Court that exceeds the courts jurisdictional limits.

31. In addition to the above stated, the 1st respondent submitted that the prayers sought in Rongo Magistrate's Court ELC E038 of 2023 which forms the basis of the instant application falls within the jurisdiction of the court killed he submitted that a mere expression of an intention not yet actualized cannot be a ground on which a court can grant the order of transfer. He concluded that exercising such a discretion on the part of the court would be tantamount to giving an order in vacuum or putting something on nothing; it would eventually collapse.

32. Having so submitted, the 1st respondent prayed that this court dismisses the applicants' application with costs.

Issue, Analysis and Determination

33. The pertinent issues for determination herein are whether the applicants should be granted stay of proceedings in Rongo ELC

Case no. E 038 of 2023; whether the suit should be transferred to this court; and, ultimately who should bear the costs of the application.

- 34.** The court has considered the application in its entirety, the response thereto as well as the submissions of the parties. The applicants seek stay off proceedings at the trial court and pray that the suit be transferred to this court on the basis of their intention to plead adverse position before this court.
- 35.** They contended that this court is the appropriate forum for ventilating their issues, which they stated to be fraud and adverse possession and further maintained that the trial court does not have jurisdiction to hear and determine matters relating to adverse possession period. The applicants equally argued that should this court not allow their application their application, they will suffer irreparable harm since the issues relating to adverse possession would be left unheard.
- 36.** The 1st respondent on the other hand stated that the application is misplaced and aimed at delaying litigation to his detriment. He further argued that the claim of adverse possession was never an issue before the Magistrates Court and that the applicants have never objected to the court's jurisdiction to hear and determine the matter.
- 37.** Equally important is the argument that the applicants are seeking orders in vacuum since the application is merely based on an intention to file a suit before this court. This, the 1st respondent argues, cannot be the basis of granting the stay of

proceedings and transfer of the suit as sought by the applicants.

38. On whether the applicants should be granted the stay of proceedings orders, it should be noted that stay of proceedings is a discretionary power of the court, which must be exercised judicially. Aburili J. in **Makena v Nalwa (Civil Appeal E127 of 2024) [2024] KEHC 13086 (KLR) (23 October 2024) (Ruling)** observed that:

16. All these factors must be considered, in a given case, in the spirit concisely expressed in Halsbury's Laws of England, 4th Edition, Vol. 37 at p. 330, that:

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 reasonable doubt, ought not to be allowed to continue. (emphases added)

17. 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 facts of his case (emphasis added).

*18. In other words, a stay of proceedings is a radical remedy which is only granted in very exceptional circumstances. Ringera J. in *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No 43 of 2000)* had this to say on this matter of stay of proceedings:*

“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.”
(Emphasis added)

- 39.** I am persuaded by the learned judge's view. Thus, guided by the above stated principles, this court is called upon to determine whether the particular circumstances of this case warrant the grant of stay of proceedings as played by the applicants. It has examined the Plaint filed by the applicants herein at the lower court. It notes that adverse possession was not among the reliefs sought by the applicants.
- 40.** Although both parties agree that the suit has just has been substantially, they do not seem to agree on number of witnesses yet to be heard. The applicants maintain that their suit is premised on fraud and adverse possession, hence the need to file a suit before this court since the lower court does not have jurisdiction to hear and determine matters relating to adverse possession. That claim does not seem to be correct. The application is specifically hinged on a non-existent claim of adverse possession which, if at all, is yet to be filed.
- 41.** It is trite that under Section 107 of the Evidence Act, a party who desires the court to rely on a certain set of facts to prove the existence or non existence of other set of fact bears the burden of prove or adducing evidence on that set of prerequisite facts in order to benefit from a favourable finding of the court as he wishes. In this case, it was incumbent on the applicants to prove the existence of a claim of adverse possession in the lower court.
- 42.** The applicants have sought refuge under Article 159 of the Constitution, arguing that the same mandates court to ensure

the expeditious disposal of cases without and due regard to procedural technicalities.

43. In determining whether or not to grant stay of proceedings as prayed by the applicants, this court must balance among others, the pros and cons of granting or otherwise not granting the orders. This court is of the opinion that the matter has been heard substantially and granting the state orders sought would amount to delaying the hearing and determination of the same contrary to the tenets of Article 159 of the Constitution.

44. More importantly, the court has considered that the applicants seek to be granted orders on the basis of a claim that has not yet been filed. In **Andrew Okoko v Johnis Waweru Ngatia & another, Machakos civil appeal no. 13 Of 2028, Odunga, J** (as he then was) held that:

25. On the face of it the time for filing an appeal has lapsed. The applicant has not disclosed the reasons why the appeal has not been lodged or whether he has applied for enlargement of time to do so. The decision whether or not to grant stay is no doubt an exercise of discretion and a party seeking favourable exercise of discretion must disclose all material facts to enable the Court do so. Where an appeal has not been filed and the applicant seeking a stay pending the filing of the appeal, the applicant must disclose the steps being taken to file the

appeal so that the Court does not grant the stay in vacuum.

45. The upshot of the foregoing is that the prayer on stay of proceedings fails. Since courts rely on facts and not conjecture or guesswork or intent (except in criminal cases regarding certain offences), it also follows that the prayer of transfer of the suit to this court also fails.

46. The Applicants must bear the costs of the application.

RULING DATED, SIGNED AND DELIVERED virtually via the Teams Platform this **6TH DAY OF FEBRUARY 2026.**

HON. DR. IUR. NYAGAKA

JUDGE

IN THE PRESENCE OF,

Mr. Ngani Advocate holding brief for Juma Ouko for the Applicant

Mr. Achola Advocate for the 1st Respondent