



**Osoro v Ngibuini (Environmental and Land Originating Summons
E054 of 2025) [2026] KEELC 2754 (KLR) (12 May 2026) (Ruling)**

Neutral citation: [2026] KEELC 2754 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E054 OF 2025
CA OCHIENG, J
MAY 12, 2026**

BETWEEN

EZEKIEL OMBASO OSORO PLAINTIFF

AND

JOHNSON GIKANDI NGIBUINI DEFENDANT

RULING

1. What is before the Court for determination is the Plaintiff's Notice of Motion application dated 28th October 2025 where he seeks the following Orders:
 - a. Spent.
 - b. Spent.
 - c. That there be a stay of proceedings in MCELC No. E091 OF 2022 (Milimani Commercial Courts) pending the hearing and determination of ELCLOS NoE054 of 2025 (Milimani Environment and Land Court).
 - d. That costs of this application be in the course.
2. The application is premised on grounds on its face and on the Plaintiff's supporting affidavit. He avers that the Defendant instituted MCELC NO. E091 OF 2022, where he has sued him as the 3rd Defendant for trespass on Plots No. 1 and 4 on LR No. 209/9566 Kayole Saika registered as Grant No. IR 39403, which land is also the subject matter herein. Further, that in the said matter, he has pleaded adverse possession in his defence and counterclaim and since this is the Court with jurisdiction to determine issues of adverse possession, he filed the instant suit seeking to be registered as the legal and beneficial owner of the suit property by virtue of the said doctrine of adverse possession.



3. He contends that the subordinate Court's proceedings should be stayed so as to avoid the possibility of conflicting decisions. Further, that this Court has supervisory powers over the Magistrate's Courts and allowing the application will not cause any prejudice to the Defendant.

Response

4. The Defendant filed a Preliminary Objection dated 13th December 2025 in which he contends that the supporting affidavit sworn by the Plaintiff in support of the instant Notice of Motion is defective for offending Section 4 (1) of the *Oaths and Statutory Declarations Act*, as the postal address of the Commissioner for Oaths appended to the Plaintiff's affidavit is the same as that of her advocate on record.
5. He also filed a replying affidavit in which he avers that the application is intended solely to delay the expeditious disposal of MCELC No. E091 of 2022, which is already fixed for hearing and where the Plaintiff fully participated in pretrial procedures and even filed a Defence and Counterclaim. Further, that under Section 9 of the Magistrates Courts' Act, Magistrates' Court have jurisdiction to determine issues of adverse possession and since the Plaintiff raised the issue in his defence at the subordinate court, this suit is sub judice.
6. He insists that staying the subordinate Court's proceedings will greatly prejudice him as he has been prosecuting the case for more than three (3) years. He points out that the Plaintiff's conduct in the subordinate Court's proceedings is that of dealing with the matter through seeking adjournments and raising fresh objections to obstruct expeditious disposal contrary to the principles at sections 1A and 1B of the *Civil Procedure Act*. Further, that the Plaintiff has not demonstrated any special, exceptional or compelling circumstances to warrant the drastic remedy of staying a subordinate Court's proceedings.
7. He also avers that this Court's Supervisory jurisdiction under Article 165(6) of the *Constitution* is not a substitute for ordinary Appellate or trial processes, and cannot be invoked merely because a party prefers another forum.
8. The application was canvassed by way of written submissions.

Submissions

9. The Plaintiff submits that sharing a mere address does not disqualify a Commissioner for Oaths from commissioning an affidavit. Further, that there is no evidence that Ms. Jane Miyogo, who commissioned the supporting affidavit in support of the instant Notice of Motion application works and or is a partner in the firm of messrs Masara & Company Advocates, who are his advocates on record.
10. On his part, the Defendant submits that his Preliminary Objection raises a pure point of law, discernable from the face of the record, thus it satisfies the test in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 69. Further, that under Order 51 Rule 4 of the Civil Procedure Rules, it is trite that every interlocutory application must be supported by a competent affidavit thus where a supporting affidavit is fatally defective, the application is rendered incompetent ab initio. He insists that the Plaintiff's supporting affidavit was commissioned by a Commissioner for Oaths who shares the same postal address and professional premises as the Plaintiff's advocate on record, which is an arrangement that offends Section 4(1) of the *Oaths and Statutory Declarations Act* as the affidavit is tainted by conflict and illegality.
11. He submits that compliance with the *Oaths and Statutory Declarations Act* is a substantive legal requirement, not a mere technicality to be cured under Article 159 (2) (d) of the *Constitution*.



12. On the Plaintiff's prayer for stay of proceedings, he submits that it is a drastic, exceptional remedy whose effect is to freeze the right of a litigant to prosecute a case already in Court thus it must be granted sparingly, cautiously and in the clearest of cases and in the instant case, there is no demonstration that it is a clear case for grant of the said orders as the Plaintiff is calculated to purely derail hearing of the suit.
13. To buttress his averments, the Defendant relied on several authorities including; Hunker Trading Company Limited v Elf Oil Kenya Limited [20101] eKLR: Mumo Matemu v Trusted society of Human Rights Alliance & 5 others [2013] eKLR and Alfred Mutua v Ethics and Anti-corruption commission [2015] eKLR among others which the Court has carefully considered.

Analysis and Determination

14. Upon consideration of the instant Notice of Motion application including the respective affidavits, Notice of Preliminary Objection and rivalling submissions, the only issue for determination is whether Milimani MCELC No. E091 of 2022 should be stayed pending outcome of this suit and if the Defendant's Preliminary Objection is merited.
15. The Plaintiff filed the instant application seeking stay of proceedings in MCELC NO. E091 OF 2022, where the Defendant herein has sued him as the 3rd Defendant for trespass on Plots Nos. 1 and 4 on LR No. 209/9566 Kayole Saika registered as Grant No. IR 39403.
16. In opposition, the Defendant filed a Preliminary Objection on the basis that the Plaintiff's supporting affidavit to the Notion of Motion is defective for offending Section 4 (1) of the [Oaths and Statutory Declarations Act](#), as the postal address of the Commissioner for Oaths appended to the Plaintiff's affidavit is the same as that of his advocate on record.
17. On his part, the Plaintiff contends that there is no evidence that Ms. Jane Miyogo, who commissioned the supporting affidavit in support of the instant Notice of Motion application works in the firm of messrs Masara & Company Advocates, who are his advocates on record. Further, that sharing a mere address does not disqualify a Commissioner for Oaths from commissioning an affidavit.
18. Section 4(1) of the Oaths and Statutory Declaration Act provides as follows:

“ A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court: Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.”
19. While discussing the import of the said provisions, the Court stated as follows in Mwandi v Songe (Environment and Land Miscellaneous Case E005 of 2025) [2025] KEELC 5145 (KLR) (10 July 2025) (Ruling):

“ Section 4(1) of the [Oaths and Statutory Declarations Act](#) is a statutory requirement. It cannot be taken as a mere technicality or a mistake of counsel which can be executed under Article 159 of the [Constitution](#). Dola Indidis is the lawyer who drafted the pleadings in this case. He is also the one who commissioned the affidavit in support of the Notice of Motion.”



20. In the case of *Kaiser Investments Limited v Hua Run Company Limited & 3 others* (2021) eKLR, it was held as follows:

“In my view, the proviso to Section 4(1) of the Oaths and Statutory Declaration Act can be the subject of different interpretation. Where a firm of advocates has several lawyers and only one of them is appearing in a matter, a party who swears an affidavit before different advocates within the same firm may justify such an action. All what is contained in such affidavits is averments known to the deponent and striking out the affidavit might be another draconian exercise. Advocates are given the Commissioner of Oaths right as individuals and not as a ground in one firm. The Commissioner for Oaths takes the personal responsibility of ensuring that the deponent is telling the truth as per the affidavit. That responsibility is not a joint or communal duty of a firm of advocates. It can be argued that good practice would entail having affidavits drawn by firm on record in a matter sworn before a different firm of advocates. In my view, failure to do so does not mean that the averments are totally false or defective”.

21. From the arguments of the respective parties, noting that the Commissioner for Oaths only shares the same postal address with the Plaintiff’s advocates, while associating myself with the decisions cited, I opine that there is no clear demonstration that the supporting affidavit is faulty and should be struck out. There is no evidence presented that the said Commissioner for Oaths indeed works for the firm representing the Plaintiff. It is trite that the role of the Commissioner for Oaths is to take the personal responsibility of ensuring that the deponent is telling the truth as per the affidavit. However, the Defendant has not demonstrated that the Plaintiff’s averments are false nor what prejudice he stands to suffer if the Commissioner for Oaths shares the same postal address as the Plaintiff’s advocates law firm. In the foregoing, I decline to find the supporting affidavit fatally defective. I have disallowed the Preliminary Objection.

22. On the second issue, the Plaintiff seeks stay of proceedings in the subordinate court on the basis that he has raised the issue of adverse possession in his defence and counterclaim in the matter before the said Court and that it is this Court, which has jurisdiction to determine the said issue. Further, that he had also filed the instant suit seeking to be declared owner of the suit land through adverse possession. The Defendant is opposed to the stay of the subordinate Court case, arguing that a stay of proceedings would disadvantage him, as it only serves to delay justice and deny him his right to be heard. Further, that the said suit has already been set down for hearing.

23. In *Kenya Wildlife Service v James Mutembei* [2019] eKLR, it was held that:

“Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on the right of access to justice, the right to be heard without delay, and overall, the right to a fair trial. Therefore, the test for stay of proceedings is high and stringent. This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases... Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation...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 no cause of action in law or equity.....”



24. Further, this Court (Angote J) stated as follows in *Laly Furnishing House Limited v Kenya National Highways Authority & 2 others* [2025] KEELC 429 (KLR) when considering an application of a similar nature;

“An order of stay of proceedings, which is distinct from an order of stay of execution, is one that should be granted in exceptional circumstances. The Halsbury’s Laws of England, 4th Edition, Vol. 37 at p. 330 states as follows with respect to applications to stay proceedings: “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....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 this case.”

25. I note the suit in the subordinate Court was filed in 2022 while the instant suit was filed three years later in 2025. Further, the Plaintiff has confirmed that he filed a Defence including Counterclaim in the subordinate Court case but I note he proceeded to file the instant suit. It is ironical that the Plaintiff had subjected himself to the jurisdiction of the subordinate Court, filed his defence and counterclaim, undertook pretrial directions in preparation for the hearing and then decided to file the instant suit claiming that the said Court did not have jurisdiction.

26. In my view, I find that the Plaintiff is not being candid and sought to disrupt the lower Court matter, which has been set down for hearing. I opine that the Plaintiff should have sought to have the lower court matter transferred to this Court and consolidated with this suit, instead of seeking to stay it. In the foregoing while associating myself with the decisions cited, I am unable to stay the subordinate Court proceedings as they were commenced much earlier than the instant suit.

27. In the circumstances, I find the instant Notice of Motion application including the Notice of Preliminary Objection unmerited and will disallow them.

28. Costs will be in the cause.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2026

CHRISTINE OCHIENG

JUDGE

In the presence of:

Ochola for Odigi for Defendant

Olonde for Masara for Applicant

Court Assistant: Joan

