

REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT SIAYA

ELC LAND CASE NO. E022 OF 2022(OS)

ERICK OCHIENG SEWE.....
PLAINTIFF

VERSUS

MICHAEL OWINO OGUTU.....
DEFENDANT

RULING

- 1 The applicant Erick Ochieng Sewe is the plaintiff defendant in this suit. By way of Notice of Motion dated 25/10/2025 he seeks orders of stay of proceedings and execution of the order/ruling dated 17/7/2025 pending hearing and determination of an intended appeal against the said ruling.
- 2 The application is premised upon the grounds on its face and the supporting affidavit of Erick Ochieng Sewe sworn on 25/10/2025. It is deponed that this matter was conclusively heard and judgment rendered on 19th September 2024. A copy of the said judgment is annexed.
- 3 That, the Respondent was consistently served and duly notified of the progress of the matter and it is thus unjustifiable for him to turn around and claim not being

served in their application dated 11th March 2025. Copies of the said order and notice of appeal respectively.

- 4 That, the Applicant being aggrieved by the court's ruling/order issued on 17th July 2025, lodged an appeal over the said decision. That, it is imperative that the court stay its order and proceedings in this court pending the hearing and determination of the court of appeal in regards to this matter.
- 5 That the Respondent herein stand to suffer no prejudice, if the stay of proceedings orders prayed for herein are granted. That not granting the stay orders herein will render the appeal nugatory.

GROUND OF OPPOSITION DATED

- 6 The record bears grounds of opposition dated 27/01/2026 as follows; -
 - a) That the rules of natural justice and fair hearing override the spirit and the intention of the Applicant in the application which is to have the Respondent condemned unheard.
 - b) That the application is aimed at denying the Respondent a clear opportunity to be heard thus directly denying the Respondent the constitutional right for fair hearing.
 - c) That it is only fair that the matter proceeds on merit.

- d) That no draft Memorandum of Appeal has been filed to assist the court determine whether the intended Appeal has any chances of success.
- e) That the Respondent already complied with the court's ruling of 17.7.2025 by filing and serving a replying affidavit to the amended originating summons.
- f) That the application lacks merit, is an abuse of court process and the same should be dismissed with costs.

SUBMISSIONS

- 7 The court on 10/11/2025 issued directions that the application be heard by way of written submission. None of the parties complied with the orders.

ANALYSIS AND DETERMINATION

- 8 Having considered the foregoing, the main issue for determination is whether the orders sought by the applicant ought to be granted.
- 9 The application is brought under the provisions of Section 1A and 1B of the Civil Procedure Act and Order 42 Rule 2.
- 10 The subject of this application is the ruling delivered by this court on **7/07/2025**. As a way of background this matter was heard and determined and judgement delivered on 19/09/2024. The defendant who is the respondent in the present application sought orders setting aside the judgement. I allowed the application on the following terms:

- I. The exparte judgement of Hon A.Y. Koross delivered on 19/09/2024, the decree issued thereof and all consequential orders thereto be and is hereby set aside.***
- II. That leave be and is hereby granted to the defendant applicant to file and serve his defence and response to the Amended Originating Summons, Witness statements and documents within 14 days of the date of this ruling.***
- III. That the Plaintiff/Applicant in the Amended Originating summons herein may respond further upon service in (ii) above within 14 days.***
- IV. That the Plaintiff shall remain in occupation of the suit property L.R North Ugenya/Sega/350 and the status quo on the ground shall be maintained pending the hearing and determination of the suit on merits. The defendant shall not interfere with the occupation thereof in any manner.***
- V. Pursuant to the implementation of (I) above there shall be no further registration of any dealings by the relevant land registrar against the suit property L.R North Ugenya/Sega/350 pending further orders of the court.***

- VI. That the fact that judgement herein has been set aside shall not take away any defence a party may have against the same.**
- VII. The costs of this application shall abide the outcome of the suit.**
- VIII. Leave to appeal this decision is granted if required.**

11 The applicant in the present application is aggrieved by the foregoing intends to appeal against the above ruling and desires that these proceedings be stayed for the main reason that if the matter proceeds the intended appeal will be rendered nugatory.

12 The record bears a Notice of Appeal dated 29/7/2025 which was received by the court on 30/7/2025. The same is filed pursuant to Rule 77 of the Court of Appeal Rules 2022.

13 The power to stay proceedings is donated by the provisions of order 42 of the Civil Procedure Rules. Order 42, rule 6. (1) which provides; -

'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.'

- 14 The court therefore has to rely on the settled principles on when proceedings may be stayed pending appeal. The question of whether or not to grant an order for stay of proceedings is a discretionary one. This discretionary power must be exercised judiciously. The court has to consider if it will be in the interests of justice to grant the same. Ringera J, (as he then was) in **Global Tours & Travels Limited; Nairobi HC Winding up Cause No. 43 of 2000** stated that: -

“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”.

- 15 In the case of **David Morton Silverstein vs. Atsango Chesoni [2002] eKLR**, the Court of Appeal citing **Kenya Commercial Bank Ltd vs. Benjoh Amalgamated Ltd & Another [1998] eKLR** held that it is not the law that a stay of proceedings cannot be granted but that each case depends on its own facts.
- 16 I have noted the absence of the Memorandum of Appeal but in my view, this is not fatal. But I must state that at this juncture the orders of stay of proceedings are being sought from the court that rendered the ruling. It would therefore be misplaced to consider whether or not the appeal is arguable. This would be the preserve of the Court of appeal were the application to be made before that court. But as long as the matter is before this court then I cannot purport to comment on my own decision. However, the court should also be concerned with the question of whether or not the appeal will be rendered nugatory.
- 17 Guided by the law and above judicial decisions this court will therefore apply itself to whether the reasons or grounds advanced by the applicant in support of the

application are sufficient, whether it would be in the interest of justice to grant such orders which will necessitate weighing the pros and cons of granting or denying the same. The circumstances of the case and its history would also be considered in this regard vis a vis the overriding objectives of the Civil Procedure Act and Environment and Land Court Act.

- 18 Would the Appeal be rendered nugatory should the court decline to grant an order staying these proceedings? I think this is where the crux of the matter lies.
- 19 In the present case the effect of the orders issued by this court is that this matter shall be heard afresh before this court and this is what the applicant is aggrieved with reiterating that the matter should not be heard afresh. This decision on whether the matter should or should not be heard afresh can only be made by the appellate COURT noting that I have already found in favor of the matter being heard afresh to enable the defendant participate in the proceedings.
- 20 Should the court decline the orders of stay and proceed to hear the case? In my view no for the reason that indeed the objective of the appeal will have been lost. Even assuming the appeal were to be allowed then the proceedings in this court would have been rendered unnecessary and a clear waste of Judicial time which must not be wasted in proceedings that would end up being academic exercise. See ***Muchanga Investments Ltd Vs***

Safaris Unlimited (Africa) Ltd & 2 Others [2009]
eKLR,

- 21 The upshot of the foregoing is that the Notice of Motion dated 25/10/2025 is hereby allowed and Costs shall abide the outcome of the appeal.
- 22 In the meantime, this matter shall be fixed for Mention from time to time to monitor the progress of the intended appeal. The respondents shall be at liberty to apply.

Orders accordingly.

DATED at SIAYA this 14TH DAY of MAY, 2026

HON. JUSTICE A. E. DENA

JUDGE

14/05/2026

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

Mr. Obiero Advocate for the applicant

No appearance for Respondent

Court assistant: Abiud Wekesa