



Omware t/a Molo Garage v Njeri & 2 others (Environment and Land Appeal E035 of 2025) [2025] KEELC 5542 (KLR) (22 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5542 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E035 OF 2025**

JG KEMEI, J

JULY 22, 2025

BETWEEN

MAURICE ODHIAMBO OMWARE T/A MOLO GARAGE APPELLANT

AND

SALOME NJERI 1ST RESPONDENT

BEATRICE MUTHONI 2ND RESPONDENT

**ALPHONCE MUNGAI (SUING AS ADMINISTRATORS OF THE ESTATE OF
PAULINE WANJIKU NDUNGU) 3RD RESPONDENT**

RULING

(In respect of the Appellant's Application dated 19/2/ 2025)

1. This Ruling is in respect of the Appellant's application dated 19/2/2025. The application is anchored on the provisions of Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 42 Rule 6 (1) of the Civil Procedure Rules as well as Article 159 of *the Constitution*. The Appellant substantively prays for orders that;
 - a. Upon interpartes hearing of this application the Honourable Court be pleased to grant an order of stay of proceedings in MC. ELC E050 of 2021 pending hearing and determination of the main appeal.
 - b. Costs be borne by the Respondents.
2. The application is premised on the grounds on the face of it and replicated in the Supporting Affidavit of Maurice Odhiambo Omware, the Applicant herein deponed on 19/2/2025. The Applicant avers that he is aggrieved by the Ruling delivered at the Lower Court at in MCELC E050 of 2021 on 23/4/2024. He avers that the Respondent herein filed an application in the Subordinate Court seeking to review and set aside the orders of 14/3/2023 dismissing the suit and the same be reinstated. He



contends that the Respondent herein had instituted a similar suit which vide Misc. Application 1236 of 2018 in which they were seeking eviction orders amongst other orders. That the matter proceeded and the same was dismissed with costs.

3. The Applicant deposes that the Respondents being aggrieved with the orders of the Court preferred an Appeal being Civil Appeal No. 456 of 2019. However, the Respondent was not keen on prosecuting the appeal hence the Court dismissed it on 20/1/2023.
4. He avers that the Respondent again filed a suit before the Chief Magistrate's Court being MCELC E050 of 2021 touching on the same issues which had already been determined by a Court of similar jurisdiction. The suit was dismissed but was later reinstated vide the Ruling of 23/4/2023. It is on that basis that he has preferred an appeal to this Court evident by the attached Memorandum of Appeal. He argues that the appeal filed herein is merited with overwhelming chances of success. That unless the Court intervenes and grants the orders sought, the appeal herein shall be rendered nugatory and subject him to irreparable damage and great substantial loss.

Replying Affidavit by the Respondents

5. The application was vehemently opposed by the Respondents who filed Replying Affidavit dated 25/2/2025 as well as Grounds of Opposition dated 26/2/2025.
6. In their Replying Affidavit sworn by Salome Njeri, the 1st Respondent herein, the Respondents aver that the late Pauline Wanjiku Ndungu was the registered Proprietor of the parcel of land known as Title No. Dagoretti/Karandini/T.32, the suit property herein. In reference to the genesis of the appeal, the deponent avers that the Appellant delayed in the filing of his Defence before the Lower Court. That subsequently, an interlocutory judgment was entered and the matter was slated for pre-trial conference. That the Appellant then raised a Preliminary Objection and prosecuted it ex parte resulting in the dismissal of the suit on the 14/3/2023.
7. Subsequently, the Respondents filed an application seeking a review of the dismissal order. That the Court in its Ruling of 18/7/2024 reinstated the suit and directed parties to proceed with pre-trial. That the Appellant failed to file his documents but the Court nonetheless issued a hearing date. It is the said order of reinstating the suit that is subject of this Appeal. The Respondents contend that the instant application is intended at delaying the hearing of the suit in the Subordinate Court.
8. She avers that the proceedings commenced in May 2024 as HCCA No. E622 of 2024 and proceeded without effecting service on the Respondents. They contend that the transfer of the matter from the High Court to this Court is defective. Further, that the application is an abuse of the Court as the Appellant has not even filed the record of appeal. That in any event the appeal has been overtaken by events. It should therefore be dismissed with costs.

Grounds of Opposition by the Respondents

9. In their grounds of opposition, the Respondents aver that the application is an abuse of the Court process as the Applicant has not served them with the pleadings in HCCA No. E622 of 2024. They aver that the Appellant has therefore approached this Court with unclean hands and with intentions of delaying the hearing and determination of the suit in the Subordinate Court.
10. The Respondents accuse the Appellant of transferring the appeal from the High Court without following due procedure hence the interim orders issued herein are illegal ab initio. They contend that the High Court lacked the jurisdiction to transfer the suit and that this Court cannot be used to perpetuate an illegality. The Respondent's cite the Supreme Court decision in Albert Chaurembo



Mumba & 7 Others –vs- Maurice Munyao & 148 Others (2019) e KLR where the apex Court held that a suit filed in a Court without jurisdiction could not be transferred to another Court. The initial Court must have jurisdiction before transferring it.

11. The Respondents further contend that in any event, the appeal was filed out of time hence incurably defective. That the purported filing and transfer of the suit was purely aimed at defecting the timelines provided in Section 79G of the *Civil Procedure Act* and Section 16A of the Environment and *Land Act* having been filed outside the 30-day period.
12. The Respondents argue that the Applicant has not met the threshold for grant of stay of proceedings in the subordinate Court. They aver that the Applicant has not met the conditions for grant of stay of execution as stated in the case of *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000*. The Respondents urge the Court to dismiss the application with costs.

The written Submissions

13. The application was canvassed by way written submissions. Parties were directed to file their respective submissions. Parties complied. The Appellant/ Applicant filed his submissions dated 15/4/2025 whereas the Respondent’s submissions are dated 2/4/ 2025. The Court has had occasion to read through the submissions by parties and considered them in its determination and wishes to thank Counsel for their industry and highlights.

Analysis and Determination

14. I have considered the Application, the responses thereto as well as the respective submissions filed thereto, in my view, the following issues fall for determination;
 - a. Whether there is a competent appeal before this Court.
 - b. Whether this Court ought to grant stay of proceedings in the subordinate Court pending hearing of this appeal.
 - c. Who should bear costs of the application.

Whether there is a Competent Appeal Before this Court

15. Section 79G of the *Civil Procedure Act*, provides that an Appeal should be filed within a period of 30 days from the date of Judgement. However, the proviso to the said Section provides that the Court may grant leave or extension of time to file Appeal out of time, but the delay must be explained. The above section states as follows:

“79G. Time for filing appeals from subordinate Courts

Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the Appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the Appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.”



16. Section 16A of the *Environment and Land Court Act* mirrors Section 79G of the *Civil Procedure Act* which sets out the statutory timeline of 30 days upon which an aggrieved party can file an appeal to the Environment and Land Court. The Ruling which the Appellant seeks to appeal against was delivered on 23/4/2024. The Appellant then filed the Memorandum on 22/5/2024 before High Court. The application was therefore within the statutory 30-day period.
17. It is however evident from the record and the Appellant's own admission in the submissions that the Appeal was filed in the High Court and allocated number; HCCA No. E622 of 2024. The Appellant submits that upon realizing the error, he immediately wrote a Letter to the High Court requesting that the appeal be transferred to this Court; the Environment and Land Appeal Court.
18. Section 18 of the *Civil Procedure Act* bestows upon the High Court (ELC too) the powers to transfer suits of a civil nature. The section provides that;
- “(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—
- a. transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or
- b. withdraw any suit or other proceeding pending in any Court subordinate to it, and thereafter—
- (i) try or dispose of the same; or
- (ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or
- (iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.
- (2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”
19. From the above procedural law, the Court may transfer on application or on its own motion. In this case the High Court having been prompted by the request from the Applicants counsel moved suo moto and transferred the matter to this Court. see the Orders of the Court by Hon Justice Mrima J dated the 17/2/25. I find no fault on the part of the Appellant.

Whether this Court ought to grant stay of proceedings in the subordinate Court pending hearing of this Appeal

20. The law on stay of proceedings pending appeal is provided for in Section 6 of the *Civil Procedure Act* to the effect that where an issue is directly and substantially in issue in the proceedings between the same parties, another Court ought to stay its proceedings in respect of such suit. Stay of proceedings is further alluded to under Section 6 of the *Civil Procedure Act* (CPA) and Order 42 Rule 6(1) of the Civil Procedure Rules (CPR).



21. In the case of William Odhiambo Ramogi & 2 Others –vs- The Honourable Attorney General & 3 Others [2019] eKLR, a 5-judge Bench of the High Court, laid out the principles our Courts have established for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory Application to a higher Court;
- a. First, there must be an appeal pending before the higher Court;
 - b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an Application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an Application for stay of proceedings to inordinately delay trial, there is a policy in favour of Applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
 - c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
 - d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
 - e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
 - f. Sixth, the Applicant must demonstrate that the Application for stay was filed expeditiously and without delay.
22. The law on stay of proceedings is provided for in Section 6 of the *Civil Procedure Act* to the effect that where an issue is directly and substantially in issue in proceedings between the same parties, another Court ought to stay its proceedings in respect of such suit. Stay of proceedings is further alluded to under Order 42 Rule 6(1).
23. In the case of Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000, the Court held as follows;
- “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.
24. The Halsbury’s Law of England 4th Edition Vol. 37 pages 330 and 332 states 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 proceeding beyond all 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 the case.”

25. It is not in dispute that the Applicant has filed an appeal vide the memorandum of appeal dated the 22/5/24 in which he has impugned the decision of the lower Court on grounds inter alia that the trial Court failed to consider the evidence of the Applicant in setting aside the dismissal orders and reinstating the suit. Such an averment touches on the right to be heard and the Court finds that the appeal is not one that is slothful and warrants the Court to hear the parties. For the orderly administration of justice, it is met that the stay orders be granted to avoid confusion and conflicting decisions that may bring the dignity of the Court to disrepute. Furthermore, judicial time will be deployed efficiently if one matter is heard at a time.

Final Orders for Disposal

26. For the above reason I exercise my discretion in favour of the Applicant and grant the orders sought in the application with terms;
- a. The application dated the 19/2/25 be and is hereby allowed.
 - b. The proceedings in MC. ELC E050 of 2021 be and are hereby stayed pending the hearing and determination of the appeal or such other orders of the Court.
 - c. The orders shall last for a period of 360 days within which Applicant ought to have prosecuted his appeal to conclusion. In default the order shall lapse automatically.
 - d. I make no orders as to costs.
27. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF JULY 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered Online in the Presence of:

1. Ms. Okumu HB for Mr. Nyangito for the Appellant
2. Mr. Kithinji for the 1st, 2nd and 3rd Respondents
3. CA- Ms. Yvette Njoroge

