



REPUBLIC OF KENYA



KENYA LAW
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**Ongwacho v Mariera & another (Civil Application E053 of 2025)
[2025] KECA 1161 (KLR) (20 June 2025) (Ruling)**

Neutral citation: [2025] KECA 1161 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E053 OF 2025
HA OMONDI, JA
JUNE 20, 2025**

BETWEEN

ABEL MORANGA ONGWACHO APPLICANT

AND

ISAAC ONWONGA MARIERA 1ST RESPONDENT

**ISAAC ONWONGA MARIERA (BEING SUED ON HIS CAPACITY AS
PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE SOSPETER
MARIERA OONGA) 2ND RESPONDENT**

(Being an application for extension of time to file Memorandum and Record of appeal out of time, temporary injunctive/conservatory orders and stay of execution orders pending the hearing and determination of an intended appeal against the Judgment of the Environment & Land Court at Kisii (Munyao, J.) dated on 9th November, 2023 in Case No. 958 of 2016)

RULING

1. The respondent filed an application, dated 18th December 2024, the respondent is seeking the applicant's committal to civil jail for contempt of court and for failing to comply with the court's orders in the impugned judgment of 9th November 2023.
2. Being apprehensive that execution may issue, by an application dated 10th March, 2025, and a supporting affidavit of even date, sworn by Abel Moranga Ongwacho seeks that:
 - i. pending the hearing and determination of the instant application, there be temporary stay of contempt and/or execution proceedings before the trial/superior Court.
 - ii. extension of time for the applicant to file Memorandum and Record of appeal.
 - iii. the annexed Memorandum of Appeal be deemed as properly filed.



3. The events leading to this application is that the trial court delivered a judgment on 9th November 2023, in Kisii ELC No. 958 of 2016, allowing the cancellation of the applicant's title to parcel number Kisii Municipality/Block ID240; the forceful eviction of the applicant and the payment of damages to the tune of KShs.5,000,000/- and costs of the suit by the applicant to the respondents.
4. The applicant laments that he was unaware of the impugned judgment which was entered virtually without Notice to him or his Advocates, until he was served in person with the respondents' application dated 18th December 2024 accusing him of contempt of court orders. The main reason for the inaction being that the applicant severed ties with his former advocate, who in turn, and without his knowledge decided to sabotage his case by; absconding court sessions, failing to comply with the court's directions in the matter, failing to file submissions on behalf of the applicant as directed by the trial superior court, missing to attend court for judgment on the day appointed for delivery of judgment, and failing to communicate court directions/instructions to the applicant.
5. As a result of the mistakes of counsel the matter, Kisii ELC No. 958 of 2016, remained unattended on the part of the applicant until he was served with the respondents' application dated 18th December 2024. The applicant laments that he is an elderly man, who does not know how to read or write, entirely dependent on his former advocates advice and counsel to prosecute the matter that was before the trial court.
6. He contends that upon service of the respondents' application dated 18th December 2024, he promptly and within reasonable time to ensure that the court is properly moved. He is apprehensive that if committed to civil jail he may be exposed to life threatening diseases considering his advanced age.
7. That if proceedings before the trial Court are not stayed, they are certain to result in committal to civil jail of the applicant and/or his forceful eviction and may give way to a multiplicity of further costly restitution proceedings; and the applicant stands to suffer irreparable loss which will further render his intended appeal nugatory.
8. The respondent's position is that this application is incompetent as it has been brought under both Rule 4 and Rule 5 of this Court's Rules, which delineate distinct jurisdictional competencies, and cannot be invoked alternatively or interchangeably. The applicant points out that applications under Rule 4 are determined by a single judge, whilst those under Rule 5 fall within the ambit of a bench comprising not less than three judges.
9. In the instant matter, the applicant has made an omnibus application, merging prayers under Rule 4 which provides that:

The Court may, on such terms as may be just, by order, extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.

See *Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees* [2020] KECA 761 KLR.

10. This is fortified by Rule 55 of the Court of Appeal Rules which states that:
 - “(1) Each application, other than an application specified in sub rule (2), shall be heard by a signal Judge. Provided that such application may be adjourned by the Judge for determination by the Court.



- (2) This rule shall not apply to-
- (a)
 - (b) application for stay of execution, injunctions or stay of further proceedings.

11. It is therefore clear that this Court, sitting as a single Judge, does not have jurisdiction to consider prayer for stay orders as sought by the applicant. I concur with the respondent that the attempt to simultaneously invoke both rules go to the heart of the Court's jurisdiction and proper constitution of the bench. It is not a mere technical procedural issue which can be wished away. Consequently, I will not delve into the merits of the application, which is dismissed for being incompetent. I award costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF JUNE, 2025.

H.A. OMONDI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

