



**Achieng v Ating'a & 4 others (Environment and Land Appeal  
1 of 2023) [2024] KEELC 13633 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13633 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL 1 OF 2023  
GMA ONGONDO, J  
DECEMBER 5, 2024**

**BETWEEN**

**HILDA LINET ACHIENG ..... APPELLANT**

**AND**

**JANET AKINYI ATING'A ..... 1<sup>ST</sup> RESPONDENT**

**JEROME MODECHAI ATINGA ..... 2<sup>ND</sup> RESPONDENT**

**JAPHETH ANG'ILA ATING'A ..... 3<sup>RD</sup> RESPONDENT**

**LAND REGISTRAR MIGORI COUNTY ..... 4<sup>TH</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. By a Notice of motion application dated 7th August 2024 brought under, inter alia, sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* Chapter 21 Laws of Kenya, the 1<sup>st</sup> and 2<sup>nd</sup> respondents/applicants through Akello Karuga and company Advocates, are seeking orders that the instant appeal be dismissed with costs.
2. The application is founded upon the grounds that Migori High Court Succession Cause (HCSC) No. 27 of 2018 Re Estate of Dr Polycarp Eric Wambi Ating'a-Deceased, has been concluded and the applicant's objection dismissed. An affidavit of five paragraphs sworn on even date by George Brian Akello learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, is in support of the application. It is alleged, inter alia, that in dismissing the appellant's objection, the High Court held that the appellant was neither a wife nor a dependant of the deceased.
3. By a replying affidavit of twenty paragraphs sworn on 13<sup>th</sup> September 2024, the appellant through Omonde Kisera and company Advocates, opposed the application and stated in part that whereas judgment was been rendered in Migori HCSC No. 27 of 2018 on 31<sup>st</sup> July 2024 dismissing her



objection, she was aggrieved thereby. That thus, she has exercised her right of appeal to the Court of Appeal as per notices of appeal marked HLA 3 (a) and (b) and 4 annexed to replying affidavit. That litigation is still alive as the appeal remains unheard at the Court of Appeal and therefore, there be stay of the impugned decree of the trial court as execution of the same shall render the Appeal superfluous and spent.

4. In the supplementary affidavit of fourteen paragraphs sworn on 2nd October 2024, the appellant further opposed the application and averred that the Appeal preferred sustains the litigation of the Succession Cause hence, the matter is sub judice. That the orders of 25<sup>th</sup> July 2024 be extended subject to the hearing and determination of the Appeal where directions were given as revealed in copies of her application marked as HLA 6 (a) and (b) annexed to the affidavit. That the application for dismissal of the appeal is frowned upon by Order 36 of the Civil Procedure Rules 2010 since this is a land matter and does stretch far beyond her entitlement in the suit land which cannot be summarily dismissed on a simplistic ground.
5. The application was heard by written submissions pursuant to this court's directions of 17<sup>th</sup> September 2024.
6. By the appellant's submissions dated 2<sup>nd</sup> October 2024, reference is made to the prayer in the application, the ground on which the same is premised and that this court stayed the proceedings herein pending the outcome of Migori HCSC No. 27 of 2018 which has since attracted an Appeal to the Court of Appeal thus, the matters continue to remain sub judice the Appeal. That this court has unfettered jurisdiction under the *Environment and Land Court Act* and *the Constitution* to do justice and avoid technicalities of procedure as every party has the right to fair hearing and right of appeal. The appellant implored the court to extend the stay of execution orders of the ruling rendered on 25<sup>th</sup> July 2023 by this court and dismiss the application or allow the appeal in light of the said ruling.
7. The 1<sup>st</sup> respondent's submissions dated 24<sup>th</sup> September 2024 refer to the application, the ruling delivered on 25<sup>th</sup> July 2024 herein which did not stay the trial court's orders. That Migori HCSC No. 27 of 2018 has been determined vide judgment delivered on 31<sup>st</sup> July 2024 against the appellant. That therefore, an order to issue for the appellant's vacation or eviction from the Land Title number Kamagambo/Kabuoro/9975 within 30 days from the date of dismissal of the appeal in terms of the trial court's orders dated 3<sup>rd</sup> March 2022 as there is nothing left to determine herein.
8. I have duly considered the entire application, the replying affidavit the supplementary affidavit and the parties' respective submissions. So, is the 1<sup>st</sup> defendant's application meritorious?
9. The principal order sought in the application is dismissal of the present appeal. The anchorage of the application is that Migori HCSC No. 27 Of 2018 has been concluded and the appellant's objection therein dismissed.
10. It is common ground that the said Succession Cause was determined on 31<sup>st</sup> July 2024. That the decision attracted an appeal namely Civil Appeal Application No. E137 of 2024 pending before the Court of Appeal at Kisumu.
11. Clearly, live litigation revolving on the subject matter of this appeal as captured in the grounds of appeal, has escalated to the Court of Appeal. It would not be fair for the same matter to run simultaneously before the Court of Appeal and this Court. Therefore, the orders of this court given on 25<sup>th</sup> July 2024 would operate as stay in order to preserve, in the interim, of the subject matter of this appeal pending the outcome of Kisumu Court of Appeal Civil Appeal Application No. E137 of 2024.



12. Sections 1A, 1B, 3 and 3A (supra) as well as sections 3 of the *Environment and Land Court Act* 2015 (2011) stipulate this court's overriding objective, inherent and special powers. More fundamentally, Article 159 (2) (d) of *the Constitution* of Kenya 2010 provides for the administration of justice without undue regard to procedural technicalities.
13. On that score, it is the considered finding of this court that the instant application is premature and inept.
14. This court is conscious of the possible effect of striking out such an application; see *Ngoni Matengo Cooperative Marketing Union Ltd-vs-Alimohamed Osman* (1959) EA 577 relating to a matter struck out and not dismissed.
15. Thus, this application is hereby struck out with no orders as to costs.
16. It is so ordered.

**DATED and DELIVERED AT HOMA BAY THIS 5<sup>TH</sup> DAY OF DECEMBER 2024**

**G.M. A ONG'ONDO**

**JUDGE**

Mr Mbugua Karuga learned counsel for the 1<sup>st</sup> respondent

Mr Malachi Obunga, court assistant

