



**Malaba & another v Wandabwa (Environment and Land Appeal  
E002 of 2023) [2023] KEELC 17772 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17772 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL E002 OF 2023  
EC CHERONO, J  
MAY 25, 2023**

**BETWEEN**

**CATHERINE NEKESA MALABA ..... 1<sup>ST</sup> APPELLANT**

**COUNTY GOVERNMENT OF BUNGOMA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JOSEPH WANDABWA ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 9th March 2023 the Appellants, Applicant seek the following orders
  1. Spent
  2. That the Honourable court be pleased to grant the Applicant/Appellant temporary stay of execution of judgment delivered on the 7<sup>th</sup> June 2023 pending the interparties of the applicant
  3. That the honorable court be pleased to grant the Applicant/Appellant temporary stay of execution of Judgment delivered on the 7<sup>th</sup> June 2023 pending the hearing and determination of Bungoma ELC Appeal no E002 of 2023.
  4. That the costs of the application be provided for.
2. The application is based on grounds apparent on the face of the application and the Supporting affidavit of the Applicant Catherine Nekesa Malaba sworn on even date. the Supporting Affidavit is further supported by a copy of an Amended Memorandum of Appeal.
3. The said application is opposed with a Replying affidavit sworn by the Respondent on 28<sup>th</sup> March 2023. The Replying affidavit is further supported by numerous annexures thereto including a title deed for land parcel no Kimilili/Kimilili/2457 in the names of Joseph Wandabwa.



4. By way of rejoinder, the Applicant filed a further affidavit described as “Replying Affidavit” sworn on 14.4.2023.
5. When the application came up for directions on 29.3.2023, the parties agreed to canvass the same by written submissions.

### **Applicant’s Summary of Case**

6. In her Supporting Affidavit, the 1<sup>st</sup> applicant/Appellant deponed that on 7.6.2022, judgment was entered against them in favour of the Respondent, in which they were permanently restrained either by themselves, their servants, agents or any person claiming or acting through them from trespassing land parcel no Kimilili/2457 and land parcel no Kimilili/2458. She stated that they were aggrieved and dissatisfied with the said judgment and instructed their Advocates on record to appeal and on 18<sup>th</sup> January 2023, he filed the Appeal which was amended on the 7<sup>th</sup> March 2023. The 1<sup>st</sup> Appellant/Applicant further stated that she has invested in developing the property and built rental houses in the suit land and that the intended appeal will be rendered nugatory and will suffer irreparable loss and damage. She stated that the Respondent has always been keen to evict tenants and claim ownership and he is unlikely to await the appeal without proceeding to execute which will in effect render the appeal nugatory resulting in great loss and damage.
7. The Appellants/Applicant also stated that she lodged a case at the Business Premises Rent Tribunal to protect the tenants who were in constant harassment from the Respondent. She stated that her late husband developed the suit land during his lifetime and attracted tenants who paid rent on a monthly basis until his demise.

### **Respondents Summary of Facts**

8. The Respondent in his response deponed that he is the registered proprietor of LR no Kimilili/Kimilili/2457. He stated that the suit property was grabbed by one Florence Anyango who purported to sell to John Kimani Mwaniki who thereafter purported to sell to Kimilili Municipal Council and Edward Nabangi. He stated that after realizing his property was in danger of alienation, he filed the former suit CMCC no 129 of 2002 against Florence Anyango, John Kimani Mwaniki, Kimilili Municipal Council and Edward Nabangi. He stated that while the proceedings were pending, Edward Nabangi passed on and was substituted by one Catherine Nekesa Malaba. Subsequently she stated judgment was entered in his favour.
9. He also stated that instead of appealing against the impugned judgment, the 1<sup>st</sup> Applicant preferred a reference to the Business Premises Tribunal BPRT/E116 of 2022 which was dismissed on 30.11.2022. The Respondent further deponed that the Applicant having acknowledged him as Landlord, she cannot purport to assert her rights as the owner of the said premises as basis of stay orders sought, or the intended appeal. He stated that the Applicant/Appellant is underserving of the court’s discretion to the extent that the applicant has been surreptitious about this information and has neglected, refused and failed to disclose the foregoing to this honourable court.
10. He further stated that the applicant has not demonstrated that she will suffer substantial loss unless the stay orders are granted. He stated that the applicant has not also given security for the due performance of the judgment/decreed as may ultimately be binding on him and that the application is not a proper case for the exercise of the court’s discretion and the same should be dismissed with costs.



## Legal Analysis and Decision

11. I have considered the Notice of Motion application dated 9<sup>th</sup> March 2023, the Supporting Affidavit as well as the further affidavit and the annexures thereto. I have also considered the Replying Affidavit by the Respondent and the rival submissions by Advocates for the disputing parties. The said application is seeking stay of execution pending Appeal under Order 42 Rule 6 [CPR](#).
12. Order 42 Rule 6(2) [CPR](#) provides three conditions under which stay of execution of an order/decree may be stayed pending appeal as follows:
  1. The application has been brought without unreasonable delay;
  2. The Applicant must establish that he/she will suffer substantial loss unless the stay order(s) is granted; and
  3. The Applicant has given security as the court orders for the due performance of the Decree/ Order as may ultimately be binding on him.
13. On the first condition the impugned judgment/Decree is said to have been delivered on the 7<sup>th</sup> June 2022. The present application was filed on 9<sup>th</sup> March 2023. It has taken the Applicant 9 months to bring the application. No explanation has been given by the Applicant/Appellant for the delay. A period of 9 months without explanation in my view is unreasonable and inexcusable.
14. The second condition is that the Applicant/Appellant must demonstrate that he will suffer substantial loss unless the stay order is granted. substantial loss has been described in numerous decisions by the Superior Courts as factors that will impede the Applicant/Appellant as the successful party. Substantial loss as the Cornerstone of stay pending appeal was aptly put by Gikonyo J (as he then was) in the case of [James Wangalwa & another v Agnes Naliaka Cheseto](#) Bungoma High Court Misc. Appl. no 42 of 2011 where he held thus:-

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail.”
15. I agree with the interpretation of the law by the learned judge. In order to succeed in establishing this condition, the applicant must demonstrate that unless the stay of execution is granted, his appeal if he ultimately succeeds on appeal will be rendered nugatory. Execution is a lawful process and cannot be a ground for stay pending Appeal unless the decree holder disposes of the property to third parties beyond the reach of the court. If the Appellant cannot establish any of these factors which can render the appeal nugatory, the applicant may not succeed under this limb.
16. The third and final condition for stay pending appeal is the applicant to give security as the court may order for the due performance of the decree as may ultimately be bounding on them.
17. An undertaking by the Applicant to abide by any term(s) as to security may be sufficient under this limb.
18. I have perused both the supporting affidavit and the further affidavit dubbed “Replying affidavit” and find nowhere the Applicant has given an undertaking to abide by any term(s) and condition(s) that this Honourable court may give.
19. The three conditions for stay pending appeal must be established by the Applicant sequentially. In this case the applicant has not established any of the three conditions to warrant the grand of the orders



sought. The upshot of my finding is that the Notice of Motion application of 9<sup>th</sup> March 2023 is without merit and the same is hereby dismissed with costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED IN THE OPEN COURT AT BUNGOMA THIS 25<sup>TH</sup> DAY OF MAY 2023.**

**HON. E.C CHERONO**

**ELC JUDGE**

**In the presence of:**

1. Mr. Oura holding brief Mr. Angima
2. Respondent/Advocate – absent.
3. Joy- Court Assistant.

