



**Chemelil v Chesoi & another (Environment and Land Appeal  
E006 of 2024) [2025] KEELC 228 (KLR) (29 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 228 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KABARNET  
ENVIRONMENT AND LAND APPEAL E006 OF 2024  
L WAITHAKA, J  
JANUARY 29, 2025**

**BETWEEN**

**EZEKIEL KIPKEBUT CHEMELIL ..... APPLICANT**

**AND**

**PAUL CHESOI ..... 1<sup>ST</sup> RESPONDENT**

**BARGORETT WENDOT ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. Vide a ruling delivered on 24<sup>th</sup> July 2024 in Baringo MCELC Case No. E005 of 2024, the trial magistrate dismissed the applicant’s application dated 27<sup>th</sup> February 2024 in which the applicant sought to permanently restrain the respondents from interfering by way of eviction, dispossession, ploughing, cultivating, disposing through sale, transferring, entering, destroying any fixtures or attachments, fencing or dealing in any manner whatsoever with the suit land/plot parcel P/565 Block 1/Mochongoi-Kamaille measuring 3.5 ha situate in Mochongoi.
2. In dismissing the application, the learned trial magistrate inter alia observed/held:-

“The purpose of an injunction the courts have repeatedly held is to conserve or preserve the subject property pending the determination of the suit concerning the property. An injunction can be granted to prevent the disposal or alienation and/or to prevent wastage and/or damage of the suit property. The court will not grant an injunction whose implementation is not practical as courts will not grant orders in vain. Where a party is or has been in possession of land, the court cannot properly grant an injunction restraining entry or possession of the land as you cannot restrain that which has already occurred.



In the instant matter as I have made a finding that the defendant was in possession and occupation of the suit land, to grant an injunction in the terms sought by the plaintiff would effectively amount to ordering eviction of the defendant. The net result is that the plaintiff has not made out a case for grant of an injunction against the defendant in the circumstances...”

3. Aggrieved by the decision of the trial magistrate, the applicant appealed to this court. Besides appealing to this court, the applicant filed the notice of motion dated 7<sup>th</sup> August 2024, which is the subject matter of this ruling, seeking stay of execution of the decision of the lower court pending hearing and determination of the appeal.
4. The application is premised on the ground that there is an eminent danger that the applicant may be forcefully evicted from the suit property thereby rendering the appeal nugatory. The application is supported by the affidavit of the applicant sworn on 7<sup>th</sup> August 2024 on which the grounds on the face of the application are reiterated.
5. In reply and opposition to the application, the respondents through the replying affidavit of Paul Chepswoi sworn on 9<sup>th</sup> September 2024, have inter alia deponed that the orders issued by the learned magistrate are negative in nature hence incapable of forming the basis of an order for stay.
6. Terming the application frivolous, mischievous, misconceived, incompetent, brought in bad faith and lacking in merits, the respondent urges the court to dismiss it with costs to them.
7. Pursuant to directions given on 18<sup>th</sup> September 2024, the application was disposed off by written submissions.
8. In his submissions filed on 4<sup>th</sup> October 2024, the applicant has advanced a case for setting aside the ruling of the court.
9. Despite having been granted opportunity to file their submissions, the respondents did not file their submissions within the time ordered by the court or at all.

### **Analysis and determination**

10. The application before me being one for stay of the decision of the lower court pending appeal, the burden was on the applicant to fulfil the conditions set out in Order 42 rule 6(1) of the Civil Procedure Rules and restated in many decided cases on stay pending appeal. These are: -
  - a. Substantial loss may result to the applicant unless the order is made;
  - b. That the application has been made without unreasonable delay; and
  - c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
11. I have considered the grounds, affidavits and submissions and I find the sole issue arising from the instant application and the law applicable in respect thereof, is whether the applicant has made up a case for being granted an order of stay of the decision of the lower court.
12. As pointed out herein above, the application is premised on the ground that the applicant is apprehensive that unless stay is granted, the respondents may evict him from the suit property. In addressing that concern or fear, I have read the decision of the lower court and established that the court did not issue any order of eviction of the applicant from the suit property. All what the court did was to refuse to grant the orders sought by the applicant. The orders the court refused to grant



were targeted against the respondents. The only order the lower court issued which is capable of being enforced against the applicant is the order for cost.

13. I agree with the respondents' argument/contention that the order issued by the trial magistrate was negative in nature hence incapable of forming the basis of the order of stay of execution sought by the applicant. In that regard, see the case of *Chege v Gachora (Civil Appeal 265 of 2023)* (2024) KEHC 1994 (KLR) (29 February 2024) (Ruling) where it was stated/held: -

“I have further perused the court record and noted that the ruling dated 30<sup>th</sup> August 2023 in Thika CMCC No.718 of 2021 before the trial court dismissed the application dated 14<sup>th</sup> March 2023 that sought to set aside the orders issued on 5<sup>th</sup> April 2023. The orders the applicant sought to set aside were for dismissal of his application for stay of execution for the reason that the applicant failed to serve the said application on the respondent despite the court ordering him to do so. In essence the impugned ruling is a negative order and is incapable of execution. This principle was enunciated in *Cooperative Bank of Kenya Limited v. Banking Insurance & Finance Union (Kenya)* (2015)e KLR where the court held as follows:-

An order for stay of execution (pending appeal) is ordinary an interim order which seeks to delay performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay-called positive order-either an order that has not been complied with or has partly been complied with.”

14. The upshot of the foregoing is that the application is misconceived, ill-advised and lacking in merits. Consequently, I dismiss it with costs to the respondents.
15. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT KABARNET THIS 29<sup>TH</sup> DAY OF JANUARY, 2025.**

**L. N. WAITHAKA**

**JUDGE**

Ruling read virtually in the presence of:-

Mr. Boiwo for the Appellants

Mr. Kiage holding brief for Mr. Ogola for the Respondents

Court Assistant: Christine

