



REPUBLIC OF KENYA



**Sakwa v Masanga (Environment and Land Appeal E037 of 2021)
[2023] KEELC 17489 (KLR) (23 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17489 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E037 OF 2021**

DO OHUNGO, J

MAY 23, 2023

BETWEEN

JOSEPH MALALA SAKWA APPELLANT

AND

MWANAISHA APIO MASANGA RESPONDENT

(Being an appeal from the judgment and decree of the Senior Principal Magistrate's Court at Mumias (Hon. W. K Cheruiyot, Senior Resident Magistrate) delivered on 13th August 2021 in Mumias MCL & E No. 143 of 2018)

RULING

1. Judgment was delivered in this appeal on December 5, 2022 as follows:
 - a) This appeal is allowed.
 - b) The judgment and decree of the Senior Principal Magistrate's Court at Mumias delivered on August 13, 2021 in Mumias MCL & E No 143 of 2018 is hereby set aside and is replaced with an order dismissing the said suit.
 - c) The appellant shall have costs of this appeal as well as costs of the suit in the subordinate court.
2. The respondent later filed Notice of Motion dated December 23, 2022, seeking, in the main, an order that "pending the hearing of this appeal there be a stay of execution of the orders in ELCA No E037 of 2021."
3. The application is supported by an affidavit sworn by the respondent/applicant who deposed that she is in the process of appealing against the judgment, but she is apprehensive that the respondent is in the process of executing the judgment and transferring parcel number N/Wanga/Indangalasia/463 (suit property) to himself. She further deposed that the appeal has high chances of success and that the



respondent will suffer no prejudice as he has never occupied the suit property. She therefore prayed that the application be allowed.

4. The appellant/respondent opposed the application through a replying affidavit which he swore on January 10, 2023. He deposed that the application has been overtaken by events since following the judgment of this court the Land Registrar had reverted the suit property to the status prevailing prior to the judgment of the Subordinate Court and that the applicant has not fulfilled requirements for stay pending appeal. He therefore urged that the application be dismissed.
5. The application was canvassed through written submissions. Both parties duly filed submissions. I have considered the application, the affidavits, and the submissions.
6. This court's jurisdiction to grant stay of execution pending appeal is guided by Order 42 rule 6 (1) and (2) of the [*Civil Procedure Rules, 2010*](#) which provides as follows:

6.

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) No order for stay of execution shall be made under sub rule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

7. Thus, an applicant seeking stay of execution pending hearing and determination of an appeal must demonstrate that substantial loss will result to her if stay is not granted, and that the application has been made without unreasonable delay. As Platt Ag JA (as he then was) stated in [*Kenya Shell Limited v Benjamin Karuga Kibiru & another*](#) [1986] eKLR, substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. It is virtually impossible for such an application to succeed if an applicant fails to demonstrate that he will suffer substantial loss if stay is not granted. Further, the applicant is required to give such security as the court may order for the due performance of the decree.



8. As pleaded at prayer 4 of her application, the applicant seeks stay pending the hearing of “this appeal”. This appeal was determined through the judgment delivered on 5th December 2022. The application is thus overtaken by events. Additionally, the appellant has placed before the court certificates of search demonstrating that the Land Registrar has since reverted the suit property to the status prevailing prior to the judgment of the Subordinate Court. The applicant did not offer anything to challenge the certificates of search. In the circumstances, the applicant has failed to demonstrate that she will suffer substantial loss if stay is not granted.
9. I find no merit in Notice of Motion dated December 23, 2022 and I therefore dismiss it with costs to the appellant.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 23RD DAY OF MAY 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the appellant/respondent

No appearance for the respondent/applicant

Court Assistant: E. Juma

