



REPUBLIC OF KENYA



KENYA LAW
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**Elijah v Mangóli (Environment and Land Appeal E078 of 2024)
[2025] KEELC 241 (KLR) (29 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 241 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E078 OF 2024**

**A NYUKURI, J
JANUARY 29, 2025**

BETWEEN

RASHID SIAMBIRI ELIJAH APPELLANT

AND

NAOMI MUNYISI MANGÓLI RESPONDENT

RULING

Introduction

1. Before court is a Notice of Motion application dated November 18, 2024 filed by the appellant seeking stay of execution of the judgment of the lower court delivered on 7th November 2024 in Kakamega CMCELC NO. E111 OF 2024 pending hearing and determination of this appeal.
2. The application is supported by the affidavit sworn by Rashid Siambiri Elijah, the appellant in this case, on 18th November 2024. The applicant's case is that there is a judgment and decree by the lower court in favour of the respondent, which the respondent intends to execute against him. He stated that he had extensively developed the suit property and cultivated sugarcane and harvested the same, which proceeds were deposited in court. He stated that if execution proceeds, he will suffer irreparable loss and damage. He stated that the appeal has high chances of success and that the same might be rendered nugatory if the orders sought are not granted. He also maintained that he had approached court without undue delay and that the respondent shall not suffer prejudice if orders sought are granted as she has never cultivated sugarcane on the suit property or been in occupation of the same.
3. The application is opposed. Naomi Munyisi Mang'oli the respondent filed a replying affidavit sworn on 6th December 2024 opposing the application. She stated that she was the registered proprietor of the property known as parcel No. Bunyala/Sirigoi/699 measuring approximately 0.31Ha (suit property) having purchased the same from one Augustin Osundwa. Further that she is the one currently in



occupation of the suit property which she is using. She stated that the applicant was a stranger in these proceedings and had no locus standi to bring suit before court.

Analysis and determination

4. The court has carefully considered the application and the response. The only issue that arise for determination is whether the applicant has met conditions for grant of orders of stay of execution pending appeal.
5. Order 42 Rule 6 of the Civil Procedure Rules grants this court power to order stay of execution pending appeal and provides as follows;

Stay in case of appeal [Order 42, rule 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 subrule (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.
6. Therefore, to obtain stay of execution pending appeal, an applicant must demonstrate that they stand to suffer substantial loss if stay is not granted; that they have sought for stay without unreasonable delay and show willingness to provide security for the due performance of the decree.
7. Execution is a lawful process that is consequent and follow grant of order, judgment and or decree and therefore imminent execution alone cannot be the basis for granting an order of stay. The applicant seeking stay must show that he or she stands to suffer substantial loss if execution proceeds.
8. On substantial loss, the applicant must show that execution will cause significant loss and result in rendering the appeal nugatory. In the case of *James Wangalwa & Another v. Agnes Naliaka Cheseto* [2012] eKLR, the court had the following to say on the element of substantial loss;

No doubt in law the fact that the process of execution has been put in motion or is likely to be put in motion by itself does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. this is so because execution is a lawful process.

The applicant must establish 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.

9. In the instant matter, the appellant states that he has extensively developed the suit property and cultivated sugarcane thereon and harvested the same with the proceeds thereof having been deposited in court. He argues that if orders sought are not granted he stands to suffer irreparable loss and



damage and that his appeal which has high chances of success will be rendered nugatory. In response the respondent maintained that she is the registered proprietor of the suit property which she is in occupation and that the applicant is a stranger.

10. Having considered the rival assertions, it is clear that both the appellant and respondent assert being in possession of the suit property. Section 109 of the *Evidence Act* places the burden of proof of a fact on the party who wishes the court to believe in its existence, and in this case the burden to prove possession and development of the suit property rests on the applicant. Having considered the applicant's affidavit no evidence is attached thereon to demonstrate his possession or development of the suit property as alleged or at all. The lower court in its judgment granted a permanent injunction against the appellant restraining him from cultivating or in any manner dealing with the suit property. The appellant has not told this court the nature of the loss he stands to suffer if the permanent injunction issued against him is not stayed. Therefore, the appellant's assertion that he stands to suffer substantial loss if stay of execution is not granted, has not been proved.
11. In the premises, I find no merit in the appellants Application dated November 18, 2024, which I hereby dismiss with costs to the respondent.
12. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA VIRTUALLY THIS 29TH DAY OF JANUARY, 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Rashidi Siambiri the appellant in person

Naomi Munyisi the respondent in person

Court Assistant: M. Nguyayi

