



**Wekesa & 4 others v Kisibo (Environment and Land Appeal
E003 of 2023) [2023] KEELC 21901 (KLR) (28 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21901 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E003 OF 2023
DO OHUNGO, J
NOVEMBER 28, 2023**

BETWEEN

**JAMIN JUMA WEKESA 1ST APPELLANT
KEPHA SIMIYU JUMA 2ND APPELLANT
PATRICK MUYONDO WEKESA 3RD APPELLANT
CAROLINE OMURONJE 4TH APPELLANT
CHARLES WICHENJE 5TH APPELLANT**

AND

LAURENT MISIGO KISIBO RESPONDENT

*(Being an appeal from the judgment and decree of the Senior Principal
Magistrate's Court at Butali in Butali MCELC No. 13 of 2021)*

RULING

1. The appellants filed this appeal on 9th February 2023. Together with the Memorandum of Appeal, the appellants filed Notice of Motion dated 9th May 2023, through which they seek stay of execution of the judgment of the Subordinate Court pending hearing and determination of this appeal.
2. The application is supported by an affidavit sworn by the first appellant. He deposed that the appellants would suffer great prejudice if stay is not granted since the respondent intends to survey and demarcate land that was not subject of the suit before the Subordinate Court and that the appellants will be forced to vacate with nowhere else to go to.
3. The respondent opposed the application through a replying affidavit in which he deposed that the appellants are wasting his land thereby occasioning him irreparable loss and making him homeless. He



added that if the court is inclined to grant stay, the appellants should be ordered to deposit security in the sum of KShs 1,000,000.

4. The application was canvassed through written submissions, which both sides duly filed and which I have noted. I have considered the application, the affidavits, and the submissions.
5. The principles that guide this court's exercise of jurisdiction to grant stay of execution pending hearing and determination of an appeal are outlined at Order 42 rule 6 (1) and (2) of the [Civil Procedure Rules, 2010](#) which provide 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.
 6. It follows therefore that an applicant seeking stay pending appeal must demonstrate that substantial loss will result to him if stay is not granted, and that the application has been made without unreasonable delay. Such an applicant is further required to give such security as the court may order for the due performance of the decree. See [Kenya Power & Lighting Co. Ltd v Kigaita Ngare Unduthu & 36 others](#) [2020] eKLR and [Kenya Shell Limited v Benjamin Karuga Kibiru & another](#) [1986] eKLR.
 7. As Platt Ag JA (as he then was) stated in [Kenya Shell Limited v Benjamin Karuga Kibiru & another](#) (*supra*), 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.
 8. The applicants contend that the respondent will survey and demarcate the land in dispute if stay is not granted. I have perused the judgment appealed against and I note that the trial court ordered that a 0.40 hectare portion of the parcel of land known as Kakamega/Lugari/2362 is the property of the respondent, that the County Land Registrar and County Surveyor to demarcate boundary features of the said parcel and that upon such demarcation an eviction order to issue against any of the appellants found on the said parcel. The trial court also granted a permanent injunction restraining the respondents from trespassing on the parcel.
 9. In particular, the appellants are concerned that they will be evicted from the suit property and left with nowhere to go. I have no doubt that an eviction would constitute substantial loss.



10. The respondent has urged the court to order security of KShs 1,000,000. I am not inclined to make such an order as it will practically stifle the appellants' right of appeal. Instead, I will make orders to expedite the appeal.
11. In view of the foregoing discourse, I find merit in Notice of Motion dated 9th May 2023, and I therefore make the following orders:
 - a. I hereby grant stay of execution of the judgment and decree in Butali SPMELC Case Number 13 of 2021 pending hearing and determination of this appeal.
 - b. The appellants to file and serve record of appeal and written submissions on the appeal within 30 (thirty) days from the date of this ruling.
 - c. The respondent to file and serve written submissions on the appeal within 30 (thirty) days from the date of service of the appellant's submissions.
 - d. Costs shall be in the appeal.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 28TH DAY OF NOVEMBER 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:-

Ms Luseno holding brief for Mr Kiveu for the Appellants

The Respondent present in person

Court Assistant: E. Juma

