



British American Tobacco Limited v Mwita & 2 others (Environment and Land Appeal 007 of 2025) [2025] KEELC 3556 (KLR) (28 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3556 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL 007 OF 2025
FO NYAGAKA, J
APRIL 28, 2025**

BETWEEN

BRITISH AMERICAN TOBACCO LIMITED APPELLANT

AND

JACKSON MARTINE MWITA 1ST RESPONDENT

**STEPHEN MWITA CHACHA (SUING ON BEHALF OF THE ESTATE OF
MWITA MATIKO MWITA) 2ND RESPONDENT**

LAND REGISTRAR, KEHANCHA 3RD RESPONDENT

RULING

Brief Facts

1. The Appellant filed the instant application dated 5th March, 2025 seeking the following orders:
 1. Spent.
 2. Spent.
 3. Spent.
 4. That pending the hearing and determination of the Appellant's appeal herein, there be a stay of execution of the judgment and decree delivered on 20 March 2024 by the Chief Magistrate Court in Chief Magistrate ELC Case Number E018 of 2024- Jackson Martine Mwita and Stephen Mwita Chacha (Suing on behalf of Matiko Mwita (deceased) V British American Tobacco Ltd and the Land Registrar Kehancha.
 5. That pending the hearing and determination of the Appellant's appeal, this Honourable Court be pleased to grant an interim injunction restraining the first and second Respondents whether by themselves and/or their servants, agents or other persons under their control



from entering upon or into, wasting, demarcating, alienating the property known as Bukira/Bwisaboka/301 or in any way interfering with the Appellant's possession and ownership of the property known as Bukira/Bwisaboka/301.

6. That the costs of this application be awarded to the Appellant.
2. The Application was based on grounds set out and supported by the Affidavit of Waeni Ngea the Appellant's company secretary herein sworn on 65th March, 2025. She stated that the Chief's Magistrate's judgment delivered on 20th March, 2024 had the effect of cancelling the Appellant's ownership of the suit property without affording the Appellant its constitutional right to be heard. She stated that the Appellant appealed against the said judgment where the court declined to strike out the proceedings and judgment of the trial court for being a nullity despite finding that the trial court did not have the requisite pecuniary jurisdiction.
3. She stated that the trial court heard the matter ex parte on the basis that the Appellant had not entered appearance where it delivered its judgment cancelling the Appellant's title.
4. She further stated that they filed an application to set aside the judgment on the basis that the trial court did not have the jurisdiction. She added that in its ruling delivered on 4th March, 2025, the trial court found that it did not have the jurisdiction but declined to strike out the proceedings or set aside the judgment on the ground that it would be sitting on its own decision.
5. She stated that the application was filed without undue delay and that the appeal is arguable on the ground of jurisdiction. She also stated that the Respondents have sent intruders who have since invaded the suit land with the intention of disposing the Appellant from the property despite existence of stay orders.

Response

6. There was no response filed by the Respondent.

Submissions

7. Counsel for both parties made their oral submissions to the application on 11th March, 2025.

Analysis And Determination

8. This court has carefully considered the application and the oral submission by both parties and the main issue for determination is whether Appellant has met the threshold for stay of execution pending hearing and determination of appeal.
9. The Grant of stay of execution pending appeal is anchored under Order 42 Rule 6(1) of the Civil Procedure Rules which provides as follows: -
 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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..."



10. It is noteworthy that aside from seeking stay of execution the Appellant also prays for a temporary injunction. It is this court's view that in as much as it possesses the requisite powers to grant such orders, the Appellant has not proved that the status of the land changed since delivery of judgment.
11. Furthermore, the Appellant never sought for a temporary injunction in the subordinate court. Furthermore, from the Draft Defence the appellant wished to file and presented in the lower court it admitted the jurisdiction of the trial Court. It cannot turn around and deny the same. A party is bound by its pleadings.
12. I therefore find that the circumstances touching on the suit land remains the same and thus this court declines to grant the temporary injunction orders as sought.
13. Going to the issue of stay of execution pending appeal, this court is of the view that grant of stay of execution remains a discretionary order that must consider the fact that the court ought not to make a practice of denying a successful litigant the fruits of their judgment.
14. Counsel for the Appellant contends that the Respondents intend to dispossess the Appellant from the suit land. He admitted that they had not filed stay of execution in the subordinate court since it lacked the requisite jurisdiction.
15. In the case of *Mwangi V Mokaya (Environment and Land Appeal 17 of 2022)* [2022] KEELC 14835 (KLR) the court held as follows:

“A plain grammatical or textual reading of this terminology reading of the text above, particularly, the underlined phrase is to the effect that a party is not permitted to skip the most important point as the first point of call: the respective trial magistrate or judge against whose order or judgment an appeal is preferred. After he or she has moved the Court and his Application is granted or not, depending on how he views the decision, then he/she will file another application in the Court appealed to. It is upon this step having been taken that the application for stay of proceedings in the trial can be considered by the appellate Court. Absent of this step, the application filed for stay of execution or proceedings directly to the appealed to is improper.”

16. Further, in the case of *Vipingo Ridge Limited V Swalehe Ngonge Mpitta* [2021] KEELRC 616 (KLR) the court held that:

“ 11. A plain reading of the provision requires that before an Applicant seeking stay pending appeal moves the appellate court for stay orders, he/she must first have applied for the orders before the trial court. And there must be evidence that the trial court pronounced itself on the application whether it granted or declined to grant it.

12. It appears to me therefore that it would be irregular for such applicant to move the appellate court without first approaching the trial court on the matter and the trial court pronouncing itself on it one way or the other.”

17. I have keenly perused the court record and it is not in dispute that judgment was delivered on 20th March, 2024 in favour of the Respondent. The Appellant vide an application dated 29th October, 2024 challenged the trial court's pecuniary jurisdiction where vide its ruling delivered on 4th March, 2025, it found that it lacked the pecuniary jurisdiction and thus could not set aside the judgment as it would amount to sitting on its own decision.



18. The Appellant clearly admits that it had not moved the trial court for stay of execution on the basis of its lack of pecuniary jurisdiction. It is also noteworthy that the Appellant vide its filed statement of defence admitted jurisdiction of the case.
19. Be that as it may, it is this court's view that the implication of having failed to move the trial court for stay, meant that the present application was filed contrary to the requirements of Order 42 Rule 6(1) of the Civil Procedure Rules
20. Consequently, this application cannot stand since the Appellant failed to exhaust the necessary steps in the subordinate court and therefore the application remains premature, incompetent and bad in law. The upshot of the above is that the application dated 5th March, 2025 is without merit and is hereby struck out with costs to the Respondent.
21. In the interest of justice, since the appellant moved this Court incompetently believing that it had taken the right step when it did not, this Court grants it chance to approach the right forum first. Thus, the Appellant is given a temporary stay of execution for only fourteen (14) days pending the filing of a proper application in the proper forum, in default the stay to lapse immediately afterwards.
22. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THE 28TH APRIL 2025

HON. DR. *IUR* NYAGAKA

JUDGE

