



**Musa & 5 others v Muyonga (Environment and Land Appeal
E003 of 2025) [2025] KEELC 173 (KLR) (28 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 173 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E003 OF 2025**

**A NYUKURI, J
JANUARY 28, 2025**

BETWEEN

**CHARLES SHIKUKU MUSA 1ST APPELLANT
TABITHA OPETE 2ND APPELLANT
JOSEPH OMULUPI 3RD APPELLANT
RONALD OPETE 4TH APPELLANT
BRAMWEL SHIKUKU 5TH APPELLANT
TITUS SHIKUKU 6TH APPELLANT**

AND

WILSON MUYONGA RESPONDENT

RULING

Introduction

1. Before court is a Notice of Motion dated 13th January 2025 filed by the appellants seeking the following orders;
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That pending the hearing and determination of the appeal, the honourable court be pleased to order that there be stay of the execution of the judgment in Kakamega MCL& E No. E 225 of 2024 and status quo be maintained to the end that there shall be no eviction of the applicants herein from land parcel No. Butso/Ingotse/688.



- e. The costs of this application be provided for.
2. The application is supported by the affidavit sworn on 13th January 2025 by Tabitha Opete the 2nd appellant, on her own behalf and on behalf of her co-appellants. She deponed that she was married to the late Opete Musa in the 1980s and that they have always lived on one acre of the parcel of land known as Butsotso/Ingotse/688 (Suit property) as husband and wife, where they put up their homestead. That upon the death of her husband she was sued to stop the burial of his remains and for eviction. Further that the judgment entered by the trial court ordered the appellants' eviction and restrained them from trespassing on the suit property.
 3. They stated that they have lived on the suit property for 40 years and have crops thereon and if evicted their property will be destroyed and their appeal, which they believe has high chances of success, will be rendered nugatory. They maintained that if eviction is done they were in doubt as to the respondent's ability to compensate them in the event they succeed in their appeal. They attached a copy of the judgment and the appeal.
 4. The application is opposed. Wilson Muyonga, the respondent filed a replying affidavit sworn on 23rd January 2025 opposing the application. He stated that the applicants were his step brother, sister in-law and nephews and that they own the parcels of land known as Butsotso/ Ingotse 1680 and 1681 which are subdivisions of land known as Butsotso/Ingotse/608. That the 1st appellant who was the father in-law of the 2nd respondent and Grandfather to the rest of the appellants, was the respondent's step brother from the same father. Further that the parcel of land known as Butsotso/Ingotse 608 was registered in the 1st appellant's name while the land parcel No. Butsotso/Ingotse/688 was registered in the name of the respondent. He stated that his mother was staying on the suit property and that the 1st appellant moved in to stay with her.
 5. He maintained that the appellants' stay on the suit property was by consent and no right of adverse possession accrued. He denied holding the title of the suit property in trust for the appellants. According to him, it was expected that upon attainment of the age of majority and upon the death of his mother, the appellants would move out of the suit property enter into their parcel of land Butsotso/Ingotse/608. He cited the case of Mombasa Teachers Coop Savings & Credit Society Ltd v Robert Muhambi Katana & 15 others [2018]e KLR on the elements for proof of adverse possession.
 6. He therefore argued that the question of adverse possession was a non-issue and that the trial court had no jurisdiction to determine the same, hence the appeal had no chance of success. He argued that the application did not meet the threshold for grant of stay of execution pending appeal, under Order 42 Rule 6 of the Civil Procedure Rules. He attached pleadings before the trial court.
 7. The application was canvassed by way of written submissions and on record are submissions filed by the respondent dated 27th January 2025. Counsel for the respondent submitted that the suit property was registered in the respondent's name while parcel Butsotso/Ingotse/608 was registered in the name of the 1st appellant, the same being their respective inheritance from their father as per their culture. It was submitted for the respondent that the suit before the trial court was filed to stop the burial of the husband of the 2nd appellant and eviction of the rest of the appellants. That issues raised included the question of the suit being time barred, the question of sub judice, the question of whether there was a trust and the question of adverse possession.
 8. Counsel placed reliance on the cases of Mombasa Teachers Cooperative Savings & Credit Society v Robert Mahabindu Katama & 15 Others [2018]e KLR and Pauline Chemuge Sugawara v Nairuko Ene Mutarakwa Kerut & 4 Others Civil Appela No. E141 of 2022 and submitted that a claim for adverse possession must demonstrate non-permissive, actual, open, notorious and exclusive possession



and that the question of adverse possession is a matter to be determined by the Environment and Land Court and not by the trial court. Counsel submitted that trust was not proved by the appellants.

9. It was also submitted for the Respondent that the court has power to grant stay pending appeal under Order 42 Rule 6, but that the applicant must show that they stood to suffer substantial loss. Counsel contended that as the respondent had shown that the applicants had their own parcels of land known as Butso/Ingotse/1680 and 1681, subdivisions of 608, in case they are evicted, they will move into the said parcels which are within the same locality with the suit property. Counsel argued that the respondent will suffer if the appellants continue staying on the suit property as there is no reason, legal or equitable to allow the appellants to continue occupying the same. On that basis, counsel argued that there was no proof that the appellants would suffer substantial loss. Counsel argued that should an order of stay be granted, the same should be on condition that security of Kshs. 500, 000/= be deposited. Counsel contended that should the orders sought be granted the same ought to be on condition that the burial of the deceased should not be made on the suit property. Counsel submitted that the appeal has no chances of success.

Analysis and determination

10. The court has duly considered the application, the response thereto and submissions. The applicant sought orders of stay of execution and orders of “status quo, to be maintained to the end that there shall be no eviction of the applicants herein from land parcel No. Butso/Butso/688.” It is clear therefore that besides seeking orders of stay of execution of the judgment by the lower court, the applicants are also seeking orders of a prohibitory injunction to restrain the respondent from evicting them from the suit property, as the status quo order sought is framed as a restraining order only against one party. Therefore, the issues that arise for the court’s determination are as follows;
- a. Whether the applicant has met the threshold for grant of orders of stay of execution pending appeal, and
- b. Whether the court should grant orders of injunction to stop the respondent from evicting the appellants from the suit property.
11. Order 42 Rule 6 of the Civil Procedure Rules grants this court the power to grant orders of stay of execution and orders of temporary injunction 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.



- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
 - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
 - (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
 - (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
12. Therefore, to obtain orders of 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. On the other hand, to obtain orders of temporary injunction pending appeal, the applicant ought to demonstrate having complied with the procedure for instituting the appeal and show that they have met the conditions for grant of temporary injunction which, are; that they have an arguable appeal with chances of success; that they stand to suffer irreparable injury if the injunction is not granted and that the balance of convenience tilts in favour of granting the injunction. (See *Giella v Cassman Brown Co. Ltd* (1973) EA 358).
13. On whether the court should grant stay of execution pending appeal, an imminent execution per se does not guarantee grant of stay orders, since execution is part of the lawful process in proceedings in court, and which is a process pursuant and subsequent to grant of orders, judgment and or decree. The applicant must demonstrate that if stay is not granted, they stand to suffer substantial loss that would render the appeal nugatory. In the case of *James Wangalwa & Another v. Agnes Naliaka Cheseto* [2012] eKLR, the court discussed the element of substantial loss as follows;
- 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.
14. In the instant matter, there is no dispute that the appellants have homesteads and live on the suit property and have been there for a while with the knowledge of the respondent who is the registered proprietor thereof. It is also not disputed that the trial court in its judgment issued orders of eviction and injunction against the appellants in regard to the suit property. The appellants contend that if execution proceeds, their homes and crops will be destroyed and they cannot tell if the respondent will be able to compensate them in the event they succeed in this appeal. In response, the respondent stated that the parcels of land known as Butsotso/Ingotse/1680 and 1681 are registered in the appellants' names and is within the same locality as the suit property and that they can move to the said property, hence there is no evidence of imminent substantial loss. Taking into account the arguments on both sides, it is the view of this court that the appellants' apprehension that their property consisting of their



homes and crops will be destroyed and that the respondent may not have the ability to compensate them in the event they succeed in this appeal, is a justified apprehension which in my view has not been adequately responded to by the respondent. The fact that they have homes on the suit property and have lived thereon for several years means that if their homes are destroyed in the eviction process, and in the event the appeal is successful, they may not recover the said homes as they are. On that basis I find and hold that the appellants have demonstrated that they stand to suffer substantial loss if the orders of stay pending appeal are not granted, and therefore they deserve the orders sought. The arguments on whether or not jurisdiction; trust; or adverse possession were proved, are arguments touching on the merits of the appeal and at this stage the court will not address them so as not to embarrass the determination of the appeal. Therefore, on the first limb of the application, this court finds and holds that the appellants have met the conditions for grant of stay of execution of the judgment of the trial court pending appeal.

15. On whether security should be ordered, I note that the subject matter herein is land and the same remains where it is and no allegation or evidence of the change of character thereof has been presented by the respondent and therefore this court will not unnecessarily fetter the appellants' right to pursue an appeal having the assurance of the preservation of the substratum of the appeal. I therefore do not think that an order for security is necessary in the circumstances of these proceedings.
16. On the prayer for restraining the respondent from evicting the appellants, this court takes the view that in the judgment appealed against, the trial court ordered for eviction of the appellants. The trial court also made other five orders in favour of the respondent. By seeking to stay the execution of the said judgment, effectively the appellants are seeking among other prayers that eviction against them be stayed. Therefore, for all practical purposes, the order for restraining the respondent from evicting the appellants has essentially similar import to the order for stay of execution, only that the order of stay of execution is more encompassing as it stays all orders of the trial court including eviction orders against the appellants. In the circumstances, it therefore does not serve any purpose to order stay of execution and simultaneously issue orders restraining the respondent from evicting the appellants.
17. In the premises I find and hold that the application dated 13th January 2025 is merited and the same is hereby allowed as follows;
 - a. That pending the hearing and determination of the appeal herein, the execution of the judgment in Kakamega MCL& E No. E 225 of 2024 is hereby stayed.
 - b. There is no order as to costs.
18. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA VIRTUALLY THIS 28TH DAY OF JANUARY 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Kombwayo for the appellants

Mr. Wachilonga for the respondent

Court Assistant: M. Nguyayi

