



**Wekesa & another v Milimo (Suing as the Administrator of the Estate of Andrew Milimo Mufutu)
(Environment and Land Appeal E039 of 2024) [2025] KEELC 4251 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4251 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E039 OF 2024**

EC CHERONO, J

MAY 29, 2025

BETWEEN

SIMON SIMIYU WEKESA 1ST APPELLANT

ENOS WEKESA SIMIYU 2ND APPELLANT

AND

FRIDA NAMEMBA MILIMO RESPONDENT

**SUING AS THE ADMINISTRATOR OF THE ESTATE OF ANDREW MILIMO
MUFUTU**

RULING

1. This ruling arises from the Notice of Motion application dated 13/02/2025 brought under Sections 1A,1B,3,3A & 63(e) of the [Civil Procedure Act](#), Order 10 Rule 11 of the [Civil Procedure Rules](#) and all enabling provisions of the Law seeking the following orders;
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of the appellants appeal herein, there be and is hereby granted stay of execution of the decree of the lower court dated the 15/08/2024 sanctioning the applicant's forceful eviction from land parcel no. E.Bukusu/S.Kanduyi/4473.
 - d. There be an order for costs for the application.
2. The application is premised on the grounds apparent on the face of the application supported by the affidavit of Tobias Muwanga Wafubwa, the Applicant herein.



3. The Applicant in his supporting affidavit deposed that the lower court delivered a judgment in favour of the Respondent ordering for their eviction from land parcel no. E.Bukusu/S.Kandyi/4473(hereinafter referred to as “the suit land”) and dismissing their counter claim for adverse possession. That they initially applied for orders for stay vide an application dated 20/08/2024 before the trial court which was not granted on the interim. That the trial court went ahead and issued orders of eviction against them on 21/08/2024. That their abovementioned application was later allowed and stay was granted on condition that they deposited 1 Million as security.
4. The Applicant further deposed that they have been unable to meet the said condition arguing that it was unachievable. That they filed an application for review which was later withdrawn. That they recently discovered that the Respondents have sought for orders of security to undertake demolition of buildings erected in the suit land. That the said eviction does not comply with the provisions of Section 152E of the Land Act. They asked the court to invoke Section 152F of the Land Act. They argued that unless the orders sought are granted, they stand to suffer irreparable damages.
5. In opposition thereto, the Respondent filed a Replying affidavit sworn on 10/03/2025 in which she deposed that the Applicants herein had filed a similar application before the trial court which was allowed on condition that they made a deposit of kshs. 1,000,000/= in a joint interest earning account. That the Applicants have never appealed against the said ruling and as such, they cannot come before this court for the same application.
6. When the application came for directions, the parties agreed to have the same application canvassed by way of written submissions. The Applicants filed their submissions dated 25/02/2025 together with supplementary submissions dated 27/03/2025. They submitted on the applicable law and added that they have promptly filed this application and that they shall stand to suffer damages if the developments on the suit land are demolished. They urged the court to preserve the substratum of the appeal and if the same is lost, the appeal would be rendered nugatory. As for security, the Applicants offered the property on the suit land as security for due performance. Reliance was placed in the case of Mutava Kioko alias Mutava Kioko (Deceased) (Succession Appeal E004 of 2023) [2024] KEHC 9739 (KLR) (30 July 2024) (Ruling) Neutral citation: [2024] KEHC 9739 (KLR).
7. It was their further submission that Order 42 Rule 6(1) allowed them to file a further application for stay before this court despite having filed one before the trial court. They submitted that their right to appeal ought not to be curtailed by placing punitive condition for stay orders. He relied in the case of Lochab Transport Limited v Teresia Wanoari & Another (2015) eKLR and Matata & another v Rono & another (Civil Appeal E034 of 2024) [2024] KEHC 2799 (KLR) (19 March 2024) (Ruling).
8. At the time of preparing this ruling, the Respondents had not filed their submissions.
9. Having reviewed the materials and averments before me, the main issue for the determination in this appeal is whether to grant or not to grant stay pending appeal.
10. The Lower Court in its impugned judgment ordered for the eviction of the Applicants from the suit land, issued a permanent injunction against them from interfering with the Respondent’s quiet enjoyment of the said land and for damages amounting to kshs. 1,000,000/=.
11. The Respondent contends that this court lacks jurisdiction to hear and determine the issue of stay of execution pending appeal since the lower court has already heard and determined a similar application and allowed the same on certain conditions. In this regard, I am persuaded by the pronouncement in Lochab Transport Limited v Teresia Wanoari & Another (2015) eKLR where Meoli J, in answering the



issue of whether the high court had jurisdiction to entertain an application for stay of execution which had been rejected earlier by the lower court observed:-

“with regard to the legal objection raised by the Respondent, it does seem to me that this court does exercise both original and appellate jurisdiction with regard to applications for stay pending execution. Order 42 Rule 6(1) contains the words:-

‘whether the application for such stay shall have been granted or refused by the court appealed from the court to which the appeal is preferred shall be at liberty to consider such application and make such order thereon as may to it seem just’

There is before this court an appeal filed by the applicant in respect of the substantive decision of the lower court. On the authority of *Githunguri v Jimba Credit Corporation Ltd* (No.2) [1988] 838 it seems that the existence of the memorandum of appeal clothes this court with a separate original jurisdiction under Order 42 Rule 6(1) to consider a similar application to the one heard in the lower court. It matters not therefore that no appeal has been filed in respect of the specific decision on the application in the lower court. Similarly, the jurisdiction of the High Court in this case was invoked when the substantial appeal a fresh pleading separate from the suit in the lower court was filed. It is true that the application for stay of execution was allowed with conditions in the lower court. The wording in Order 42 Rule 6(1) however does not preclude the applicant from approaching this court as it has done.

I would venture to add that the wording to Order 42 Rule 6(1) of the *Civil Procedure Rules* effectively grants the same jurisdiction to this court as an appellate court as Rule 5 (2) (b) does in the Court of Appeal. To entertain an application for stay whether or not the same has already been heard by the lower court and dismissed. The only salient difference is that in the case of the High Court the rule makes it clear that it matters not whether the earlier application for stay in the lower court has been allowed or rejected in the lower court. That is my reading of Order 42 Rule 6(1).

It suffices in my opinion in this case, in view of the nature of the application before me, that there is an existing substantive appeal against the judgment of the lower court to insist in this case that the applicant must first file a separate appeal on the ruling of the lower court, apart from the judgment would in my view not only lead to confusing duplication of proceedings in respect of the same matter but also cause delay.

In the circumstances of this case, I consider that driving the applicant from the seat of justice when there exist a substantive appeal, and in disregard of the full import of Order 42 Rule (6) (1) would amount of raising a technicality, namely, the filing of an appeal on a supplemental matter that actually touches on the appeal where substantial appeal already exists, above purpose and substance. There may arise in certain cases allegations of abuse of procedure but that must be established?

12. This court as noted above therefore has the necessary jurisdiction to entertain the present application for stay pending appeal and I therefore proceed to determine the application on its merits.
13. The factors to consider before a stay is granted are as held in the case of *Antoine Ndiaye v African Virtual University* [2015] eKLR:

“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the *Civil Procedure Rules*. The relief is discretionary although, as it has been said often, the discretion



must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, a stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the *Civil Procedure Rules*, that:

- a. The application is brought without undue delay;
- b. The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and
- c. 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.”

14. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the Court of Appeal while dealing with an application for stay of execution pending appeal held that a stay must be granted so that an appeal may not be rendered nugatory. While in *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) eKLR the Court of Appeal held that: -“An 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 a successful party.”
15. Was the application brought without undue delay? The application before the trial court was determined on 23/10/2024, with a directive for compliance within 60 days of the ruling. The present application was filed on 15/02/2025, approximately 46 days after the expiry of the time stipulated by the lower court’s order. Although no explanation was offered for the delay, in my considered view, the delay was not inordinate. Accordingly, I find that the application was filed within a reasonable time.
16. Substantial loss occurring to the Applicant is the cornerstone of the jurisdiction of this court in granting stay of execution. There is an ample judicial authority on this issue. In *Silverstein v Chesoni* (2002) IKLR867, the issue of what comprises substantial loss was held as follows: -“The issue of substantial loss is what loss has to be prevented by preserving the status quo because such loss would render the appeal nugatory”
17. In the current application, the Applicants have stated that failure to grant the orders sought would expose them to eviction and demolition of their properties which will result to irreparable loss and render the appeal nugatory. I am persuaded that the Applicants have satisfied this court that they stand to suffer substantial loss if the stay orders are not granted and the eviction and demolitions are carried out. The appeal may also be rendered nugatory.
18. The other condition for granting stay orders is security to be offered. However, the issue of security is at the discretion of the court. Looking at the circumstances of this case and the submission by the Applicants on security, it would be in the interest of justice that security is not imposed upon the Applicants. Instead, I direct them to fast track the hearing of this appeal.
19. In the end, I find the application dated 13/02/2025 merited and allow the same as prayed with each party to bear their own costs. The Applicant/Appellant is ordered to file his appeal within 30 days of this ruling and to prosecute this appeal within 12 months.
20. Orders accordingly.

DATED, SIGNED and DELIVERED at BUNGOMA this 29th day of May, 2025.

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HON.E.C CHERONO



ELC JUDGE

In the presence of;

1. M/S Nekesa H/B for Mr. Wamalwa Simiyu for the Respondent.
2. Mr. Angima for the Appellant.
3. Bett C/A.

