



**Lumunyasi & another v Soita (Environment and Land Appeal
E081 of 2024) [2025] KEELC 4368 (KLR) (28 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4368 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E081 OF 2024**

A NYUKURI, J

MAY 28, 2025

BETWEEN

FREDRICK MUTACHI LUMUNYASI 1ST APPELLANT

JOTHAM BARASA LUSASI 2ND APPELLANT

AND

MARY BEATRICE SOITA RESPONDENT

RULING

1. Before court is a Notice of Motion dated 25th November, 2024 filed by the appellants seeking the following orders;
 - a. Spent
 - b. That an injunction to issue restraining the trial magistrate Butali Law Courts from issuing orders to the respondent until the determination of the appeal herein.
 - c. That the orders to issue direction to trial magistrate Butali Law Court judgment and orders issued on the 19th November, 2024 for stay orders restraining the respondent from executing orders until determination of the appeal at this honourable court.
2. The application is predicated on the affidavit sworn by the appellants on 25th November, 2024. The appellants stated that they were dissatisfied with the judgment from Butali court and were seeking orders that the magistrate and the respondents be restrained from executing the orders until the appeal herein is heard. Further that the 1st appellant is the owner of the parcel of land known as N. Kabras/ Malava/3XX9 and that the appellants stand to suffer irreparable loss and their appeal stands to be rendered nugatory unless the orders sought are granted. They also averred that no prejudice will be suffered by the respondent.



3. The application was opposed. Mary Beatrice Soita the respondent filed a replying affidavit sworn on 16th December, 2024. She stated that the appellants are not entitled to orders sought and that their application is fatally defective as orders sought are not available. She also stated that this court cannot instruct the subordinate court. Further that the appellants are not in possession of the suit property as the respondent is the one in possession having also acquired title by adverse possession. That orders of adverse possession will not result in any irreparable loss to the applicants.
4. The application was disposed by way of written submissions filed by applicants dated 30th December, 2024 and the respondent's submissions dated 14th March, 2025; both of which this court has duly considered.

Analysis and determination.

5. The court has carefully considered the application, the response and submissions. The pleadings herein were drafted by one John Barasa Kausi, who is not a party to these proceedings and who confirmed in court that he is not a lawyer. The orders sought by the applicants are not clear but it appears that the applicants are seeking an injunction against the Magistrate at Butali from issuing orders executing the decree issued in the lower court proceedings. Further they also appear to be seeking stay of execution of the decree pending appeal. As the trial Magistrate is not a party in these proceedings, and the appellants have not shown this court which law allows this court on appeal to issue an injunction against the trial magistrate, I decline to issue orders sought against him. Therefore, the only issue that arise for determination is whether the applicants have met conditions for grant of orders of stay of execution pending appeal.
6. 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)	<p>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.</p>		
(2)	<p>No order for stay of execution shall be made under subrule (1) unless—</p> <table border="1" data-bbox="858 1025 1045 1973"> <tr> <td data-bbox="858 1025 922 1973">(a)</td> <td data-bbox="922 1025 1045 1973"> <p>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</p> </td> </tr> </table>	(a)	<p>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</p>
(a)	<p>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</p>		



	(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.
(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.

7. 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.
8. Execution is a lawful process that is consequent to grant of an order, judgment or decree and therefore imminent execution alone cannot be the basis for granting an order of stay of execution pending appeal. An applicant seeking stay must show that they stand to suffer substantial loss if execution proceeds.
9. 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.

10. In the instant matter, the appellants have only stated that they stand to suffer irreparable loss and that their appeal will be rendered nugatory if stay is not granted. No basis or explanation has been advanced for that proposition and the nature of the envisaged loss has not been demonstrated. Besides, the applicants are not in possession of the suit property, and therefore, I am not satisfied that if execution proceeds they stand to suffer substantial loss.
11. In the premises, I find no merit in the appellants' application dated 25th November 2024, which I hereby dismiss with costs to the respondent.
12. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 28TH DAY OF MAY, 2025

A. NYUKURI

JUDGE

In the presence of;

Mr. Fredrick Mutachi Lumunyasi the 1st appellant in person

Mr. Jotham Barasa Lusasi the 2nd Appellant in person

No appearance for the respondent

Court Assistant: M. Nguyai

