



**Khaki & 28 others v Juma & 5 others (Environment & Land Case 35 of 2019
& Environment and Land Miscellaneous Application E063 of 2020
(Consolidated)) [2025] KEELC 333 (KLR) (5 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 333 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 35 OF 2019 & ENVIRONMENT AND
LAND MISCELLANEOUS APPLICATION E063 OF 2020 (CONSOLIDATED)**

SM KIBUNJA, J

FEBRUARY 5, 2025

BETWEEN

**HUSSEIN ALO M KHAKI 1ST PLAINTIFF
MOHSIN A KHAKI 2ND PLAINTIFF
MUSLIM M KHAKI 3RD PLAINTIFF**

AND

**SAIDI JUMA 1ST DEFENDANT
NGOLO BAYA 2ND DEFENDANT**

**AS CONSOLIDATED WITH
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E063 OF 2020**

BETWEEN

**NGOLO BAYA & 25 OTHERS & 25 OTHERS & 25 OTHERS & 25
OTHERS APPLICANT**

AND

**HUSSEIN ALI MOHAMED 1ST RESPONDENT
JAFFER KHAKI & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2
OTHERS 2ND RESPONDENT**



RULING

1. The defendants/Applicants filed the application dated 26th July 2024, that is brought under Order 42 Rue 6 (1) and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B & 3A of the Civil Procedure Act, seeking for:
 - a. “Spent.
 - b. Spent.
 - c. Spent.
 - d. That after the said inter parte hearing, this honourable court be pleased to grant a stay of execution of the said judgement and decree pending the hearing and determination of the intended appeal against the said judgement and decree.
 - e. An appropriate order be made for the costs of this application.”

The application is premised on eight (8) grounds on its face, and supported by the affidavit of Ngolo Baya, sworn on 26th July 2024, in which he among others deposed that judgement was entered against them on 1st July 2024, in terms of prayer (i), (ii), & (iii) of the plaint; that they orally applied for and were granted a 30 day stay of execution for them to lodge an appeal at the Court of Appeal; that they filed a notice of appeal and prepared the record of appeal without delay; that they believe their appeal is meritorious, with a high chance of success, and urged the court to allow for a stay of execution pending the appeal's determination; that if the stay of execution is not granted, they will suffer substantial loss since their homes will be destroyed, and the respondents are not capable of compensating them if their appeal succeeds.

2. The application is opposed by the plaintiffs through the replying affidavit of Husseinali M. Khaki, the 1st plaintiff, sworn on the 16th August 2024, in which he inter alia deposed that the application was a non-starter, bad in law, misconceived, lacked merits, made in bad faith and an abuse of the court process and should be dismissed with costs; that the plaintiffs were the registered owners of the suit property, which title was confirmed by the court's judgement; that the applicants invaded the suit property sometime in 2018-19 and put up temporary structures, without approval by the County Government of Mombasa, and the court has issued eviction orders; that the plaintiffs stand to suffer irreparable loss, damage and emotional distress for being denied access to their property, and the application should be found unmerited and dismissed with costs.
3. The learned counsel for the defendants/applicants and plaintiffs/respondents filed their submissions dated the 1st November 2024, and 15th October 2024 respectively, which the court has considered.
4. The following are the issues for the determinations by the court:
 - a. Whether the applicants have met the threshold for stay of execution pending appeal order to issue.
 - b. Who pays the costs?
5. The court has carefully considered the grounds on the application, affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon, and come to the following findings:



- a. The plaintiffs/respondents herein filed ELC No 35 of 2019 against the defendants/applicants vide a plaint dated 28th February 2019 seeking for inter alia, the following:
 - i. Declaration that the plaintiffs are legal owners of plot number 344/1/MN, [CR. 1852], suit property.
 - ii. An eviction order against the defendants and or their agents, servants or other persons, and demolition of the structures on the suit property, under the supervision of Bamburi Police Station police.
 - iii. Permanent injunction restraining the defendants whether by themselves, their servants, agents or otherwise howsoever from encroaching and or trespassing and or taking possession, moving into occupy, developing and constructing any structures whatsoever on the suit property.
 - iv. Costs and interests at court rates

On their part, the defendants/applicants filed Mombasa ELC [OS] No 63 of 2020 against the plaintiffs claiming ownership of the land under adverse possession. In their defence and counterclaim in ELCC NO. 35 of 2019, they sought for the following prayers:

 - a. Permanent injunction restraining the plaintiff by themselves or their agents from wrongfully entering and or trespassing and or continuing to wrongfully enter and or evicting or demolishing and or harassing and or interfering with the defendants occupation of the suit property.
 - b. A declaration that defendants have become entitled to the suit property, by virtue of adverse possession.
 - c. Costs and interest at court rates.
- b. The court heard the consolidated suits and in its merit judgement delivered on 1st July 2024, confirmed that the plaintiffs are the registered proprietors of the suit property, and that the defendants' claim of title over the suit property based on adverse possession was unmerited. The court, upon finding for the plaintiffs, made the following orders:
 - i. That the defendants/applicants have failed to prove their counterclaim in ELC No 35 of 2019 and adverse possession claim in ELC No 63 of 2020 to the standard required of balance of probabilities. Their claims are therefore hereby dismissed.
 - ii. That the plaintiffs/respondent have proved their claim in ELC No 35 of 2019 and judgement is hereby entered in their favour against the defendants as per prayers (i) to (iii) of the plaint dated 28th February 2019.
 - iii. That each party to bear their own costs in both suits.
- c. The power of the court to stay the execution of the judgement /decree pending the determination of the appeal, is guided by Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules which provides that:
 - “(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.

- (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.”

d. The court in the case of Muchiri versus Rutere (Environment & Land Case 319 & 316 of 2017 (Consolidated)) [2023] KEELC 22377 (KLR) (14 December 2023) (Ruling) held;

“Stay of execution pending appeal is a discretionary power bestowed upon this court by law. In *Butt v Rent Restriction Tribunal* (1982) KLR 417, the Court of Appeal gave guidance on how a court should exercise the said discretion and held that -;

- a. The power of the court to grant or refuse an application for a stay of execution is discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - b. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reserve the judge’s decision.
 - c. A Judge should not refuse a stay if there are good grounds for it granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 - d. The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances in this case were that there was a larger amount of rent in dispute and the appellant had an undoubted right of appeal.
 - e. the court in exercising its power under order XLI rule 4(2) (b) of the Civil Procedure Rules, can Order Security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
- e. The defendants/applicants were required to satisfy the following conditions to the court to justify the grant of an order for stay of execution pending appeal, that is establish sufficient



cause; demonstrate that he will suffer substantial loss unless a stay is granted; offer security and apply for the stay order without unreasonable delay. There is no dispute, and the record has confirmed that the judgement in the suits was delivered on 1st July 2014, while the application was filed on 26th July 2024. I therefore find there was no unreasonable delay in filing the instant application. On the requirement for the defendants/applicants to show that they will suffer substantial loss unless the order for stay is granted, they alleged and deposed that they stand to suffer significant loss and prejudice as their homes stand to be demolished and the plaintiffs have no way of repaying them for the loss and damage should be successful in the appeal. In the case of China City Construction Company Limited & another versus Karisa (*Suing as the Administrator and Legal Representative of the Estate of the Late Didlora Mwaka Mwangala*) (*Civil Appeal 105 of 2023*) [2024] KEHC 3323 (KLR) (8 April 2024) (Ruling), the court had this to say on substantial loss;

“On substantial loss, it was the Appellant’s allegation that the decretal amount is substantial, if paid to the Respondent and the appeal succeeds, they may not be able to recover the same. On this principle, Platt, Ag. JA (as he then was) in *Kenya Shell Limited v Kibiru* [1986] KLR 410, at page 416 expressed himself as follows:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.

On his part Gachuhi, Ag.JA (as he then was) at 417 held:

“It is not sufficient by merely stating that the sum of Kshs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

- f. The defendants herein did not go further to show or substantiate the nature of the loss they would suffer, that would amount to substantial loss to warrant this court stay the eviction orders against them. This was especially important when taking note of the plaintiffs’ contention of their date of entry and nature of the temporary structures they had erected on the land. The plaintiffs were found by the court to be the legal proprietors of the suit property, and the defendants/applicants did not show how they would be unable or incapable of compensating them should they emerge successful on appeal. In the case of *Machira t/a Machira & Co Advocates versus East African Standard* [2002] KEHC 1167 (KLR) the court held as follows;

“To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion.



The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put in effect by the way we handle applications for stay of further proceedings or execution, pending appeal.

Of course, in the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in the courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.

This means that in whatever we do in the civil courts, we must, so far as is practicable, ensure that the parties fight it out on level ground on equal footing, attempt to minimize and save costs, ensure expeditious and fair disposal of the case in hand, allotting to every case an appropriate share of judicial resources as account is taken of the need to allot those resources to other cases, and the way a case is dealt with must be proportionate to (a) the amount of money involved, (b) the importance of the case, (c) the complexity of the issues, and (d) the financial position of the respective parties. In the exercise of any power under any rule, or in its interpretation, we must strive to give effect to this overriding objective; and it is the duty of the parties to help the court in the furtherance of the overriding objective to yield justice and fairness.

So, in justice and fairness, when a party has been found by a court to be in the right at whatever stage in the litigation, he should ordinarily have access to the consequences of that judicial finding and decision and enjoy his rights as so found and determined. Any subsequent decision of the court which tends to impede the normal flow of justice, by suspending the enjoyment of the consequential benefits of one's success can only be rendered in exceptional circumstances after an exercise of great caution and finding that suspension is necessary in justice and fairness.

In this regard, this process means that in order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavit or on some other proper evidential material, that substantial loss may result to him out of all proportions in relation to the interests of justice and fairness, unless suspension or stay is ordered and the parties' positions so regulated and ordered that injustice is averted.

In attempting to convince a court that substantial loss is likely to be suffered so that whatever he intends to achieve by his intended recourse to some other authority will be nugatory if ultimately he prevails, the applicant is under a duty to do more than merely repeating to the court words of the relevant statutory rule or general words used in some judgment or ruling of a court in a decided case cited as a judicial precedent to guide. It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do.

If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded



decree or order, before disposal of the applicant's business (eg appeal or intended appeal).

Sometimes litigants seek to go to a higher court or to ask for review, and simultaneously ask for further steps or execution to be stopped while they go forth, for reasons of expressing their unhappiness with what has been decided. Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay merely on the ground of annoyance to feelings. Indeed, remote contingencies would not warrant the court's interference with the ordinary course of justice and the process of law.

Moreover, a court will not order a stay upon a mere vague speculation; there must be the clearest ground of necessity disclosed on evidence. Commonly, the applicant may obtain a stay of further proceedings or execution, if he shows facts which point to a conclusion that to allow execution or further proceedings to go ahead before appeal concluded would let an impecunious party to pocket and squander or pilfer what may be needed in restitution if the appeal succeeds and is allowed. Another common factor in favour of the applicant is whether to proceed further or to execute may destroy the subject matter of the action and deprive the appellant or intended appellant of the means of prosecuting the appeal or intended appeal. So, really, stay is normally not to be granted, save in exceptional circumstances.

As a further consideration of the principle of justice and fairness, the court abhors inexcusable delay in seeking an order for a stay. Such delay is an aspect of injustice and abuse of judicial process. The other party may take further steps in reliance on the belated applicant's inactivity prolonged without good reason. Costs might be incurred in the meantime. There might be a change of position to the prejudice of the other party."

- g. This court is persuaded by the above decisions, and finds that the defendants having failed to make a case for adverse possession, and their counterclaim being dismissed, they are in the eyes of this court without any legal or beneficial rights, as it were, over the suit property.
 - h. The court is tasked with balancing the rights of the applicants of filing an appeal, which would call for suspension of execution, which is a lawful process, with the corresponding right of the respondents to enjoy the fruits of their judgement. For the court to find for the stay of execution, the applicants ought to among others show that they will suffer substantial loss if execution took place, but have failed to do so. This responsibility of balancing is attained through allowing justice and fairness to prevail, which in this instance calls for the dismissal of this application since no substantial loss has been proved. Consequently, this court finds it not necessary to consider the requirement of security for due performance. The application failed at the point of lack of substantial loss, on the part of the defendant/applicants, which has been held as the cornerstone of issuance of stay of execution orders.
 - i. The defendants/applicants having failed in their application, then under section 27 of [Civil Procedure Act](#) chapter 21 of Laws of Kenya, they should pay the plaintiffs/respondents costs.
6. In conclusion, the court finds no merit in the defendants/applicants Notice of Motion dated 26th July 2024, and orders as follows:
- a. That the said application is dismissed.
 - b. The defendants/applicants to pay the plaintiffs/respondents costs.



Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 5TH DAY OF FEBRUARY 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiffs/respondents : Mr Omwenga

Defendants/applicants : M/s Mulongo For Ombiju

Shitemi – Court Assistant.

