



REPUBLIC OF KENYA



**Njibwakale v Kisaka (Environment and Land Appeal E014 of 2024)  
[2025] KEELC 489 (KLR) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 489 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL E014 OF 2024  
EC CHERONO, J  
FEBRUARY 6, 2025**

**BETWEEN**

**THAMSON NAMUNYU NJIBWAKALE ..... APPLICANT**

**AND**

**PATRICK SITATI KISAKA ..... RESPONDENT**

**RULING**

1. This ruling determines the application dated 09/07/2024 which seeks the following orders;-
  - a. Spent.
  - b. Spent.
  - c. That pending the hearing and determination of this appeal the honourable court be pleased to stay eviction and execution of the decree and or order of the trial court in Kimilili ELC No. 22 of 2021.
  - d. That the applicant is ready to deposit in this honourable court the original title of the suit land Kimilili/Kamakuywa/192 as security not to dispose or defeat the course of justice.
  - e. That costs be provided for.
2. The application is premised on the grounds on the face of the application supported by the affidavit of Thomas Namunyu Njibwakale sworn on 09/07/2024. The Applicant states that he sued the Respondent in Kimilili PM-ELC No. 22 of 2021 seeking for an injunction restraining him from encroaching land parcel no. Kimilili/Kamakuywa/192 which is registered in his name. The Respondent in his defence sought for eviction orders against the Applicant claiming purchasers' interest. The trial court delivered its judgment in favour of the Respondent and that he is facing eviction at the age of 101 years. That he stands to be prejudiced and face hardship if the eviction proceeds. He argued that his appeal is arguable and that it is important to preserve the status quo.



3. In his response, the Respondent filed a replying affidavit sworn on 27/07/2024 and deposed that the Applicant was ordered to vacate the suit land within 90 days of the judgment and decree delivered on 27/02/2024. That the Applicant has not demonstrated sufficient reasons for the grant of the orders sought. He argued that the intended appeal has no chance of success as all disputed issues were ventilated before the trial court. It was further argued that the Applicant's proposed security was unreasonable as the said title is irregular and that it is in the interest of justice that the application is dismissed.

#### **Submissions.**

4. Both parties filed submissions on the application as directed by the court. The appellant filed his submissions on 17/07/2024. At the time of writing this ruling, the Respondent had not filed his submissions for the court's consideration.

#### **Analysis and Determination**

5. I have carefully read through the Application, the affidavits in support and opposition, the submissions on record, the case law relied on and the provisions cited. I find only two issues for determination as follows:

- a) Whether the order for stay of execution pending appeal should issue;
- b) Who to bear the costs of this Application?

6. On the 1<sup>st</sup> issue for determination, it is imperative to note that the relevant law governing applications for stay of execution pending appeal is Order 42 Rule 6 (1) & (2) of the *Civil Procedure Rules*. The Rule states as follows:-

- “(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.”

7. Courts have often discussed substantially the issue of stay of execution. As such there is plethora of decisions which guide this Court. One such decision is the case of *Halal & Another -vs- Thornton & Turpin [1963] Ltd* [1990] eKLR where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag. JA) held thus:

- “...thus the superior court's discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must of course, be made without unreasonable delay.”



In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in the case of *Hassan Guyo Wakalo -vs- Straman EA Ltd* (2013) as follows:

“In addition the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory.”

These two principles go hand in hand and failure to prove one dislodges the other.”

8. As held in the authority cited, the grant of an order of stay of execution is a discretionary one. However, in exercising it, the Court must act judiciously, within the confines of the law and not capriciously. The court is also supposed to be guided by the oxygen principles as per the *Civil Procedure Act*, 2010. The purpose of an order for stay of execution pending appeal is to preserve the subject matter of the appeal. If the subject is not maintained before the determination of the appeal, then it would render the appeal nugatory or an academic exercise. I agree with the decision of the court in *RWW vs EKW* (2019) eKLR where it was also held:

“.....the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

9. In the instant application, judgment was delivered on 27/02/2024 and an Memorandum of appeal dated 26/03/2024 filed on 27/03/2024. Thus, the Applicant who is the Appellant herein came to this Court within the stipulated time allowed by law to file an Appeal. What he failed to do soon thereafter was to file the instant Application which is dated and filed on 09/07/2024. However, the period translated to about five months which is 60 days from the date execution was to be commenced. The Respondent has not told this court whether he has commenced execution of the eviction exercise therefore this court proceeds on the presumption that the same has not been carried out. Further, I am of the view that the period does not amount to inordinate delay.
10. On the issue of substantial loss, the Applicant stated that he is apprehensive that if he evicted, he risked being put out in the cold with nowhere to go. From the Respondent’s statement of defence attached to the supporting affidavit marked as “TNN2”, it seems the Applicant has been in occupation of the suit land since 1964. For that, the Applicant stated that he would suffer substantial loss if the execution was not stayed. In my view, if the Applicant who has been in occupation of the land from 1964 is evicted, he would suffer substantial loss unless an order for stay of execution is granted.
11. On the issue of security, the Applicant has stated that he is willing to deposit the title of the suit land with court. The Respondent argues that the said security is no reasonable but has not suggested what he would deem as reasonable. This court shall therefore exercise its discretion regarding the security to be offered by the Applicant.
12. In the end, the application dated 9<sup>th</sup> July, 2024 is allowed and a stay of execution of the decree of the Court in Kimilili PMC Land Case No. 22 of 2021 is granted on the following conditions:
  - a. The applicant is hereby ordered to deposit with the court the original certificate of title for the suit land within 7 days from the date of this ruling.



- b. The applicant/appellant shall compile, file and serve a record of appeal within 30 days and move the Court appropriately towards the finalization of this Appeal within 6 months from the date of this ruling.
- c. Failure by the applicant to abide by any of the above stated two conditions within the fixed time lines will lead to an automatic lapse of the stay of execution.
- d. This matter shall be mentioned on 10/3/2025 to confirm compliance of this order.
- e. Costs to abide the appeal

13. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 06<sup>TH</sup> DAY OF FEBRUARY, 2025.**

.....

**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

1. Mr. Olonyi H/B for Mr.Sichangi for Appellant.
2. Mr. Okaka H/B M/S Anne Kibe for Respondent.
3. Bett C/A

