



**Kitonyo v Mwanja (Environment & Land Miscellaneous Case  
E008 of 2024) [2025] KEELC 1124 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1124 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND MISCELLANEOUS CASE E008 OF 2024**

**EO OBAGA, J**

**MARCH 6, 2025**

**BETWEEN**

**JOSHUA MWANIA KITONYO ..... APPLICANT**

**AND**

**BENJAMIN MUTUKU MWANIA ..... RESPONDENT**

**RULING**

1. Before this Court for determination is the Notice of Motion dated 26<sup>th</sup> August, 2024 brought under the provisions of Sections 1A, 1B, 3, 3A, 79G and 95 of the Civil Procedure Act in addition to Order 9 Rule 9, Order 22 Rule 22, Order 42 Rule 6 and Order 50 Rule 6 of the Civil Procedure Rules, 2010.
2. The following orders have been sought by the Applicant: -
  1. SPENT
  2. That leave be granted to the firm of Gacau Kariuki & Co. Advocates to come on record for the Applicant, Joshua Mwanja Kitonyo.
  3. That pending the hearing and determination of this application inter partes this Honourable Court be pleased to stay execution of the judgment delivered by Honourable Martin N. Mutua (SRM) in Makueni CMELC No. E025 of 2022 Joshua Mwanja Kitonyo -vs- Benjamin Mutuku Mwanja on 12<sup>th</sup> August 2024 and any other consequential orders that may be issued pursuant thereto.
  4. That this Honourable Court be pleased to extend time to file and serve the Applicant's Memorandum of appeal and Record of Appeal against the whole judgment delivered by Honourable N. Mutua (SRM) in Makueni CMELC No. E025 of 2022 Joshua Mwanja Kitonyo -vs- Benjamin Mutuku Mwanja on 12<sup>th</sup> August 2024 and any other consequential orders that may be issued pursuant thereto.



5. That pending the hearing and determination of the Applicant's intended Appeal this Honourable Court be pleased to stay execution of the judgment delivered by Honourable Martin N. Mutua (SRM) in Makueni CMELC No. E025 of 2022 Joshua Mwanja Kitonyo -vs- Benjamin Mutuku Mwanja on 12<sup>th</sup> August 2024 and any other consequential orders that may be issued pursuant thereto.
6. THAT the costs of this application be provided for.
3. The application is premised on the grounds appearing on its face together with the supporting affidavit sworn by Joshua Mwanja Kitonyo on even date.
4. The Applicant averred that judgment was delivered against him in Makueni CMELC No. E025 of 2022 Joshua Mwanja Kitonyo -vs- Benjamin Mutuku Mwanja on 12<sup>th</sup> August 2024. That in the suit before the lower court, he had sought redress for the fraudulent and illegal transfer of his land Parcel No. Makueni/Mavindini/2761 to the Respondent. The Applicant averred that he is aggrieved by the judgment and that he intends to lodge an appeal but is yet to be furnished with typed and certified proceedings.
5. The Applicant deposed that the judgment of the lower court exposes him to the risk of unjustly losing his land Parcel No. Makueni/Mavindini/2761 in the name of the Respondent in the event that the Respondent deals with the suit property through sale or an encumbrance. He further deposed that he has a meritorious appeal with overwhelming prospects of success and that the same ought to be canvassed on the merits.
6. The Applicant contended that there is a need for urgent court intervention to safeguard the Applicant from unjustly losing his property which would render the intended appeal nugatory. He averred that he is able and willing to abide by any reasonable conditions as the court may deem fit. He urged the court to grant the orders sought.
7. Opposing the application, the Respondent swore a replying affidavit on 12<sup>th</sup> September, 2024. He averred that the Applicant is the one in possession of the title for the suit property and thus it would be impossible for the Respondent to deal with the land in a manner that may prove prejudicial to him. He further averred that the trial court did not issue any orders that would prove adverse to the Applicant to warrant stay orders as the suit was dismissed without any orders as to costs. He urged the court to order that the Applicant deposits the title deed to the suit property in court pending the hearing determination of the intended appeal.
8. The Respondent deposed that he is the one who stands to suffer substantial loss because the Applicant is the custodian of the title deed for the suit property. He further deposed that he holds a valid judgment and that the actions of the Applicant are aimed at denying him the fruits of his judgment.
9. The Applicant swore a further affidavit on 12<sup>th</sup> November, 2024. He averred that both the Respondent and himself are in possession of original title deeds for land Parcel No. Makueni/Mavindini/2761 registered in their respective names. He further averred that depositing his title deed in court would be of no effect since the Respondent continues to retain another original title deed for the same parcel of land.
10. The Applicant averred that fairness can only be achieved by both the Applicant and the Respondent being compelled to deposit their respective original title deeds in court pending hearing and determination of the intended appeal. The Applicant contended that he is justifiably apprehensive that he will lose the suit property through adverse dealings by the Respondent. He further contended



that he has an arguable appeal against the impugned judgment which deserves to be canvassed on the merits. He stated that sufficient cause had been demonstrated for the orders sought to be granted.

11. The application was canvassed by way of written submissions.
12. In the Applicant's submissions dated 12<sup>st</sup> November, 2024 Counsel identified the following issues for determination: -
  - i. Whether there is risk of the Respondent dealing with the property being land Parcel No. MAKUENI/MAVINDINI/2761?
  - ii. Whether sufficient cause has been demonstrated for grant of the orders of stay of execution?
  - iii. Court's discretion on enlargement of time?
  - iv. Who should bear the costs of the application?
13. Submitting on the first issue, Counsel contended that since the Respondent is in possession of a fraudulently acquired title deed, the Applicant remains exposed to the risk of loss of the suit property. Counsel was of the view that fairness will be achieved if both parties are compelled to deposit their respective title deeds in court pending hearing and determination of the intended appeal.
14. On the second issue, Counsel submitted that the application herein was made on 27/08/2024 after judgment was delivered on 12/08/2024 confirming that there was no delay as per the requirements of Order 42 Rule 6 of the Civil Procedure Rules, 2010.
15. Counsel reiterated that unless restrained by the Court, the Applicant risks to lose the suit property which will cause him substantial loss and render the intended appeal nugatory. Submitting on the requirement for security as required under Order 42 Rule 6 (2) (b), Counsel contended that the subordinate court did not issue a monetary decree and as such, no debt was owed to the Respondent. Counsel submitted that as a sign of good faith, the Applicant was willing to furnish such reasonable security as the court may order.
16. Submitting on the third issue, Counsel contended that the 30-day cap for lodging an appeal under Section 79G of the Civil Procedure Rules lapsed on 11<sup>th</sup> September, 2024. That the delay in lodging the appeal was caused by an inadvertent error on the part of the subordinate court in issuing the requisite typed proceedings. Counsel argued that there is no prejudice that the Respondent stands to suffer that cannot be put right by an order of payment of costs.
17. Counsel urged the court to allow the application as prayed with costs.
18. In the Respondent's submissions dated 4<sup>th</sup> December, 2024, Counsel three issues for determination namely: -
  - i. Whether the application for stay of execution is merited?
  - ii. Whether the application for extension of time to file and serve the memorandum of appeal is merited?
  - iii. Which party bears the costs of the application?
19. On the first issue, Counsel submitted that there only exists one title deed which is the one that was produced by the Applicant during trial in the lower court. Counsel contended that the said title deed which was issued in the name of the Respondent is in the possession of the Applicant as acknowledged by him during trial.



20. Counsel maintained that since the Applicant is in possession of the sole existing title deed that was issued in the name of the Respondent and hence, there is no risk of substantial loss to warrant the orders of stay of execution. Counsel further argued that the Applicant had not offered any security in line with the provisions of the Civil Procedure Rules as he is not keen on depositing the title deed for the suit property in court.
21. Submitting on the second issue, Counsel contended that the Applicant simply elected not to file the appeal within the prescribed timelines as the application herein was made within fifteen days of delivery of the judgment.
22. Counsel for the Respondent urged the court to dismiss the application with costs for lack of merit.
23. It is common ground that a judgment was delivered in Makueni MCELC E025 OF 2022 on 12<sup>th</sup> August, 2024 by Martin Mutua (SRM) dismissing the Applicant/Plaintiff's suit against the Respondent with no orders as to costs.
24. It is also common ground that the Applicant wrote a letter to the Executive Officer of Makueni Law Courts on 22<sup>nd</sup> August, 2024 requesting to be supplied with the certified proceedings in respect of the lower court suit.
25. The prerequisite conditions for the issuance of stay orders are well spelt out under Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010. These are: -
  - i. That substantial loss may result to the Applicant unless the order is made;
  - ii. That the application has been made without unreasonable delay;
  - iii. That security has been given by the Applicant for the due performance of such decree as may ultimately be binding on him.
26. This Court's discretion to grant an order for stay of execution pending the determination of an appeal is guided by the decision of the Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 where it held as follows: -
  - “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  2. 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 reverse the judge's discretion.
  3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
  5. The court in exercising its powers 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.”

27. Platt Ag. J.A. (as he then was) held as follows in *Kenya Shell Ltd v Kibiru* [1986] KLR 416: -
- “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 cornerstone of both jurisdictions for granting a stay. That is what has to be prevented.”
28. The Applicant annexed a copy of the plaint and the judgment as Exhibits “JMK1” and “JMK3” respectively. Whereas the Applicant has an undoubted right of appeal from the judgment of the lower court, the Respondent has an equally undoubted right to enjoy the fruits of his judgment. As per paragraph 3 of the Applicant’s further affidavit, there are two title deeds in existence in respect of the suit property Parcel No. 2761 issued in the names of both the Applicant and the Respondent. What is in doubt however, is who is in the possession of the title deed that was issued in the Respondent’s name
29. The Applicant averred that the fact that the Respondent has a title deed issued in his name means that the suit property could be disposed of during the pendency of the appeal thereby rendering it nugatory and occasioning to him substantial loss. At the cornerstone of an application for stay pending appeal is the prevention of substantial loss to the Applicant if the subject matter could be transferred, leased, sold or lost before the appeal is heard and determined.
30. In his further affidavit, the Applicant averred he is ready to abide by the orders for security as this court may deem fit and just. It is not in doubt that the Applicant would suffer substantial loss if the Respondent were to dispose of the suit property during the pendency of the appeal. The application herein was made fifteen days after delivery of the subordinate court’s judgment hence, the Applicant is not guilty of delay.
31. Order 42 Rule 6 (1) gives this court discretionary powers to issue an order for stay pending appeal in the following terms: -
- 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.
32. In the circumstances of the case, the appropriate order for stay would entail that both parties should deposit their respective title deeds for Parcel No. 2761 in court pending hearing and determination of the intended appeal. In addition, the Applicant should be ordered to deposit a further security of Kshs. 50,000/= in court for the due performance of such decree as may ultimately be binding on him.
33. Aside from the application for stay pending appeal, the Applicant urged the court to issue orders of extension of time for the filing of the Memorandum and Record of appeal.



34. Section 79G of the *Civil Procedure Act* prescribes a thirty (30) day timeline for the filing of an appeal from the subordinate court to the High Court. The law is as follows: -

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

35. The Applicant attributed his failure to file a memorandum of appeal and record of appeal within the statutory period as the delay in receipt of typed certified court proceedings as per his letter of request dated 22<sup>nd</sup> August, 2024. It is the finding of this court that the Applicant has demonstrated sufficient cause for not filing his appeal in time.

36. Lastly, the Applicant made an application for leave to be granted to the firm of Gacau Kariuki & Co. Advocates to come on record on his behalf. Order 9 Rule 9 of the Civil Procedure Rules, 2010 provides as follows: -

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

a. upon an application with notice to all the parties; or ...

37. The application has properly been made under Order 9 Rule 9 of the Civil Procedure Rules and ought to be allowed.

38. The upshot of the foregoing is that the application is meritorious. It ought to be allowed in the following terms: -

1. Leave is hereby granted to the firm of Gacau Kariuki & Co. Advocates to come on record for the Applicant, Joshua Mwanja Kitonyo.
2. The Applicant is hereby granted Thirty (30) days extension of time to file and serve the Applicant's Memorandum of appeal and Record of Appeal against the whole judgment delivered by Honourable N. Mutua (SRM) in Makueni CMELC No. E025 of 2022 Joshua Mwanja Kitonyo -vs- Benjamin Mutuku Mwanja on 12<sup>th</sup> August 2024.
3. An order is hereby issued for stay execution of the judgment delivered by Honourable Martin N. Mutua (SRM) in Makueni CMELC No. E025 of 2022 Joshua Mwanja Kitonyo -vs- Benjamin Mutuku Mwanja on 12<sup>th</sup> August 2024 and any other consequential orders that may be issued pursuant thereto pending the hearing and determination of the Applicant's intended Appeal.
4. The Applicant and the Respondent shall deposit their respective title deeds to Parcel No. MAKUENI/MAVINDINI/2761 in court within Thirty (30) days hereof.
5. In addition, the Applicant shall within Thirty (30) days hereof deposit Kshs. 50,000/= in court as security for the due performance of such decree as may be binding on him.
6. Each party to be its own costs.



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**HON. E. O. OBAGA**

**JUDGE**

**RULING DATED SIGEND AND DELIVERED VIA MICROSOFT TEAMS THIS 6<sup>TH</sup> DAY OF MARCH, 2025.**

In the presence of:

Mr. Kariuki for Applicant.

Mr. Munyao for Respondent.

Courta ssistant Steve Musyoki.

