



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kyallo v Mutuku & 4 others (Environment & Land Miscellaneous Case  
E046 of 2024) [2025] KEELC 975 (KLR) (4 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 975 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND MISCELLANEOUS CASE E046 OF 2024**

**AY KOROSS, J**

**MARCH 4, 2025**

**BETWEEN**

**JOSHUA WELLINGTON KYALLO ..... APPLICANT**

**AND**

**DANIEL KINGI MUTUKU ..... 1<sup>ST</sup> RESPONDENT**

**ABEDNEGO MWEU MUTUKU ..... 2<sup>ND</sup> RESPONDENT**

**JONATHAN M. MWANIA ..... 3<sup>RD</sup> RESPONDENT**

**ANNASTASICA MBINYA NZAU ..... 4<sup>TH</sup> RESPONDENT**

**REBEUN MUENDO MUTHENGI ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. The applicant moved this court under several provisions of law in filing the instant notice of motion that is the subject for determination, which is dated 11/11/2024. Some of the reliefs he sought are spent, and the substantive reliefs pending determination are as follows: -
  - a. Spent.
  - b. Spent.
  - c. That pending the hearing and determination of the appeal filed by the applicant, the court does issue orders of stay of proceedings in respect of Machakos Chief Magistrates Court MELC no. 114 of 2022 Joshua W Kyallo v. Daniel Kingi Mutuku, CMELC no. E088 of 2023 Jonathan M Mwanja v. Joshua Wellington Kyallo and MELC no. E103 of 2023 Joshua Wellington Kyallo v. Daniel K Mutuku & Others, which subject matters have their foundation based on land parcel no. L.R.Masii/Embui/94, which is the subject matter of MELC No. E114 of 2022 OS, which now has an appeal in the Court of Appeal and which land the applicant has obtained



ownership of by way of adverse possession and was illegally subdivided during the pendency of a ruling in the lower court by the 1<sup>st</sup> respondent seeking orders to restrain the 1<sup>st</sup> respondent from interfering with the land either by sale, transfer or otherwise.

- d. That the court does issue any further orders as it shall deem it.
2. The application was premised on the grounds set out in the affidavits of the applicant Joshua W. Kyallo, which he deposed on the instant date of 11/11/2024 and another one on 10/01/2025.
3. In summary, the applicant averred that in ELC LA, no. E034 of 2023, this court dismissed his appeal over a claim of adverse possession, which he had filed in the lower court in MELC 114 of 2022 (OS). He contended he has appealed against the decision of this court to the Court of Appeal in COA CA no. E0845.
4. He stated that while MELC 114 of 2022 (OS), which was the suit that was the subject of the appeal before this court, was pending in the lower court, the 1<sup>st</sup> respondent, without following due process, removed the restriction placed over land parcel no. LR Masii/Embui/94 (mother parcel). Thereafter, he allegedly subdivided and transferred the subdivisions to the respondents.
5. According to him, the subdivisions were LR Masii/Embui/994, 995, 996, 997 and 998, which were respectively registered in the names of the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 3<sup>rd</sup> respondents and one Rebecca Muendo Muthengi. It appears this latter name was a typographical error, and it is probable he meant the 5<sup>th</sup> respondent.
6. He contended that as a result of these transfers, a plethora of suits had been filed in the lower court, either by himself or by the respondents. He argued that, as a result, his appeal to the Court of Appeal would be rendered nugatory.

### **Respondents' case**

7. The respondents opposed the motion by a replying affidavit, which was deposed by the 1<sup>st</sup> respondent with the authority of his co-respondents. This affidavit was deposed on 11/12/2024.
8. In it, he contended the applicant's suit in MELC 114 of 2022 (OS) was dismissed in the lower court, and the decision was upheld by this court. He argued that these decisions have never been set aside.
9. He maintained that, as a consequence, there was nothing capable of being stayed. He asserted the transfers were a result of the implementation of a certificate of confirmation of a grant issued in Machakos Succession Cause No. 606 of 2006, and by it, the restriction was automatically removed.
10. He averred the motion was not merited and that the lower court suits were distinct from the one that was the subject of the appeal, which was ELC LA no. E034 of 2023. Ultimately, he urged this court to dismiss the motion.

### **Submissions**

11. As directed by the court, both parties filed written submissions. The applicant's law firm on record, Ms. Nathan Mbullo & Ass., filed written submissions dated 22/01/2025. By them, they submitted on the principles provided for in Order 42 Rule 6 (2) of the Civil Procedure Rules, which are unreasonable delay, substantial loss and security.
12. The respondents' law firm on record M/s. Mutinda Kimeu & Co. Advocates filed written submissions dated 15/01/2025 and submitted on the principles for a stay of proceedings and placed reliance on various case law.



13. It is noted in their submissions that both counsels could not contain themselves and waded into the merits of the various cases and argued on matters of evidence, yet submissions should usually contain arguments. Based on these, some of their advances of argument will be disregarded.
14. Therefore, upon identifying and considering the issues for determination, this ruling shall, later on in its analysis and determination, consider each of the counsel's arguments on the particular issue and also bear in mind the judicial precedents that were relied upon.

### **Issues for determination, Analysis, and Determination**

15. Having considered the motion and its grounds, affidavits, and parties' rival submissions and being guided by provisions of law and judicial precedents, the single issue for determination is whether the motion is merited.
16. As submitted by the applicant, the legal framework for a stay of proceedings is found in Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules. This Order 42 Rule 6 (1) and (2) provides as follows: -
  1. 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.
  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.
17. When entertaining an application for a stay of proceedings, this court usually exercises judicious discretion, which is anchored on law and reason. In the Supreme Court decision of Khan v International Commercial Company (K) Ltd [2023] KESC 84 (KLR), the court stated as follows on the guiding principles: -

“The grant of an order for a stay of proceedings was to be entertained only in deserving cases as it impacted the right to expeditious trial. Such orders were discretionary in nature, exercisable by the court upon consideration of the facts and circumstances of each case.”
18. In the persuasive decision of Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000, which the respondents' counsel has relied upon, Ringera J (as he then was) had this to say on the principles for the stay of proceedings:-

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the



order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added).”

19. Turning to this case, it is observed the applicant has, without doubt, confused the stay of execution and stay of proceedings, and he did so by placing reliance on the principles of stay of execution, such as substantial loss and deposit of security. I am sure that had he considered the settled principles for a stay of proceedings, his submissions would have a different tenor.
20. Moreover, having considered the principles set out in the above case law, which lay down the principles for a stay of proceedings against the applicant’s case, I am not satisfied he met the threshold therein.
21. I arrive at this conclusion for several reasons. firstly, in ELC LA no. E034 of 2023, this court dismissed the appeal before it and concluded the appeal was unmerited. In my humble view, being the court from whose decision an appeal was made, it is the Court of Appeal that is better placed to determine whether the appeal is arguable or merited.
22. Secondly, as rightfully argued by the respondents’ counsel, in the instant case, the applicant seeks to stay proceedings in the lower court, which are obviously separate and different from the subject of the appeal that was before this court and is now pending before the Court of Appeal.
23. Lastly, from the record, particularly from the decision of this court, the applicant has filed several cases in court and, in the decision rendered in ELC LA no. E034 of 2023, this court determined the applicant’s suit in the lower court in MELC 114 of 2022 (OS) was res judicata, and a grant of the stay of the proceedings in the lower court would impact the respondents’ right to expeditious trial.
24. As has been held in a line of decisions, the stay of proceedings is a grave matter to be entertained only in the most deserving cases and in the circumstances of this case, I am not satisfied the applicant has met the threshold. Consequently, it is my finding that the stay orders sought are not merited.
25. Ultimately, it is my finding the application dated 11/11/2024 is not merited, and I hereby dismiss it. Since it is trite law, costs follow the event; I award costs to the respondents. This file is hereby effectively marked as closed.

It is so ordered.

**DATED AT MACHAKOS THIS 4<sup>TH</sup> DAY OF MARCH, 2025**

**HON A. Y. KOROSS**

**JUDGE**

03.2025

Delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Mr. Kimeu for respondents.

N/A for applicant.

Ms Kanja- Court Assistant

