



**Litungu v Sendwa (Environment and Land Appeal E033 of 2024)
[2025] KEELC 1067 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1067 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E033 OF 2024**

DO OHUNGO, J

MARCH 6, 2025

BETWEEN

WILBERFORCE LITUNGU APPELLANT

AND

JANET MINYIKHA SENDWA RESPONDENT

*(Being an appeal from the judgment of the Chief Magistrate's
Court at Kakamega (Hon. Angeline Odawo, Principal Magistrate)
delivered on 26th June 2024 in Kakamega MCELC No. E039 of 2021)*

RULING

1. By Notice of Motion dated 12th August 2024, the Appellant is seeking an order of stay of execution of the decree and all consequential orders arising from the judgment of the Chief Magistrate's Court at Kakamega (Hon. Angeline Odawo, Principal Magistrate) delivered on 26th June 2024 in Kakamega MCELC No. E039 of 2021, pending hearing and determination of this appeal. The application based on the grounds listed on the face thereof and is supported by an affidavit sworn by the Appellant.
2. The Appellant deposed that he had been exclusive use and occupation of the suit and that he stands to suffer great loss with this appeal being rendered nugatory if stay of execution of the judgment is not granted.
3. The Respondent opposed the application through a replying affidavit in which she deposed that she had initiated the process of execution, that the application was made in bad faith to defeat justice, and that she was incurring irreparable loss due to the Appellant's occupation of the suit property.
4. The application was canvassed through written submissions which both parties duly filed. I have considered the application, the affidavits and the submissions. The sole issue for determination is whether the order sought should be granted.



5. The court's jurisdiction to grant stay pending appeal is guided by Order 42 rule 6 (1) and (2) of the Civil Procedure Rules which stipulate that no order for stay of execution shall be made unless 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. Additionally, an applicant is required to give such security as the court orders for the due performance of the decree or order that may ultimately be binding on him.
6. The foregoing principles have been severally restated in case law. See Kenya Power & Lighting Co. Ltd v Kigaita Ngare Unduthu & 36 others [2020] eKLR and Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR. As Platt Ag JA (as he then was) stated in Kenya Shell Limited v Benjamin Karuga Kibiru & another (supra), substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. It is unlikely that such an application would succeed if an applicant failed to demonstrate that he would suffer substantial loss if stay were not granted.
7. The judgment appealed against was delivered on 26th June 2024. It ordered eviction of the Appellant from the parcel of land known as Isukha/Ileho/2350. The Respondent was also awarded costs of the suit. I have no doubt in my mind that eviction will result in substantial loss to the Appellant if he ultimately succeeds in the appeal.
8. The Appellant filed this appeal on 16th July 2024 followed by the present application on 15th August 2024. A period of less than two months passed between the date of delivery of the judgment and the date of filing of the application. There was no unreasonable delay.
9. I find merit in the application. The Appellant will however be required to proactively prosecute the appeal. In that regard, I note that I gave directions on 16th August 2024 which required the Appellant to file the Record of Appeal within 30 (thirty) days of the said date. None has been filed so far.
10. In the end, I make the following orders:
 - a. I grant stay of execution of the decree and all consequential orders arising from the judgment of the Chief Magistrate's Court at Kakamega (Hon. Angeline Odawo, Principal Magistrate) delivered on 26th June 2024 in Kakamega MCELC No. E039 of 2021, pending hearing and determination of this appeal.
 - b. The stay order shall be conditional on the Appellant filing and serving the Record of Appeal within 30 (thirty) days from the date of delivery of this ruling. In default, Notice of Motion dated 12th August 2024 shall stand dismissed.
 - c. Costs shall be in the appeal.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 6TH DAY OF MARCH 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

No appearance for the Appellant

No appearance for the Respondent

Court Assistant: B Kerubo

