



**Muthembwa v Nzioka (Environment and Land Appeal
E015 of 2024) [2025] KEELC 1125 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1125 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E015 OF 2024**

EO OBAGA, J

MARCH 6, 2025

BETWEEN

JAPHETH KASYOKI MUTHEMBWA APPELLANT

AND

STEPHEN MWANZA NZIOKA RESPONDENT

RULING

1. Before this Court for determination is the Notice of Motion dated 30th September, 2024 brought under the provisions of Sections 1A, 1B, 3A and 79G of the Civil Procedure Act, Sections 3, 13(7) of the Environment and Land Court Act in addition to Order 42 Rule 6 (1) and (2) and Order 50 of the Civil Procedure Rules, 2010.
2. The following orders have been sought by the Appellant/Applicant: -
 1. [Spent]
 2. [Spent]
 3. That pending the hearing and determination of the intended Appeal, this Honourable Court be pleased to grant a stay of execution of the decision and orders of Principal Magistrate's Court (Hon. Mwendwa) in Tawa Principal Magistrate's ELC No. E007 of 2022 (Stephen Mwanza Nzioka v Japheth Kasyoki Muthembwa) issued on 28th August 2024.
 4. That the Honourable Court be pleased to issue any other/further orders that it deems fit in the circumstances of the case.
 5. That the costs of this application be in the cause.
3. The application is premised on the grounds appearing on its face together with the supporting affidavit sworn by Japheth Kasyoki Muthembwa on even date.



4. The Applicant averred that he was the Defendant in Tawa MCELC No. E007 of 2022. He added that the Respondent had sued him seeking vacant possession of land Parcel Nos. Makueni/Kyuu/4248, 4250, 4251 and 4253. The Applicant averred that the Respondent processed the title deeds for land Parcel Nos. Makueni/Kyuu/4251 and 4253 without any legal authority since succession proceedings had not been done in respect of the estates of the deceased owners.
5. The Applicant further averred that vide the judgment delivered on 29th August, 2024, the Trial court found that the titles in question were valid and indefeasible. He stated that in the judgment, the trial court ordered for the eviction of the Applicant and being dissatisfied with the judgment, he has appealed to this court. The Applicant asserted that unless stay of execution is granted, he will suffer irreparable loss from being evicted from the suit properties. He further asserted that unless the orders are issued, the Appeal will be rendered nugatory. He urged the court to allow the application in the interest of justice.
6. The application was opposed by the Respondent vide his affidavit sworn on 11th November, 2024. He averred that he took possession of the suit properties after the trial court issued injunctive orders dated 29th November, 2022 against the Applicant. He added that after the trial court had issued the said injunctive orders, the Applicant trespassed into the suit properties which prompted the filing of a contempt of court application.
7. The Respondent averred that the Applicant was found guilty of contempt but that he had since purged his contempt by keeping away from the suit properties. The Respondent asserted that he has been in peaceful possession and use of the suit properties until date. He added that the application for stay orders is a misguided attempt by the Applicant to re-enter the suit properties and interfere with the Respondent's quiet possession.
8. The Respondent contended that the Applicant was out to frustrate him from enjoying the fruits of the judgment because the Applicant had not demonstrated any loss he would suffer if the application is disallowed. He further contended that the appeal does not raise triable issues and hence it has no chance of success. The Respondent averred that the Applicant had not satisfied the mandatory conditions under Order 42 Rule 6 (2) of the Civil Procedure Rules in order to enable this court to exercise its discretion in his favour.
9. In a further affidavit sworn by the Applicant on 15th November, 2024, he averred that it is in the interest of justice that the court preserves the subject matter of the appeal pending hearing and determination. He further averred that no party will suffer prejudice if the orders sought are granted. Lastly, the Applicant stated that he would suffer greater prejudice if the application is disallowed and the appeal ultimately succeeds.
10. The application was canvassed by way of written submissions.
11. The Applicant filed his submissions dated 21st January, 2025.
12. Counsel identified the sole issue for determination as whether the Applicant is deserving of the orders sought.
13. Counsel submitted that the Applicant had met the legal threshold outlined under Order 42 Rule 6 (2) of the Civil Procedure Rules. Counsel further submitted that the application had been made timeously within the stay period granted by the trial court immediately after judgment was delivered. It was further contended that the Respondent could easily dispose of the disputed land and or charge/ mortgage the same which in turn would render the appeal nugatory.



14. It was submitted that the essence of stay pending appeal is to preserve the subject matter of litigation to avoid the situation of a successful Appellant getting a paper judgement. Counsel cited the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010 in support of the submission that the Applicant had met the conditions for a grant of the orders sought.
15. Counsel contended that a failure to preserve the lands in dispute, the subject of the appeal, would leave them exposed to possible disposal thereby rendering any success of the appeal nugatory.
16. In the Respondent's submissions dated 20th January, 2025, the sole issue for determination that was identified was whether the Applicant had satisfied the requirements for grant of the orders of stay pending appeal. Submitting on whether the Applicant would suffer substantial loss in reference to the requirements of Order 42 Rule 6 of the Civil Procedure Rules, the Respondent contended that the Applicant had not stated any specific details of the loss he will suffer.
17. The Respondent submitted that the Applicant is not in occupation of the suit land and therefore the issue of eviction does not arise. It was submitted that the Respondent had earlier taken vacant possession of the suit property when temporary injunctive orders dated 29th November, 2022 were granted by the trial court. The Respondent further entreated the court to take into account that the Applicant had not offered security for the due performance of the decree. It was submitted that the application is not meritorious and that the court ought to dismiss the same with costs.
18. It is common ground that a judgment was delivered in Tawa MCELC Case No. E007/2022 on 29th August, 2024 by Lawrence Mwendwa PM against the Applicant herein in the following terms: -
 1. A declaration be and is hereby made that the Plaintiff is the rightful and indefeasible owner of all that parcel of land known as Makueni/Kyuu/4248, Makueni/Kyuu/4250, Makueni/Kyuu/4251 and Makueni/Kyuu/4253.
 2. A permanent injunction be and is hereby issued restraining the Defendant, his agents and any other person acting under him from entering and interfering in any manner whatsoever with land known as Makueni/kyuu/4248, Makueni/Kyuu/4250, And Makueni/Kyuu/4253.
 3. Costs and interest of the suit at court rates to the Plaintiff.
19. It is also common ground that the Applicant herein filed a memorandum of appeal against the lower court's judgment on 30/09/2024.
20. 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 the decree as may ultimately be binding on him.
21. 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."

22. 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."

23. 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. Indeed, it was affirmed by the Respondent that the suit properties are in the possession of the Respondent and that the Applicant has not been in occupation of the same. In the Plaint produced by the Respondent as Exhibit "JKM1", no orders were sought for vacant possession. Similarly, in his statement of defence produced as Exhibit "SMN5", the Applicant only sought orders for cancellation of the Respondent's title deeds.

24. The Applicant did not annex evidence of a decree to demonstrate that the Respondent has already commenced a lawful execution of the lower court judgment. The Applicant has only expressed fears that the Respondent may proceed to dispose of the suit properties while the appeal herein is still pending hearing and determination. In the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR the court observed as follows: -

"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein v Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma v Abuoga* quoted above. The last case, referring to the exercise of discretion by



the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

25. Similarly, in *Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates, Nishit Raikundalia & Sapphire Trading & Marketing Ltd* [2014] KEHC 2430 (KLR) the Court held as follows: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment-debtor... This is a civil suit where the Applicants are judgment-debtors... Civil process is quite different because, in a civil process, the judgment is like a debt hence the Applicants become and are judgment-debtors in relation to the Respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the Applicants. I presume, the security must be one which can serve that purpose.”

26. The Applicant has not presented any evidence that would justify a claim of substantial loss. Firstly, the Applicant has not demonstrated that he is in possession of the suit properties and that the Respondent has moved to evict him. Secondly, the Applicant has not demonstrated that the Applicant is at any stage of disposing of, leasing or charging the suit properties. The Applicant has only made unsubstantiated claims to the effect that he stands to suffer substantial loss. Since substantial loss has not been proved, there are no grounds to reach a conclusion that the appeal will be rendered nugatory if the orders sought are not granted. Reference is made to the case of *Kenya Shell Ltd* (Supra).
27. The upshot is that the application herein is devoid of merit. Accordingly, it is dismissed with costs to the Respondent.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 6TH DAY OF MARCH, 2025.

IN THE PRESENCE OF:

Mr. Maweu for Applicant.

Court assistant Steve Musyoki

