



**Wanyama & another v Aboge (Environment and Land Appeal
E037 of 2024) [2025] KEELC 3039 (KLR) (1 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3039 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E037 OF 2024**

SO OKONG'O, J

APRIL 1, 2025

BETWEEN

JOSEPH WANYAMA 1ST APPELLANT

MILLICENT MUKHWANA WEKESA 2ND APPELLANT

AND

CLEMENT ODHIAMBO ABOGE RESPONDENT

RULING

1. Before the court is the Appellants' application, brought by way of a Notice of Motion dated 16th December 2024, seeking a stay of execution of the judgment delivered by Hon. E.N. Mwenda, PM on 23rd May 2024 in Kisumu CMC ELC No. E38B of 2021 (hereinafter referred to as "the lower court") pending the hearing and determination of the appeal herein. The application is supported by the affidavit of the 2nd Appellant sworn on 16th December 2024.
2. The 2nd Appellant averred that she was the registered proprietor of all that parcel of land known as Title No. Kisumu/Konya/6542(hereinafter referred to as "Plot No. 6542"), while the Respondent was the registered proprietor of all that parcel of land known as Title No. Kisumu/Konya/2886 (hereinafter referred to as "the suit property"). The 2nd Appellant averred that the 1st Appellant was her spouse.
3. The 2nd Appellant averred that in a judgment delivered by the lower court on 23rd May 2024, the court restrained them (the Appellants) from trespassing on the suit property and ordered them to remove the structures they had put up on the property within 90 days failure of which the Respondent was to be at liberty to remove the same. The 2nd Appellant averred that the lower court also awarded the Respondent general damages of Kshs. 100,000/- for trespass together with interest and the costs of the suit.
4. The 2nd Appellant averred that they were aggrieved by the said judgment and filed this appeal. The 2nd Appellant averred that on 12th and 13th December 2024, a group of people acting on the instructions



of the Respondent threatened to demolish the temporary structures they had put up on Plot No. 6542 in execution of the said judgment. The 2nd Appellant averred that the Respondent would carry out the said threat unless the stay sought was granted. The 2nd Appellant averred that if the execution of the said judgment proceeded, their appeal, which had high chances of success, would be rendered nugatory.

5. The 2nd Appellant averred that they were willing to deposit the sum of Kshs. 100,000/- in an interest-earning joint bank account in the names of the advocates for the parties as security pending the hearing and determination of the appeal. The 2nd Appellant averred that the application had been brought without unreasonable delay and that it would serve the interest of justice if the application was allowed.
6. The application was opposed by the Respondent through a replying affidavit sworn on 13th February 2025. The Respondent averred that he was the registered owner of the suit property. The Respondent averred that the Appellants were ordered by the lower court to vacate the portion of the suit property that they were occupying within 90 days, failure of which the Respondent was allowed to evict them therefrom.
7. The Respondent averred that the Appellants failed to vacate the suit property as ordered by the court, as a result of which the Respondent evicted them from the suit property by demolishing the temporary structures that they had put up thereon. The Respondent averred that the court could not stay a decree that has been executed. The Respondent averred further that he was a person of means and, as such, would be able to refund the decretal sum of Kshs. 100,000/- if paid should the Appellants succeed in their appeal. The Respondent averred that if the court was inclined to grant the stay sought, the Appellants should be ordered to deposit as security a total sum of Kshs. 280,000/- comprising of general damages awarded by the lower court and estimated costs.
8. The application was argued orally on 17th February 2025. I have considered the Appellants' application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the Respondent in opposition to the application. Finally, I have considered the submissions by the advocates for the parties.
9. The Appellants' application was brought principally under Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provides that:

6.

- (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 sub-rule (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 ultimately be binding on him has been given by the applicant.”



10. In Kenya Shell Limited v. Karuga (1982 – 1988) I KAR 1018 the court stated that:

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. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”

11. The Appellants’ application was brought 6 months after the judgment of the lower court. The Appellants have not explained why it took them 6 months to bring the application, having regard to the fact that the appeal was filed in less than 30 days from the date of the lower court judgment. I find a delay of 6 months without an explanation unreasonable. I am also not satisfied that the Appellants are likely to suffer substantial loss if the stay sought is not granted. The orders issued by the lower court had 3 limbs. The first limb restrained the Appellants from trespassing on the suit property and gave them 90 days to vacate the portion of the suit property on which they had put up temporary structures, failure of which they be evicted. According to the averments in the replying affidavit, which have not been controverted, the Appellants did not vacate the suit property as ordered by the lower court and were evicted from the property. That limb of the lower court order cannot be stayed as it has been executed. The second limb relates to the damages for trespass awarded to the Respondent in the sum of Kshs. 100,000/- against the Appellants. The Appellants have not convinced this court that they would suffer substantial loss if they paid this sum of Kshs. 100,000/- to the Respondent. There is no evidence before the court showing that the Respondent would not be able to refund the said amount to the Appellants should they succeed in the appeal. The third limb of the lower court order was on the costs of the suit, which is yet to be assessed. Again, there is no evidence that the Appellants would suffer substantial loss if they pay the costs of the suit to the Respondent. The Respondent’s averment that he is a person of means and can refund the decretal sum to the Appellants if they succeed in the appeal has not been rebutted.

Conclusion

12. The upshot of the foregoing is that the Appellants’ Notice of Motion application dated 16th December 2024 has no merit. The application is dismissed with costs to the Respondent.

DELIVERED AND DATED AT KISUMU ON THIS 1ST DAY OF APRIL 2025

S. OKONG’O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Appellants

Mr. Odhiambo D. for the Respondent

Ms. J.Omondi-Court Assistant

