



REPUBLIC OF KENYA



**Busienei v Wesonga (Environment and Land Appeal
E059 of 2024) [2025] KEELC 3536 (KLR) (6 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3536 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL E059 OF 2024**

EM WASHE, J

MAY 6, 2025

BETWEEN

JOSEPH K. BUSIENEI APPELLANT

AND

BEN MUNERIA WESONGA RESPONDENT

RULING

1. The Appellant (hereinafter referred to as “the Applicant”) filed an Application dated 27.11.2024 (hereinafter referred to as “the present Application”) against the Respondent (hereinafter referred to as “the Respondent”) seeking for the following Orders; -
 - a. That this Application be certified extremely urgent and service be dispensed within in the 1st instance.
 - b. That this Honourable Court be pleased to stay proceedings and/or further proceedings in Eldoret Chief Magistrate’s Court Elc No. E032 Of 2024 Between Ben Muneria Wesonga-versus-joseph K. Busienei pending the hearing and determination of this Application inter-partes.
 - c. That this Honourable Court be pleased to stay proceedings and/or further proceedings in Eldoret Chief Magistrate’s Court Elc No. E032 Of 2024 Between Ben Muneria Wesonga-versus-joseph K. Busienei pending the hearing and determination of this Appeal.
 - d. That costs of the Application be provided for.
2. The grounds in support of the above prayers are contained in the body of the present Application as well as the Supporting Affidavit sworn on the 27.11.2024 and can be summarised as follows;-



- a. The Applicant and the Respondent herein are parties to an ongoing litigation known as Eldoret Chief Magistrate's Court Elc No. E032 Of 2024 Between Ben Muneria Wesonga-versus- Joseph K. Busienei in the Lower Court which is the Trial Court.
 - b. The Respondent herein filed an Application dated 11.02.2021 which upon a hearing on merit was allowed 19.02.2021.
 - c. The Applicant pleaded that after the Ruling of 19.02.2021 regarding the Application dated 11.02.2021, the Respondent did not take any steps until 10.08.2023 when an Application for Contempt was filed against the Applicant.
 - d. The Application For Contempt against the Applicant was heard on merit and the Trial Court pronounced its Ruling on the 12.11.2024 allowing the same.
 - e. The Trial Court in its Ruling dated 12.11.2024 directed that the Appellant do remove and/or demolish all the improvements and/or developments undertaken on the suit property after the issuance of the Injunctive Orders issued on 19.02.2021 within 7 days from the date of Ruling and stop any further construction on the said disputed suit property.
 - f. The Applicant being aggrieved by the Ruling and Orders of the Trial Court issued on the 12.11.2024 filed a Memorandum of Appeal dated 25.11.2024 (hereinafter referred as "the present Appeal") as well as the present Application.
 - g. The Applicant is therefore seeking a stay of the proceedings and/or Orders of the Trial Court pending the hearing and determination of the present Appeal.
3. The present Application was duly served on the Respondent who opposed the same by filing a Replying affidavit dated 13.12.2024 on the following grounds; -
- a. The Respondent stated that indeed there is a pending suit before the Trial Court which was filed on 11.02.2021.
 - b. Pending the hearing and determination of the pending suit before the Trial Court, the Trial Magistrate directed that the Applicant herein to restrain for dealing, using and/or constructing on the disputed property in the year 2021.
 - c. Similarly, the Trial Court Ordered for the re-establishment of the Boundary between the Applicant and the Respondent on the 01.02.2024.
 - d. However, before the Order for re-establishment of boundary would be undertaken, the Applicant returned to the disputed property and commenced construction.
 - e. It is based on this action by the Applicant that the Respondent filed an Application for Contempt dated 09.10.2024 which was determined on 12.11.2024.
 - f. The Trial Court in its determination dated 12.11.2024 found the Applicant in Contempt of the Orders issued in the year 2021 and directed him to demolish, remove and/or restore the suit property in the manner it was before the injunctive orders were issued.
 - g. The Respondent despite being found guilty of disobeying the Injunctive Orders issued in the year 2021 has continued to be in contempt of Court.
 - h. The Respondent pleaded that the Orders being sought in the present Application are discretional in nature and the Applicant must come with clean hands.



- i. In conclusion thereof, the Respondent stated that the Applicant should not be given audience based on his blatant disobedience of the Orders issued by the Trial Court and the Application should be dismissed with costs.
4. The Replying Affidavit dated 13.12.2024 was served on the Applicant who filed a Further Affidavit dated 10.03.2025 in response.
5. The Applicant in his Further Affidavit dated 13.12.2024 stated as follows; -
 - a. The Applicant stated that the Replying Affidavit was full of misrepresentation and/or misleading facts.
 - b. The Applicant pleaded that the Orders issued on 12.11.2024 finding him in Contempt of the injunctive orders issued in 2021 directed him to remove and/or, demolish structures which had been constructed even before the commencement of the proceedings in the Trial Court.
 - c. The Applicant therefore sought this Court to Stay the proceedings in the Trial Court until the present Appeal is heard and determined.
 - d. Lastly, the Applicant averred that he had filed the present Application in good faith and that he had a high chance of success in the pending Appeal.
6. After the filing of this Further Affidavit, the Court directed that the present Application would be heard through written submissions.
7. The Applicant duly filed his submissions on 10.03.2025 while their submissions on 07.03.2025.
8. The Court has carefully gone through the present Application, the Replying Affidavit, the Further Affidavit as well as the submissions by both parties and identifies the following issues for determination.
 - Issue No. 1- Which Is The Ruling Being Appealed Against In The Applicant?
 - Issue No. 2- Has The Applicant Satisfied The Conditions For Granting A Stay Pending Appeal?
 - Issue No. 3- Is The Applicant Entitled To The Prayers Sought In The Present Applicant?
 - Issue No. 4- Who Bears The Costs Of The Present Application?
9. The Court having identified the issues for determination hereinabove, the same will now be discussed below.

Issue No. 1- Which Is The Ruling Being Appealed Against In The Applicant?

10. The first issue for determination is which Ruling the Applicant is seeking for a Stay of execution pending the hearing and determination of the Appeal.
11. According to the Memorandum of Appeal dated 23.11.2024, the Ruling which is being Appealed against in the one dated 12.11.2024.
12. The Applicant is not appealing against the Ruling made on the 19.02.2021 which were injunctive in nature and are still binding.



Issue No. 2- Has The Applicant Satisfied The Conditions For Granting A Stay Of Proceedings Before The Trial Court?

13. The second issue for determination is whether the Applicant has satisfied the conditions for granting a stay pending appeal.
14. The present Application before Court has been filed Under Order 42 Rule 6 and Order 51 of the Civil Procedure Rules, 2010.
15. The provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 states as follows; -
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.”
16. From a plain reading of the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010, an Applicant must satisfy three main ingredients namely; -
 - a. That substantive loss or injury may be occasioned to the Applicant emanating from the Ruling, Judgement and/or Decree being appealed.
 - b. That the Application has been made without unreasonable delay.
 - c. The Applicant must offer security for due performance as the Court may so Order.
17. In the case of Butt-versus- Rent Restriction Tribunal (1979), the Court of Appeal outlined the ingredients to be considered in Applications for Stay as follows; -
 1. The power of the court to grant or refuse an application for a stay of execution is discretionary and the discretion should be exercised in such a way as not to prevent an appeal.
 2. Secondly, 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 the appeal court reverse the judge’s discretion
 3. Thirdly, 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. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 of costs as ordered will cause the order for stay of execution to lapse.
18. Coming back to the present Applicant, the Applicant herein is not seeking to Stay the Ruling and Decree issued on the 12.11.2024 but the entire proceeding before the Trial Court.
19. According to the Ruling dated 12.11.2024 upon which the present Appeal is premised, the Applicant was found in Contempt of the Injunctive Orders issued on 19.02.2021.
20. It is clear from the Applicant's pleadings that the said Orders issued on the 19.02.2021 have never been stayed and/or set-aside and are still pending compliance by the Applicant.
21. The Ruling dated 12.11.2024 was to the effect that the Applicant had disobeyed the Injunctive Orders issued on the 19.02.2021 and further directed that he should remove all the improvements, structures and/or developments that had been put up after the Injunctive Orders were issued on the 19.02.2021.
22. The Applicant is now seeking for a stay of the proceedings before the Trial Court pending the hearing and determination of the Ruling dated 12.11.2024 which seeks to punish him for contempt of Court.
23. According to the Applicant, the improvements, structures and/or developments that will be affected by the Orders issued on 12.11.2024 were put up way before the Injunctive Orders of 19.02.2021 were issued.
24. Looking at the pleadings and facts pleaded by the Applicant, it is clear that he was aware of the Orders issued on the 19.02.2021 which are not in dispute hence valid and binding.
25. As it stands now, the Applicant is in contempt of valid Court Orders as found in the Ruling dated 12.11.2024.
26. So far, the Applicant has not demonstrated in which manner he purged the said Contempt pronounced on the 12.11.2024 and therefore comes to this Court with unclean hands.
27. The Applicant did not give any reasons as to why this Court should Stay the proceedings of the Trial Court.
28. If the Applicant feels there is any biasness by the Judicial Officer as has pleaded in his Further Affidavit dated 10.03.2025, then there are other legal options available to him to deal with such an issue under the law.
29. The prayer to Stay the proceedings before the Trial Court is in this Court's view a clever tactic to forestall the compliance of the Orders issued 19.02.2021 and the subsequent Orders issued by the Trial Court on the 12.11.2024 of which this Court will not be a party to such an intention.
30. On the issue of whether or not the present Application was filed without any delay, this Court admits that indeed the same was filed timely.
31. On the last issue of security, the Applicant did not offer any form of security as required under Order 42 Rul3 6 of the Civil Procedure Rules, 2010 and therefore failed to comply with this legal ingredient.



Issue No. 3- Is The Applicant Entitled To The Prayers Sought In The Present Applicant?

32. Based on the finding in Issue No. 2 hereinabove, the Applicant is not entitled to the prayers sought in the present Applicant.

Issue No. 4- Who Bears The Costs Of The Present Application?

33. Costs usually follow the event and in the present Application, the same is not merited and the Applicant is condemned to pay costs to the Respondent.

Conclusion

34. In conclusion, this Court hereby makes the following Orders in determination of the Application dated November 27, 2024; -

A. The notice of motion dated November 27, 2024 is not merited and is dismissed forthwith.

B. The applicant is condemned to pay the costs this application to the respondent.

DATED, SIGNED & DELIVERED VIRTUALLY AT ELDORET ELC THIS 6TH DAY OF MAY 2025.

EMMANUEL.M. WASHE

JUDGE

In The Presence Of:

Court Ass.: Brian

Appellant: Ms. Kanda holding brief Tarigo for the Appellant/Applicant

Respondent: Ms. Chepkwon holding brief Nyamweya for the Respondent/Respondent

