



**Kivumbu (Suing as the Administrator of the Estate of Kivumbu Ndiwa - Deceased) v Mwau
(Environment and Land Appeal E012 of 2024) [2025] KEELC 5154 (KLR) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5154 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E012 OF 2024**

**EO OBAGA, J
JULY 10, 2025**

BETWEEN

**HALLAN MUTUA KIVUMBU (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF KIVUMBU NDIWA - DECEASED) APPLICANT**

AND

FRANCIS KIMILU MWAU RESPONDENT

RULING

1. This is a ruling in respect of a Notice of Motion dated 10th December, 2024 in which Appellant/
Applicant seeks the following orders:
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 2. Spent
 3. That this honourable court be pleased to stay orders issued in Makueni ELC E052 of 2023
vide the ruling dated 12th August, 2024, pending the hearing and determination of the appeal.
 4. That this honourable court be pleased to issue orders to stay of proceedings in Makindu ELC
No. 52 of 2023, pending the hearing and determination of this appeal.
 5. That the costs of this application be in cause.
2. The Applicant contends that the Respondent was given injunctive orders in Makindu SPM Court
ELC No. E052 of 2023 which orders he is using to threaten to evict him. The Appellant had raised a
Preliminary Objection in that case on the ground that the suit was subjudice Makueni ELC No. E008
of 2023 but the Preliminary Objection was dismissed without any consideration.



3. The Applicant states that the title which is the basis of Makindu SPM Court ELC Case No. E052 of 2023 was obtained after the Applicant had been on the suit property for many years and the said title is the subject of challenge in Makueni ELC No. E008 OF 2023.
4. The Applicant further states that the Respondent is using the orders obtained to evict him from the disputed portion. He contends in a further affidavit that the Respondent has already fenced off portions of the disputed property and is effectively evicting him from where he has constructed his houses. The Respondent had acknowledged during the hearing of the Makindu application that the Applicant had permanent houses on the disputed portion and that if stay of execution was not granted and proceedings stayed, he will suffer irreparable loss which will render his appeal nugatory.
5. The Applicant states that the orders will not cause any prejudice against the Respondent. He states that he was not able to bring the application expeditiously as he was suffering from prostate cancer.
6. The Applicant's application was opposed by the Respondent through grounds of opposition dated 16th December, 2024. The Respondent contends that the Applicant's application is misconceived and bad in law. He states that the Applicant has filed a similar application in Makueni ELC No. E008 of 2023 (Hallan Mutua Kivumbu –vs- Francis Kimilu Mwau & Chief Land Registrar Makueni County).
7. The Respondent further states that the orders which were given at Makindu SPM court are not final; that the application offends Section 107 and 108 of the *Evidence Act* in that there is no evidence of any eviction attached, that the application is malafides and only meant to embarrass the court; that the application offends Order 2 Rule 15(1) (d) of the Civil Procedure Rules; that the application has been overtaken by events and that the interim orders of stay which were granted amounted to overturning the orders given without hearing the appeal.
8. The parties were directed to file written submissions. The Applicant filed his submissions dated 28th February, 2025. The Respondent filed his submissions dated 7th April, 2025. I have considered the Applicant's application, the opposition to the same by the Respondent, the submissions filed as well as the authorities cited. There are only two issues to be determined. The first is whether there should be stay of execution pending appeal. The second is whether there should be stay of proceedings in Makindu ELC No. E052 OF 2023.
9. The grounds upon which stay can be granted are set out under Order 42 Rule 6 (2) of the Civil Procedure Rules. First an application for stay has to be brought without unreasonable delay. Second, there must be demonstration of substantial loss absent stay. Third, there has to be security given as may be binding upon the Applicant on the decree.
10. In the instant case, the impugned ruling was delivered on 12th August, 2024. The present application was filed on 10th December 2024. The application for stay was made almost four months after the delivery of the impugned ruling. In the case of Cecilia Wanja Warrem –Vs- Jackson Wainaina Muiruri & Another (2014) eKLR the Court of Appeal held as follows:

“ There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case”.
11. In the instant case, the Applicant has explained the reason for delay in filing the application. He has stated that he was suffering from prostate cancer and that is why he was unable to file the application promptly. He has annexed a copy of a medical report to prove that. I therefore find that the delay is not unreasonable and has been sufficiently explained.



12. The Applicant has also demonstrated that he will suffer substantial loss if stay is not granted. He has stated that he has permanent houses on the disputed portion. He has demonstrated that the Respondent has already fenced off part of his compound in execution of the order given by Makindu SPM Court. If this state was to be allowed to proceed, the Respondent will come with police officers and demolish the houses which he has already fenced off and this will amount to substantial loss.
13. The purpose for grant of stay was set out in the case of *RWW –vs- EKW (2019) eKLR* where it was stated as follows:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the Appellant with those of the Respondent”.
14. On the second issue, a five judge bench in the case of *William Odhiambo Ramogi & 2 others –vs- Honourable Attorney General & 3 others (2019) eKLR* summarised the principles for grant of stay of proceedings as follows:
 - a. First, there must be an appeal pending before the higher court;
 - b. Second, where such stay is sought in the court hearing the case as opposed to the higher court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the court to which an appeal is preferred because such a court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
 - c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
 - d. Fourth, the Applicant must demonstrate that the appeal would be rendered nugatory if the stay of proceedings is not granted;
 - e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
 - f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.
15. I have considered the Applicant’s application in light of the principles set out in the case of *William Odhiambo Ramogi & 2 others –vs- Honourable Attorney General and 3 others (Supra)*. The appeal filed herein is arguable and the Applicant has met all the principles set out therein. This being an appeal from an interlocutory application, I need not go into analysis of the merits of the appeal which is better left for hearing of the appeal. I therefore find that the Applicant’s application has merits. I allow it in terms of prayer 3, 4 and 5.



It is so ordered.

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 10TH DAY OF JULY, 2025.

In the Presence of:

Ms. Singi for Appellant.

Court Assistant – Steve Musyoki

