



**Wafubwa v Wafubwa (Environment and Land Appeal
E002 of 2025) [2025] KEELC 4527 (KLR) (22 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4527 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E002 OF 2025**

EC CHERONO, J

MAY 22, 2025

BETWEEN

TOBIAS MUWANGA WAFUBWA APPELLANT

AND

GASPER MUFUTU WAFUBWA RESPONDENT

RULING

1. This ruling arises from the Notice of Motion dated 06/03/2025 brought under Sections 3,3A & 63(1) of the [Civil Procedure Act](#), Order 42 Rule 6 of the Civil Procedure Rules and all enabling rules seeking the following orders;
 - a. Spent.
 - b. Spent.
 - c. That this honourable court be pleased to stay eviction and execution of the decree and or order of the trial court in Bungoma ELC No. 16 of 2023 and issue a conservatory orders pending the hearing and determination of this appeal.
 - d. That the honourable court be pleased in exercise of its discretion in granting prayer (c) above to make an order imposing the condition precedent as it is by law required.
 - e. That costs be provided for.
2. The application is premised on grounds apparent on the face of the application supported by the affidavit of Tobias Muwanga Wafubwa-the Applicant herein.
3. The Applicant contends that following the judgment of the trial court, he has preferred the current appeal and that there is a likelihood of the respondent executing the trial court's judgment/decree unless the same is stayed thereby occasioning an injustice and negating the purpose of the appeal. He



argued this appeal has high chances of success and that he is willing to abide by any condition for the due performance of the decree as may ultimately be binding on him. He stated that he stands to suffer great prejudice, loss and hardship if the orders sought are not granted.

4. In opposition to application, the Respondent filed a replying affidavit sworn by one Simon Kimwela on 25/03/2025 in which he deposed that the suit property solely belongs to him and that the Applicant's appeal does not raise any triable issues. He stated that the Respondent is entitled to enjoy the fruits of his judgment and that the Applicant would no be able to compensate him for the losses that would be occasioned if the orders sought are issued. He further stated that the Applicant had filed another application for stay before the trial court which is pending determination.
5. The parties agreed to have the application canvassed by affidavit evidence and of oral submissions in which the Applicant relied on the grounds apparent on the face of the application and the averments contained in the supporting affidavit. He submitted that the Respondent wants to throw him out from a business they started together. The Respondent on his part argued that the Applicant has not met the requirements of Order 42 Rule 6 of the Civil Procedure Rules. He stated that the oral submissions were a contrast of the statements in the application. He stated that he will be prejudiced if the orders sought are granted as the Applicant will not be able to compensate him and that the memorandum of appeal does not raise arguable grounds raised issues and that the issues raised can only be determined by the Employment and Labour Relations Court.
6. Having reviewed the materials and averments before me, the main issue for the determination by this Court is whether the Applicant has established the threshold for the grant of stay pending appeal.
7. From the material placed before me, the trial Court ordered the Applicant to deliver vacant possession of L.R No. Bungoma/Municipality/396 within 60 days from the date of the impugned judgment and payment of mesne profits of Kshs. 10,000/= per month from 01/01/2022 to the date vacant possession is delivered.
8. The factors to consider before a stay is granted are as held in the case of *Antoine Ndiaye v African Virtual University* [2015] eKLR:

“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, a stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:

 - a. The application is brought without undue delay;
 - b. The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and
 - c. 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.”
9. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the Court of Appeal, while dealing with an application for stay of execution pending appeal held that a stay must be granted so that an



appeal may not be rendered nugatory. While in *James Wangalwa & Another Vs Agnes Naliaka Cheseto* (2012) eKLR the Court held as follows:-

“An Applicant must establish 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 a successful party.”

10. On the issue of substantial loss, the Applicant simply stated that he shall suffer hardship if the orders sought are not granted. Those arguments in my view are unsubstantiated and therefore, it is not available to the Applicant particularly where the parties went through a full hearing before the trial court rendered itself on the merits of the case. In an application of this nature, the Applicant must go beyond and demonstrate how he would suffer substantial loss if the order for stay is not granted since by granting stay would mean that the status quo should remain as it were before the judgment and that would be denying a successful litigant the fruits of his judgment.
11. Further, the proceedings of the trial court have not been attached for this court to appraise itself on the cause of action between the parties and the reasons for decision in the impugned judgment. Whereas this court is cognizant of the right of a party dissatisfied with a judgment to prefer an appeal to the appellate Court, it is important that the court balances that undoubted right with the right of the Respondent who is a successful party to enjoy the fruits of his judgment. In doing so, this Court must be satisfied that the Applicant has shown the existence of any factors that negate the very essential core of the appeal that has to be prevented by preserving the status quo. The Appellant/Applicant in my view has failed to establish the threshold for stay pending appeal to warrant this Honourable to exercise its discretion in his favour.
12. As for the second and third conditions on security and promptness in filing this application, I find that the Applicant filed the present application promptly and undertaken to abide by any condition this Honourable Court may give. However, it is trite law that in order to succeed in an application for stay pending appeal under Order 42 Rule 6(2) Civil Procedure Rules, an Applicant must meet all the three conditions set out thereunder sequentially.
13. It is against the foregoing that I find the notice of motion application dated 06/03/2025 devoid of merit and the same is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF MAY, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Wasilwa for the Respondent.
2. Mr. Sichangi for the Applicant.
3. Bett C/A.

