



**Luvate v Amimo (Environment and Land Appeal E008 of 2023)  
[2023] KEELC 20621 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20621 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENT AND LAND APPEAL E008 OF 2023**

**E ASATI, J**

**OCTOBER 12, 2023**

**BETWEEN**

**MARTHA M'MBAYI LUVATE ..... APPELLANT**

**AND**

**NAFTAL AMIMO ..... RESPONDENT**

*(Being an appeal from the ruling delivered on 8/6/2023 by Hon. S. Ongeri,  
Senior Principal Magistrate at Vihiga in MCL & E case No. 12 of 2023)*

**RULING**

1. This ruling is in respect of the Notice of Motion application dated August 29, 2023 filed by the appellant pursuant to the provisions of article 25(a) of *the Constitution* of Kenya 2010, sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, cap 21 Laws of Kenya, order 42 rule 6(1) and order 51 rule 1 of the *Civil Procedure Rules* 2010. The application seeks for stay of temporary orders issued on June 8, 2023 and stay of further proceedings in Vihiga MCL & E Case No.12 of 2023 pending hearing and determination of the appeal and costs of the application.
2. The grounds of the application are that on June 8, 2023 a ruling was delivered in MCL & C Case No.12 of 2023 granting a temporary injunction restraining the Appellant herein who is the owner of Land Parcel Number Nyang'ori/Kapsotik/452 and who is in possession, from using the said land. That subsequently the Appellant lodged the appeal herein and if the orders sought herein are not granted the appeal will be rendered nugatory. That the appeal has been filed without undue delay and in good faith and that the Appellant stands to suffer substantial loss since she is in possession and using the land and has planted vegetation thereon.
3. The application was supported by the contents of the supporting affidavit sworn by the appellant/ applicant on August 29, 2023 and the annexures thereto.



4. The respondent opposed the application vide his replying affidavit sworn on September 8, 2023. The respondent averred that the appellant has never lived on the suit land. That it is him who has been living on the land for over 30 years. That the temporary orders of injunction were issued in the lower court because the applicant without any colour of right trespassed onto the suit land and started putting up an illegal structure.
5. The application was heard orally on September 25, 2023.
6. The grounds upon which an order of stay of execution and stay of proceedings can be granted as provided in order 42 rule 6 of the Civil Procedure Rules 2010 are that:

“No order for stay of execution may 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 may ultimately be binding on him has been given by the Applicant.”
7. The court must be satisfied that the Applicant will suffer substantial loss if the order of stay of execution is not granted. The burden of proof lies with the applicant to prove that substantial loss will result to him if the order sought is not granted. In the case of Charles Wabome Gethi v Angela Wairimu Gethi [2008]eKLR the Court of Appeal held-

“..it is not enough for the applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The applicants must go further and show the substantial loss that the applicants stand to suffer if the respondent execute the decree in this suit against them”

In the case of Shell Kenya Ltd vs Benjamin Karuga Kibiru & Another [1986] eKLR 410 the court stated that

8. In the instant suit, the applicant contends that she is the one staying and using the suit land which is registered in her name and that the effect of the order appealed against is to bar her from accessing the land. That she will be highly prejudiced if the said order is not stayed. No evidence of occupation and use of the suit land was however exhibited by the applicant. The photograph attached to the supplementary affidavit according to the respondents shows the structure that the applicant started to construct when she entered the land in the year 2022. And according to the applicant, that is her house on the suit land. I find this not to be sufficient evidence of occupation.
9. I have considered the evidence in the supporting affidavit, the supplementary affidavit and the replying affidavit. I find that the grounds for stay of execution have not been proved. I also note that the Record of Appeal has been filed meaning that this interlocutory appeal can be fast-tracked and disposed of speedily. For these reasons the application is hereby dismissed. Costs in the appeal.

Orders accordingly.

**RULING, DATED AND SIGNED AT VIHIGA, READ VIRTUALLY THIS 12TH DAY OF OCTOBER 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,  
JUDGE.**

**In the presence of:**



Ajevi- Court Assistant.

Willie - for the Appellant/Applicant.

Olucheli- for the Respondent.

