



**Omukhulu (Suing as legal representative of the Late Masinde Wanzetse) v Lipuku & another (Environment and Land Appeal E017 of 2023) [2023] KEELC 21334 (KLR) (7 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21334 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E017 OF 2023  
DO OHUNGO, J  
NOVEMBER 7, 2023**

**BETWEEN**

**ARNOLD OMKHULU (SUING AS LEGAL REPRESENTATIVE OF THE LATE MASINDE WANZETSE) ..... APPELLANT**

**AND**

**HANNINGTON HAGGAI MINABO LIPUKU ..... 1<sup>ST</sup> RESPONDENT**

**EVERLYN ATIENO KANGU ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of the Principal Magistrate's Court at Butere (Hon. E. Wasike, Principal Magistrate) delivered on 22nd August 2023 in Butere MCELC No. 49 of 2021)*

**RULING**

1. The Subordinate Court (Hon. E. Wasike, Principal Magistrate) delivered judgment on August 22, 2023 in which it dismissed the appellant's case and entered judgment in favour of the first respondent against the appellant for *inter alia* eviction from the parcel of land known as Marama/Shiatsala/1334 (the suit property).
2. Aggrieved by the judgment of the subordinate court, the appellant filed this appeal through Memorandum of Appeal dated August 29, 2023. Shortly thereafter, the appellant filed Notice of Motion dated September 13, 2023, which is the subject of this ruling.
3. The following orders are sought in the application:
  1. [Spent]
  2. [Spent]



3. [Spent]
4. The honorable court be pleaded to grant an order of stay of execution of the judgement and Decree herein dated August 22, 2023, together with all consequential proceedings and/or orders and in particular, the limb thereof directing the applicant/appellant to vacate LP No. Marama/Shiatsala /1334 pending the hearing and determining (sic) of the Appeal dated August 29, 2023.
5. The Honourable court, be pleased to grant an inhibition directed to and/or against any a dealings, transactions and/or disposition relating and/or concerning transactions in respect of LP. No. Maramaishiatsala/1334 to last pending the hearing and determination of the plaintiff's appeal dated August 29, 2023, albeit filed in court on August 30, 2023.
6. The honourable court be pleased to grant such further and/or other orders as may be deemed just, appropriate and/or expedient be granted.
7. Costs of this Application to abide the Appeal.
4. The Application is supported by an Affidavit sworn by the appellant/applicant. He deposed that the first respondent is keen on executing the decree of the subordinate court and that the first respondent's advocates had written a letter demanding compliance. He added that enforcement of the decree would render this appeal futile and that he had resided on the suit property with his family for over forty years.
5. The respondents opposed the application through a Replying Affidavit sworn by the first respondent. He deposed that the appellant has been in illegal occupation of the suit property since the year 2016 and not for forty years. He added that the applicant had not demonstrated that he would suffer substantial loss and further stated that if any stay is granted, it should be conditional on the applicant depositing security.
6. The application was canvassed through Written Submissions which both sides duly filed. I have considered the Application, the Affidavits, and the Submissions. The issue for determination is whether the orders sought should issue.
7. Principally, what is before the court is an application for stay pending hearing and determination of this appeal. This court's jurisdiction to grant stay of execution pending hearing and determination of an appeal is guided by order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010. The essence of order 42 rule 6 (1) and (2) is that an applicant seeking stay of execution pending appeal must demonstrate that substantial loss will result to him if stay is not granted, and that the application has been made without unreasonable delay. The applicant is further required to give such security as the court may order for the due performance of the decree. See Kenya Power & Lighting Co. Ltd v Kigaita Ngare Unduthu & 36 others [2020] eKLR and Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR.
8. There is no dispute that the appellant/applicant is in possession of the suit property and that the subordinate court ordered his eviction. I am persuaded that he will suffer substantial loss if he is evicted prior to the determination of this appeal. He has made a case for an order of stay pending hearing and determination of this appeal. To ensure an early determination of the appeal, I will give timelines for filing of the Record of Appeal and Submissions in respect of the appeal.
9. The applicant also sought an order of inhibition in respect of the suit property. I am not persuaded that I should grant such an order since it has the potential of introducing issues that were not covered by the decree. An order of stay of execution should sufficiently address any impeding enforcement of the decree.



10. In view of the foregoing, I make the following orders:

- a. There is hereby issued an order of stay of execution of the judgement and decree of the subordinate court together with all consequential proceedings and/or orders and in particular, the limb thereof directing the applicant/appellant to vacate land parcel number Marama/Shiatsala/1334 pending the hearing and determination of this appeal.
- b. The stay is conditional on the appellant filing and serving the record of appeal together with written submissions on the appeal within 30 (thirty) days from the date of delivery of this ruling. In default, the stay orders shall lapse.
- c. The respondents to file and serve written submissions on the appeal within 30 (thirty) days of service of the appellant's submissions.
- d. Costs of Notice of Motion dated September 13, 2023 shall abide the outcome of the appeal.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 7<sup>TH</sup> DAY OF NOVEMBER 2023.**

**D. O. OHUNGO**

**JUDGE**

**Delivered in open court in the presence of:**

No appearance for Appellant

Ms Wanyonyi holding brief for Ms Nyagol for the Respondents

Court Assistant: E. Juma

