



REPUBLIC OF KENYA



**Wamukota (Suing on Behalf and as a Done of Power of Attorney from
Jean Muyenyo Kitongo) v Masika (Environment and Land Appeal
E005 of 2025) [2025] KEELC 4004 (KLR) (19 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4004 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E005 OF 2025**

EC CHERONO, J

MAY 19, 2025

BETWEEN

EVANS WAMUKOTA APPELLANT

**SUING ON BEHALF AND AS A DONE OF POWER OF ATTORNEY FROM
JEAN MUYENYO KITONGO**

AND

JANET NASIMIYU MASIKA RESPONDENT

RULING

1. This ruling arises from the Notice of Motion Application dated 18/02/2025 brought under Section 3 & 3A of the [Civil Procedure Act](#), Orders 42 Rule 6(1) of the Civil Procedure Rules seeking the following orders: -
 - a. Spent.
 - b. Spent.
 - c. That there be a temporary stay of execution of the judgment and decree in Kimilili SPM ELC Cause No. E036 of 2021 (Evans Wamukota (Suing on behalf and as a done of Power of Attorney from Jean Muyenyo Kitongo vs. Janet Nasimiyu Masika delivered on the 13th day of February 2025 pending the hearing and determination of this appeal.
 - d. The costs of the application be provided for.
2. The application is premised on the grounds on the face of the application supported by the affidavit of the applicant sworn on even date. The Applicant deposed that he is the donee of the absolute and registered proprietor of land parcel no. Bungoma/Kiminini/1872(hereinafter referred to as the “suit land”) and had sought for eviction orders against the Respondent before the trial court. That the trial



court dismissed his case and allowed the Respondent's counter-claim ordering transfer of the subject land to the Respondent who had no locust standi to file the counter-claim. He deposed that he is dissatisfied with the decision of the trial court and that he preferred an appeal which has high chances of success. He stated that the trial court's judgment is due for execution and he stands to suffer losses and his appeal nugatory if the orders sought are not granted. He argued that the application has been brought timeously and without unreasonable delay. Lastly, he expressed his willingness to abide by any orders as to security.

3. In opposition, the Respondent filed a Relying affidavit sworn on 28/02/2025 in which she deposed that the Applicant had not met the threshold for the grant of the orders sought as set out in Order 42 Rule 6 of the Civil Procedure Rules. It was further deposed that the Applicant has not demonstrated any substantial loss that he stands to suffer and neither has he demonstrated how his appeal will be rendered nugatory. It is on this basis that the respondent sought to have the application dismissed with costs.
4. When the application came up for directions, the parties agreed to have the same canvassed by way of written submissions.
5. The Applicant filed submissions dated 24/02/2025 in which he started by setting out the provisions of Order 42 Rule 6 of the *Civil Procedure Act* on the conditions for granting the orders sought and Section 1A (2) &1B of the *Civil Procedure Act*. On substantial loss, the Applicant relied in the case of Kenya Shell ltd vs. Kibiru & Anor (1986) eKLR. He submitted that if the orders sought are not issued, then his registered land shall be transferred to the Respondent causing substantial loss and rendering the appeal nugatory. On whether the application was filed timeously, he submitted that the application was filed within 5 days after delivery of the impugned Judgment therefore, there was no delay. On the issue of security, the Applicant submitted that he was willing to be abide by such terms as to security for due performance of the decree as this Court may order.
6. The Respondent on her part filed submissions dated 25/02/2025 in where she referred to the provisions of Order 42 Rule 6 of the *Civil Procedure Act* on the conditions for granting orders of stay pending appeal. On the issue of substantial loss, reliance was placed in the case of Joyce Mwelu Mulani v Tabitha Nduku Mulani (2021) eKLR and Sicpa Securities Sol.Sa v. Okiya Omtata Okoit & 2 Others (2018) eKLR. The Respondent submitted that the mere fact that execution of the trial court's judgment is imminent is not proof of substantial loss. He cited the case of James Wangalwa & Another v. Agnes Naliaka Cheseto (2012) eKLR and Joseph Gachie T/A Joska Metal Works v Simon Ndeti Muema (2012) eKLR. In conclusion, she urged the court to strike out the application with costs.

Analysis and Determination

7. I have considered the Notice of Motion application, the supporting and replying affidavits and submissions and in my view, the only issue for determination is whether the court should grant a stay of execution of the Judgment delivered on 13/02/2025 pending the hearing and determination of this appeal.
8. The legal provisions governing stay of execution pending Appeal are contained in Order 42 Rule 6(2) of the Civil Procedure Rules which provides as follows :-

No order for stay of execution shall 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.”

9. The impugned judgment declared that the Appellant holds title to land parcel no. Bungoma/Kiminini/1782 in trust and in equal share to other beneficiaries of the estate of George Kitongo Masika and directed that the Appellant transfers a portion measuring four (4) acres of the abovementioned land to the Respondent failure to which the court administrator shall execute such documents to effect the order. The Respondent’s share was to abide to the share she occupies. Being aggrieved with the impugned judgment, the Applicant preferred this appeal by filing a memorandum of appeal contemporaneously with the instant application seeking stay of execution pending appeal.
10. The purpose of stay of execution is to preserve the substratum of the case. In the case of Consolidated Marine Vs Nampijja & Another Civil App No. 93 of 1989 (Nairobi) the Court held that; “The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.” Further, the grant of an order of stay of execution is a discretionary one as was held in the case of RWW Vs EKW (2019) eKLR.
11. In the case of James Wangalwa & Another Vs Agnes Naliaka Cheseto (2012) eKLR Gikonyo J (as he then was) 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.”

Further, in the case of Butt v Rent Restriction Tribunal [1982] KLR 417 the Court of Appeal held that a stay must be granted so that an Appeal may not be rendered nugatory. Courts are called upon to balance the rights of a successful party so as not to hinder him from enjoying the fruits of the judgment and the undoubted right of the Appellant whose Appeal may succeed and be rendered nugatory if stay of execution is not granted.
12. It is imperative to determine the factors to consider before granting the orders sought.
13. The first condition is to establish whether the Applicant will suffer substantial loss unless an order of stay is granted. On this condition, the Applicant should not only state that he is likely to suffer substantial loss, but must prove that indeed he will suffer substantial loss if stay orders are not granted. See the case of Charles Wahome Gethi Vs Angela Wairimu Gethi (2008) eKLR. On this, the Applicant argued that he is the registered proprietor of the subject land and that the trial court ordered for the transfer of 4 acres of the said land to the Respondent and that he is apprehensive that the said transfer may be effected thereby compromising the suit land. On the basis of the above, the Applicant contends that he would suffer irreparable loss as his appeal would be rendered nugatory if the orders sought are not granted. The Respondent on her part argued that the Applicant had not sufficiently demonstrated substantial loss and how his appeal would be rendered nugatory.
14. This court appreciates the import of the judgment delivered by the trial court and notes that it is not in dispute that the Applicant is the registered proprietor of the suit property. It is evident from the judgment that the Applicant was ordered to transfer to the Respondent a portion measuring 4 acres and in default the court administrator to sign the transfer forms. Further, the Applicant has denied the Respondent’s claim of trust over the suit land and asserts registered owners’ interests. I therefore find that the Applicant has satisfied this Court that he is likely to suffer substantial loss if the substratum of the appeal is transferred to the Respondent.



15. Secondly, an Applicant must also satisfy the Court that his application has been made without unreasonable delay. It is not in dispute that the judgment was delivered 13/02/2025. The present application was filed on 18/02/2025. I find that the application was brought without unreasonable delay.
16. Lastly, an applicant must satisfy the condition as to the provision of security for costs, Order 42 Rule 6 (2) (b) of the Civil Procedure Rules is couched in mandatory terms to the effect that the Applicant must furnish security for the performance of the order or decree. The applicant in this case has stated that he is willing to be bound by any orders the court will issue as to security for the due performance of the decree as may ultimately be binding on him.
17. In the end, I find that the Applicant has satisfied the conditions required for the grant of stay of execution pending appeal.
18. The upshot of the foregoing is that the application dated 18/02/2025 is allowed in the following terms:-
 - a. Stay of execution of the judgment/decree is granted pending the hearing and determination of the applicant's appeal.
 - b. The applicant shall deposit the title deed for land parcel no. Bungoma/Kiminini/1872 within 30 days from the date of delivery of this ruling in default the stay orders shall automatically lapse
 - c. Each party to bear their own costs.
19. Orders Accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 19TH DAY OF MAY, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Were for the Appellant/Applicant.
2. Were H/B for Echom for the Respondent.
3. Bett C/A.

