



**Nyiro v Duwale (Environment and Land Appeal E001 of 2025)  
[2025] KEELC 4020 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4020 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND APPEAL E001 OF 2025**

**EK MAKORI, J**

**MAY 15, 2025**

**BETWEEN**

**KARISA NYIRO ..... APPLICANT**

**AND**

**ABDILLE HASSAN DUWALE ..... RESPONDENT**

**RULING**

1. The matter pertains to the Applicant's notice of motion application dated January 15, 2025, in which the Appellant requests a stay of execution of the ruling and order issued by the Hon. R.M. Amwayi (PM) in Kaloleni CMCC No. E022 of 2024, Abdille Hassan Duwale v. Karisa Nyiro, dated December 17, 2024, along with any subsequent execution proceedings, pending the hearing and determination of the appeal.
2. The Applicant asserts they are Bungale (Walea) Muungano Group members and Mathanyango Muungano Group members. Together with the aforementioned group, the Applicant initiated Kilifi CMCC ELC No. 63 of 2024, Bungale Walea & another v Suleiman Abdille & Another, and secured injunction orders against the Respondents. The Respondents subsequently appealed against that decision in ELCA E026 of 2024, where their application was dismissed. In total disregard of the previous ruling, the Respondents proceeded to move the court in Kaloleni CMCC No. E022 of 2024 regarding the same subject property and cause of action, without disclosing to the court the existence of the injunction orders. Despite the Applicant opposing that suit on the grounds of sub judice and res judicata, the learned magistrate in Kaloleni issued injunction orders against the Applicant herein.
3. The Applicant asserts that the injunction orders issued in Kaloleni have resulted in physical confrontations between the parties, particularly on December 18, 2024, when the Respondent forcibly entered the subject land with livestock, destroying the Applicant's agricultural products. The Applicant expresses concern that the appeal will be rendered nugatory if the stay is not granted. He



- contends that his appeal raises significant legal issues and that the application has been submitted promptly.
4. In his replying affidavit dated January 26, 2025, the Respondent asserts that the Applicant is not a party in Kilifi CMCC ELC No. 63 of 2024, and that the issues within that case are not analogous to those presented in Kaloleni CMCC No. E022 of 2024. He contends that in the former suit, the issue revolves around an allegation of breach of lease, whereas in the latter, it pertains to trespass due to an existing lease. The Respondent maintains that the application constitutes an attempt to evict him from the subject property and that if the orders are stayed, he would suffer irreparable harm and damage. He claims that the appeal does not raise any substantive legal issues and constitutes an abuse of the court process. Therefore, the Respondent requests that the court dismiss the application with costs.
  5. The application was expressed through written submissions; however, only the Applicant had complied when this ruling was made.
  6. I have diligently reviewed the submissions presented by the Applicant and observe that counsel primarily reiterates the events leading to this appeal, and reproduces pleadings filed in various courts. The issue identified for determination pertains to whether the proceedings in Kaloleni are sub judice and res judicata. It is my respectful opinion that this issue should not be discussed at this preliminary stage, as addressing it could result in the premature disposition of the appeal at an interlocutory stage. The matter for consideration at this juncture is whether to grant a stay of execution and to ascertain who should bear the costs associated with the current application.
  7. Order 42 Rule 6 of the Civil Procedure Rules stipulates as follows: -

“No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except in so far as the Court Appealed from may order but, the Court Appealed from, may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court Appealed from, the Court to which such Appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the Appeal is preferred may apply to the appellate Court to have such order set aside.

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 1st 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.”
  8. The Applicant must therefore demonstrate that he will incur substantial loss unless the order is granted, that the application has been made without unreasonable delay, and that security for due performance has been provided. The contested ruling was delivered on December 17, 2024, and the Memorandum of Appeal and the present application were filed on January 15, 2025. The Court does not regard this as an excessive delay.



9. Substantial loss was clearly explained in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR:

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other 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 the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

10. The subject matter of this appeal pertains to land, and in such cases, the Court is typically concerned with preserving the suit's substratum pending the appeal's outcome. The Applicant asserts his membership in the Bungale (Walea) Muungano and Mathanyango Muungano groups, which he claims leased approximately 4000 acres of unsurveyed land located in Bungale Walea and Matanyango within the Ndigiria location to the Respondent. In the original suit that led to this appeal, the Respondent contended that he is entitled to the subject property by virtue of a lease agreement with another party and the Mathanyango Muungano group. His claim against the Applicant in that proceeding involves allegations of trespass. The Applicant has failed to provide sufficient evidence to prove his membership in the group that leased the subject property to the Respondent. Consequently, I remain unconvinced that he has sufficiently demonstrated that he would incur any significant loss if the stay is not granted.
11. As previously established, substantial loss constitutes the foundation of the court's current jurisdiction and must be prevented by maintaining the status quo, as such loss would render the Appeal ineffective. In light of the failure to establish this point, I find no basis to discuss the issue of security for costs. Therefore, the present application is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIRTUALLY IN MALINDI ON THIS 15<sup>TH</sup> DAY OF MAY 2025.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

Mr. Mangaro for the Appellant

Happy: Court Assistant

In the Absence of:

Mr. Kiseu for the Respondent

