



**Makhino v Dondo (Environment and Land Appeal E083 of 2024)
[2025] KEELC 4600 (KLR) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4600 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E083 OF 2024**

**A NYUKURI, J
JUNE 19, 2025**

BETWEEN

ALLAN MAKHINO APPELLANT

AND

CHRISTOPHER B. ALEKE DONDO RESPONDENT

RULING

Introduction

1. Before court is a notice of motion dated 22nd May 2025 filed by the appellant seeking stay of execution of the judgment delivered on 27th November 2024 in Kakamega MCELC No. E052 of 2020 pending the hearing and determination of this appeal.
2. The application is anchored on the affidavits sworn by the applicant dated 22nd May 2025 and 26th May 2025. The applicant's case is that judgment was entered against him on 27th November 2024 in Kakamega MCELC No. E052 of 2020 and that before expiry of the 30 days stay of execution granted by the court on delivery of the judgment, the respondent unprocedurally moved into the suit property and demolished some of the applicant's structures but was only stopped upon police intervention.
3. He further stated that he acted diligently by filing an application for stay of execution but that the same was dismissed by the trial court on 21st May 2025 exposing him to imminent eviction. He also stated that the respondent had taken out the decree before seeking his approval of the same, culminating in the OCS Matunda Police Station summoning him for a meeting regarding the suit property on 23rd May 2025. He expressed his apprehension that the OCS intended to supervise his eviction. He stated that he had extensively developed the suit property since 1998 and had been in quiet, open and peaceful occupation of the same as he has active fish ponds and green houses on the suit property. He averred that if he is evicted, the value of the subject matter of the appeal would have been destroyed.



4. According to the applicant, the respondent has never been in occupation of the suit property even before adjudication and therefore will not suffer prejudice that cannot be compensated by an award of damages. He maintained that he had an arguable appeal as there was no evidence presented before the trial court showing that his occupation of the suit property was interrupted. He also argued that there was no justification for the trial court to award damages when the respondent had admitted having been on the suit property even before adjudication.
5. He stated that unless stay of execution is granted, he stood to suffer substantial loss as his livelihood would be taken away and that the subject matter of the appeal will not remain in its current status hence the appeal will be rendered nugatory. Further, that he is a man of means and ready and willing to abide by the court's conditions regarding security. He attached photographs of the suit property and the trial court's ruling as well as judgment.
6. The application was opposed. Christopher B. Aleke Dondo, the respondent in this matter, filed a replying affidavit sworn on 4th June, 2025 opposing the application. He stated that the applicant's application for stay of execution before the trial court was dismissed. He maintained that the application did not meet the threshold of Order 42 Rule 6 of the Civil Procedure Rules as the applicant had not demonstrated that substantial loss was imminent; that he had not deposited security for the due performance by the decree and that the application had been overtaken by events as execution had already been conducted.
7. He further stated that the application had not met the threshold of Order 22 rule 2 of the Civil Procedure Rules as no payments had been made into court, no monies had been paid by the applicant to the respondent/decree holder and no directions on payment of monies due to the respondent have been sought. He stated that the orders sought are discretionary and the court is not compelled to grant the same.
8. He maintained that since execution had already been done, no prejudice will be suffered by the applicant if stay of execution is not granted. He averred that allegations made by the applicant were mere allegations with no cogent evidence and that there was no proof of intense farming or fish farming as alleged by the applicant. He argued that the appeal has no chance of success based on the recent jurisprudence that magistrate courts have no jurisdiction to determine disputes regarding adverse possession. That the applicant has acted against equity and justice by accessing the suit property and planting crops thereon when orders of status quo are in force.
9. The application was disposed by way of written submissions. On record are submissions filed by the applicant dated 11th June 2025 and the respondent's submissions dated 4th June 2025 both of which this court has duly considered.

Analysis and determination.

10. The court has carefully considered the application, response thereto and parties' rival submissions. The sole issue for the court's determination is whether the applicant has met the threshold for grant of orders of stay of execution pending appeal.
11. Order 42 Rule 6 of the Civil Procedure Rules provides for the jurisdiction of the court to grant orders of stay of execution pending appeal as follows;
Stay in case of appeal [Order 42, rule 6]
 1. 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.

- (2) No order for stay of execution shall be made under subrule (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.
12. Essentially, imminent execution cannot in itself be a basis for grant of stay of execution pending appeal, as execution is a lawful process that follows grant of an order, judgment or decree by a court. Therefore, for an applicant to succeed in seeking stay pending appeal, they must demonstrate that they stand to suffer substantial loss if stay is not granted; that they have sought for stay without unreasonable delay and show willingness to provide security for the due performance of the decree that may issue against them.
13. The Court of Appeal enunciated principles to be considered in determining whether to grant or refuse stay of execution pending appeal in *Butt vs Rent Restriction Tribunal* [1979]KLR as follows:
 - a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion.
 - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.
14. In recognizing that execution is a legal process which should not be unjustifiably or unjudiciously hampered, the court in the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, expressed itself thus:

“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.”

15. In *Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 the court discussed the element of substantial loss as follows;

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”

16. In the instant matter, the applicant stated that he is in occupation of the suit property and running fish farming and other farming activities thereon. He provided photographs showing that farming activities were ongoing on the suit property and stated that he was apprehensive that if execution is not stayed, the character of the suit property will be altered as the current status thereof shall not remain and that he will lose his livelihood. Having considered the annexures on the affidavits filed by the parties, it is clear to me that at the point of filing Kakamega CMC ELC Case No. E052 of 2020, the applicant was in occupation of the suit property, as one of the prayers in the plaint was for his eviction. It also apparent that the respondent has not been in occupation of the suit property, but he is the registered proprietor thereof. Exhibits presented by both parties herein show that the applicant’s fence was recently removed from the suit property. Therefore, I agree with the applicant’s position that if execution proceeds the character of the suit property may be altered, hence he may suffer substantial loss. In the circumstances the court is of the view that the applicant is deserving of an orders of stay of execution.

17. As the applicant was ordered by the trial court to vacate the suit property and also pay general damages of Kshs. 300, 000/=, I allow the prayer for stay of execution pending appeal, on condition that the applicant deposits in court a sum of Kshs. 150, 000/= being security for the due performance of the decree that may ultimately be binding on him, in 30 days of this ruling.

18. Ultimately, the application dated 22nd May 2025 is allowed in the following terms;

- a. That this honourable court hereby issues an order of stay of execution of the decree issued in Kakamega MCELC NO. E052 of 2020 dated 27th November 2024 pending hearing and determination of this appeal.
- b. The appellant shall, in 30 days of this ruling, deposit in court, a sum of Kshs. 150, 000/= being security for the due performance of the decree that may issue against him. In default, the orders of stay granted herein above shall stand vacated.

19. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 19TH DAY OF JUNE, 2025

A. NYUKURI

JUDGE

In the presence of;



Ms. Wakoli for the appellant/applicant

Ms. Wilunda for the respondent

Court Assistant: M. Nguyai

