



Mwatela & 2 others (Suing as Officials of the Isangaiwishi Development Community Land Management Committee) v Mghazo & 2 others (Environment and Land Case E004 of 2023) [2025] KEELC 4573 (KLR) (19 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4573 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND CASE E004 OF 2023
EK WABWOTO, J
JUNE 19, 2025**

BETWEEN

**HON. CALIST MWATELA 1ST PLAINTIFF
TOLE MWAKIDEDI 2ND PLAINTIFF
MARY WADERO 3RD PLAINTIFF
SUING AS OFFICIALS OF THE ISANGAIWISHI DEVELOPMENT
COMMUNITY LAND MANAGEMENT COMMITTEE**

AND

**NANCY MGHAZO 1ST DEFENDANT
ERNEST MWAKIRETI KISOCHI 2ND DEFENDANT
ELIJAH MWAZUGHA 3RD DEFENDANT**

RULING

1. This court delivered its judgment in respect to the Plaintiffs suit and Defendant’s Counterclaim on 8th May 2025 as follows:-
 - a. The Plaintiff’s suit is hereby dismissed.
 - b. A declaration is hereby issued that the Defendants have acquired title to the land known as Bura/Isangaiwishi Scheme/19 by way of adverse possession.
 - c. A permanent injunction is hereby granted restraining the Plaintiffs from evicting, demolishing and interfering in any way with the Defendants peaceful occupation of the suit land.
 - d. Each party to bear own costs of the suit and the Counter claim.



2. Subsequently thereafter the Plaintiff moved this court vide an application dated 9th May 2025 seeking for the following reliefs:-
 - a. ...
 - b. This Honourable Court be pleased to issue a temporary order of stay of execution of the Judgment dated 8th May 2025 pending the hearing and determination of this application.
 - c. This Honourable Court be pleased to issue an order of stay of execution of the Judgment dated 8th May 2025 pending the hearing and determination of the appeal.
 - d. This Honourable Court be pleased to issue an order for status quo pending the determination of the application.
 - e. This Honourable Court be pleased to issue an order for status quo pending the determination of the appeal.
 - f. That pending the hearing of this application, this Honourable Court be pleased to issue an injunctive order restraining the Respondents by themselves, servants, employees, agents or any other persons acting under their instructions or their interests from entering, remaining, trespassing or in any other manner interfering with all that parcel of land known as Bura/Isangaiwishi Scheme/19.
 - g. That pending the hearing and determination of the appeal, this Honourable Court be pleased to issue an injunctive order restraining the Respondents by themselves, servants, employees, agents or any other persons acting under their instructions or their interests from entering, remaining, trespassing or in any other manner interfering with all that parcel of land known as Bura/Isangaiwishi Scheme/19.
 - h. That pending the hearing and determination of this application, this Honourable Court be pleased to issue an order of status quo against the Defendants that they should not trespass nor benefit from the suit property.
 - i. That an order be issued directing that the Taita Taveta County Commandant, The Officer Commanding Police Division Taita Taveta and the Officer Commanding Station Mwaktau Police Station to supervise, provide security and enforce the orders.
 - j. That costs be in the cause.
3. The said application was supported by an affidavit sworn on 9th May 2025 by Tole Mwakidedi. It was deponed that the Plaintiffs/Applicants stands to suffer irreparable harm and immense financial loss, particularly owing to ongoing developments on the suit property which is of significant value and strategic importance.
4. The subject matter of the dispute involves 14,000 acres of land, of which the Defendant/Respondent occupies less than one (1) acre and the status quo can be preserved without causing any hardship or prejudice to the Defendant/Respondent.
5. It was also stated that the Plaintiffs/Applicants have been in continuous possession and control of the suit property and have made substantial investments therein which would be irreversibly undermined should execution proceed before the appeal is heard and determined.
6. It was contended that granting a stay of execution will preserve the substratum of the appeal, ensure judicial economy and uphold the principle that a successful appellant should not be deprived of the



fruits of their appeal. The balance of convenience tilts in favour of the Plaintiffs/Applicants as any disruption caused by execution would have far reaching and disproportionate consequences compared to the minimal impact on the Defendants/Respondents.

7. It was also contended that the application has been brought promptly, without undue delay, in compliance with the law and the overriding objectives of justice.
8. It was further contended that the Plaintiffs/Applicants are ready, able and willing to provide any security or meet any other conditions that the Honourable Court may deem fit as a prerequisite for the grant of stay of execution and further that there is a real public interest in allowing the appeal process to run its full course without the risk of parties taking premature and irreversible actions, especially in disputes involving large tracts of land and public or community interests.
9. The application was opposed by the Defendants who filed a Replying Affidavit sworn by Ernest Mwakireti Kisochi on 2nd June 2025. It was averred that the application has not met the threshold for grant of stay of execution as required under Order 42 Rule 6(2) of the Civil Procedure Rules. No substantial loss has been demonstrated. No offer for security has been demonstrated and the said application ought to be dismissed.
10. The said application was canvassed by way of written submissions pursuant to the directions issued by this court. The Applicant filed written submissions dated 27th May 2025 which the court has considered. No written submissions had been filed by the Respondents as at the time the court retired to write its ruling. Nevertheless, this court is still obligated to consider the application and rival affidavits filed in rendering its decision.
11. The main issue for determination is whether the application is merited and deserving for granting of the orders sought therein. The issue of whether to grant stay pending appeal is a matter of discretion. This discretion is fettered by four conditions. First, an applicant must demonstrate that there is just cause to grant stay. Second, the Applicant has to demonstrate that he or she will suffer substantial loss should stay not be granted. Third, there has to be security provided for the due performance of the decree as may ultimately be binding upon the Applicant. Fourth, the application has to be brought without unreasonable delay.
12. The principles are further outlined under Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules*, which provides:
 - (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 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.

13. A stay of execution under order 42 of the Civil Procedure Rules is an interim order to suspend the rights of one party who is aggrieved with the judgment of the trial; court or tribunal and wishes to exercise his or her right of appeal. Its main objective is to protect the substratum of the suit by delaying the execution process like attachment until the determination of the appeal. Being a discretionary remedy the applicant must demonstrate that he or she has approached the court of equity with clean hands as succinctly stated in the case of *Jajbhay v Cassim* 1939 AD 537-551 the court held on this maxim that: “All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice.”
14. The general principle of law is that the successful litigant in possession of a valid court judgement is entitled to the fruits of judgement unless there exist exceptional circumstances to deny him or her that right.

In considering an application for stay of execution I am guided by the case of *Butt vs Rent Restriction Tribunal Civil App No. NAI 6 of 1979* (Madan, Miller and Porter JJA) where the following guidelines were given:

“The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

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 that appeal court reverse the judge’s discretion. 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. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

15. In the instant application, judgment was delivered on 8th May 2025 and the Applicant filed a Notice of Appeal promptly on 9th May 2025. The Applicant also filed the instant application promptly on 9th May 2025. The Applicant thus came to court within the time allowed to file the appeal.
16. On the issue of substantial loss, the Applicant argued that the Respondents are likely to execute the decree where they would lose the land in question. However according to the Applicant’s own admission, the land in question is 1500 acres and the Respondents occupy less than 1 acre and thus this is not a proper demonstration of substantial loss as envisaged under Order 42 Rule 6 of the Civil Procedure Rules.
17. Having considered the said application and the need to balance the interest of the parties and also considering that the appeal may take some time to have it determined and further considering that the Defendants are currently residing in the suit property, this court proceeds to grant the following orders in respect to the application dated 9th May 2025:-
- a. An order be and is hereby issued that the status quo currently pertaining to the suit premises be maintained for a period of 180 days from today.
- b. Each party to bear own costs of the application.



DATED, SIGNED AND DELIVERED IN OPEN COURT/VIRTUALLY AT VOI THIS 19TH DAY OF JUNE 2025.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Salim h/b for Mr. Nzuli for Plaintiffs/Applicants.

Ms. Ambusti h/b for Mr. Mukanzi for Defendants/Respondents.

Court Assistant: Mary Ngoira

