



**Omulama v Shimeka & another (Environment and Land Appeal
E005 of 2025) [2025] KEELC 6522 (KLR) (30 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6522 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E005 OF 2025
A NYUKURI, J
SEPTEMBER 30, 2025**

BETWEEN

FRANCIS OTUMA OMULAMA APPELLANT

AND

ISMAEL FESTUS SHIMEKA 1ST RESPONDENT

JOSELIC MUCHIMBA SHITANDI 2ND RESPONDENT

RULING

1. Before court is a notice of motion dated 23rd June 2025 filed by the appellant seeking the following orders;
 - a. Spent
 - b. Spent
 - c. Spent
 - d. Pending inter partes hearing and or proceedings in the lower court at Butere in MELC NO. E 001 of 2025 be stayed.
 - e. Spent
 - f. Spent
 - g. That in the final disposition of this application, an order does issue that the execution and or implementation or further implementation of the subject ruling of the Honourable learned Principal Magistrate and all orders arising therefrom shall remain stayed and or suspended until the final appeal herein pending is determined.
 - h. That costs of this application shall abide the outcome of the appeal.



2. The application is anchored on the affidavit sworn by the applicant dated 23rd June 2025. The applicant's case is that he was sued by the respondent who seeks to evict him from the land he has occupied since 1960. That he buried his parents on the suit property without any objection, which land was registered in the name of the father of the 2nd respondent. That he resides on the suit property together with his three wives and twenty children. That he realized that the respondents secretly carried out succession vide Succession Cause No. 113 of 2020, subdivided the land and transferred it into their names. That he has since filed summons for revocation before the succession court. That the respondents have never resided on the suit property but sued him in the lower court seeking his eviction and injunction. That the trial court issued orders of injunction against the appellant and on the basis of those orders, the respondents have fenced the applicant in the suit property, tilled land up to his door, blocking his access to his home. That the respondents have placed workers on the property who keep threatening the applicant that he should leave or they will burn his houses. He complained that the ruling by the trial court amounted to final orders. That if orders sought are not granted he will suffer injustice and will not access justice. He attached the Memorandum of Appeal, receipt and the ruling appealed against.
3. The respondents were duly served with the instant application. On 23rd July 2025, their counsel Ms Eroba sought for leave to file replying affidavit by close of business the same day. The court granted her 7 days to do so. However, as at 15th August 2025 when the court was writing this ruling, no response had been filed. Therefore, the application is unopposed. In addition, on 23rd July 2025, parties were also granted 14 days to file and exchange written submissions, but as of 15th August 2025, none of the parties had filed submissions.

Analysis and determination

4. I have carefully considered the application, supporting affidavit and annexures thereto. The issue that arises for the court's determination are whether the applicant has met the threshold for grant of orders of stay of execution pending appeal and stay of proceedings in respect of the case pending before the lower court.
5. Order 42 Rule 6 of the Civil Procedure Rules provides for the jurisdiction of the court to grant orders of stay of proceedings and 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.



6. The threshold for grant of stay of proceedings is higher than that for grant of stay of execution. Once cases are filed in court, they ought to be determined expeditiously as envisaged in the provisions of Article 159 (2) (b) of *the Constitution* as read with section 3 of the *Environment and Land Court Act* and sections 1A and 1B of the *Civil Procedure Act*. The court is not a parking yard, hence once cases are filed they ought to be resolved expeditiously. Therefore, for an applicant to obtain orders to stay the hearing and determination of a matter, they must unequivocally demonstrate that proceeding with the matter will result in manifest injustice.
7. I am in agreement with the position taken by the court in the case of *Kenya Wildlife Service v James Mutembei (2019) e KLR*, where it held as follows;

“Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on the right of access to justice, right to be heard without delay, and overall right to fair trial. Therefore, the test for stay of proceedings is high and stringent.”
8. In the instant suit, the applicant sought for stay of proceedings. The prayer for stay of proceedings is sought to be granted indefinitely as the same is not sought to be granted pending the determination of this appeal or the occurrence of any other future event. Parties are bound by their pleadings. If an indefinite stay is granted as sought, then the lower court case will never be heard. The applicant has not given any justification for grant of orders of stay of proceedings in the lower court, neither has he demonstrated the injustice that may ensue if the lower court proceedings are not stayed. He has not demonstrated that the interests of justice would require this court to halt proceedings in the lower court. I am therefore not convinced that the applicant deserves orders of stay of proceedings and therefore that prayer is declined.
9. Regarding stay of execution, it is trite that 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. Hence, imminent execution cannot by itself be a basis for grant of stay of execution pending appeal, as execution is a lawful process pursuant to grant of an order, judgment or decree by a court.
10. In emphasizing the point that execution is a legal process which should not be injudiciously halted, the court in the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR*, stated as follows:

“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.”



11. The Court of Appeal stated principles to be considered in determining whether to grant or refuse an order of 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.”
12. 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.”
13. In the instant matter, the applicant stated that he had been sued in the lower court for both eviction and injunction. That the trial court granted orders of temporary injunction against him which orders determined the suit as together with his three wives and twenty children, he resides on the suit property where he has been since 1960. No response was filed to deny these allegations. From the impugned ruling, it is clear that both parties were in agreement that the applicant herein is in occupation of the suit property. The respondent has not given an alternative date when the applicant entered the suit property. It is trite that no one should be condemned unheard. Where a party has in a plaint sought eviction he cannot lawfully get an eviction before evidence is taken and the other party given an opportunity to test such evidence through cross examination. In short, before a judgment is issued, a plaintiff should not ordinarily get the final orders sought in the plaint through an interlocutory application as that will be in violation of Article 50 of *the Constitution* which grants everyone a right to be heard in defence before a decision against them is made.
14. For the above reasons, I am persuaded that the applicant deserves an order of stay of execution. In the premises, the application dated 23rd June 2025 is hereby allowed only to the extent that the order of injunction made against the applicant on 10th June 2025 is hereby stayed pending hearing and determination of this appeal.
15. It is so ordered.



DATED, SIGNED AND DELIVERED AT KAKAMEGA VIRTUALLY THIS 30TH DAY OF SEPTEMBER, 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Ms Malanda for the appellant

Ms Eroba for the respondent

Court Assistant- Delphine

