



REPUBLIC OF KENYA



KENYA LAW
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**Muhati & another v Kuta (Environment and Land Appeal
E057 of 2025) [2025] KEELC 6982 (KLR) (8 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6982 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E057 OF 2025**

A NYUKURI, J

OCTOBER 8, 2025

BETWEEN

EPAINITO MUHATI 1ST APPELLANT

PAUL LWAMBI MUHATI 2ND APPELLANT

AND

SILUS MISANGO KUTA RESPONDENT

RULING

Introduction

1. Before court is a notice of motion dated 23rd June 2025 filed by the appellants seeking the following orders;
 - a. Spent
 - b. Spent
 - c. Pending the hearing and determination of this appeal this honourable court be pleased to stay the judgment, ruling, warrants of execution and any further proceedings or consequential orders in Butali Mcelc No. E069 of 2024 Silus Misango Kuta v Epainito Muhati & Paul Lwamba Muhati.
 - d. That costs for this application be in the cause.
2. The application is predicated on the supporting affidavit of the 1st appellant/applicant sworn on 23rd June 2025. The applicants' case is that they have appealed against the ruling of the trial court dated 10th June 2025 that declined to allow their application to set aside the judgment delivered in the lower court on 28th January 2025. Further that they were never served with summons to enter appearance or notice of entry of judgment in the trial court and only learnt of the matter upon service of the warrants of



execution by the auctioneer. That the respondent had instructed Dimonde Agency and Auctioneers to attach the livestock belonging to the applicants and their neighbours. That despite having a triable defence, they were denied justice in the trial court and that they stand to suffer irreparable harm if execution proceeds as they rely on livestock for survival. That this appeal has high chances of success. The deponent attached copies of application to set aside judgment and the judgment; ruling dated 10th June 2025; letter seeking typed proceedings; and proclamation.

3. The application was opposed. Silus Misango Kuta filed a replying affidavit sworn on 2nd July 2025. He stated that the applicants were served with summons to enter appearance as per the record of the trial court but neglected to enter appearance or file defence, after proper service and that therefore the judgment entered into was regular and procedural. That the dismissal of the application dated 19th May 2025 was merited. That the applicants' assertion that they were unaware of the suit was misleading and an afterthought. That auctioneers were lawfully instructed to proceed with execution. That the applicants had not demonstrated substantial loss or that their appeal raised arguable grounds and that they have not furnished any security for the due performance of the decree.. That allegations of substantial loss are unsubstantiated and that the respondent continues to suffer injustice and denial of the fruits of a judgment lawfully obtained.
4. The application was canvassed by way of written submissions. On record are submissions filed by the applicants dated 22nd September 2025 and the respondent's submissions dated 9th July 2025; both of which this court has duly considered.

Analysis and determination

5. The court has carefully considered the application, the response thereto and the submissions of parties. The only issue that arises for this court's determination is whether the applicant is entitled to the orders sought.
6. The court has power under provisions of Order 42 Rule 6 of the Civil Procedure Rules to grant orders of stay of proceedings and stay of execution pending appeal. The same provide 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.”

7. 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* of Kenya as read with section 3 of the *Environment and Land Court Act* and sections 1A and 1B of the *Civil Procedure Act*. 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. (See Kenya Wildlife Service v James Mutembei (2019) e KLR)
8. In the instant suit, the applicant sought for stay of proceedings. The applicant argued that they had been condemned without being given opportunity to be heard. The fact that the appellants did not enter appearance or file defence is not disputed. Whether or not they were given opportunity to do so is the subject of this appeal hence at this stage the court will not delve into that issue. However, the right to be heard before a decision is made is a fundamental right and therefore I am convinced that if proceedings are not stayed, the applicant having not filed defence in the lower court, an injustice may be occasioned, hence the applicants deserve the prayer for stay of proceedings.
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 the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR, held 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 discussed the element of substantial loss in the case of Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation) [2004] 2 EA 331 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.”
12. In the instant matter, the applicant stated that he was not aware of the pendency of the suit in the trial court and was only made aware when he was served with warrants of attachment by the auctioneer. He denied being served with summons to enter appearance. He stated that he had a triable defence because



the plaintiff before the trial court had leased him the suit property and that therefore he did not owe him any money. He stated that the livestock that had been attached is his source of livelihood. It is my view that the appellant has demonstrated an arguable appeal having raised the issue of non service and a triable defence. The assertion that his livestock is the source of his livelihood was not challenged by the respondent and the allegation that he was condemned unheard is a demonstration of substantial loss, as a right to be heard is fundamental

13. For those reasons I am satisfied that the applicant has demonstrated that if stay of execution is not granted, he stands to suffer substantial loss and is therefore deserving of orders of stay of execution pending appeal.
14. In the premises, the application dated 23rd June 2025 is hereby allowed as follows;
 - a. That pending the hearing and determination of this appeal this Honourable Court is hereby pleased to stay the judgment, ruling, warrants of execution and any further proceedings or consequential orders in Butali MCELC No. E069 of 2024 Silus Misango Kuta V Epainiti Muhati & Paul Lwamba Muhati.
 - b. That costs for this application shall be in the cause.
15. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THIS 8TH DAY OF OCTOBER 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM*

A. NYUKURI

JUDGE

In the presence of;

Ms Aloo holding brief for Mr. Wanyonyi for the applicants

Ms Awuor for the respondent

Court Assistant- Delphine

