

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ELC LA NO E025 OF 2024

GILBERT MUGENI APPELLANT
= VERSUS =
JOHN MARK OKONDO RESPONDENT

R U L I N G

1. **GILBERT MUGENI** (the Appellant) has moved to this Court vide his Notice of Motion dated 4th November 2024 in which he seeks the following orders:

- 1) **Spent**
- 2) **Spent**
- 3) **That there be a stay of execution of the ruling issued on 29th October 2024 in BUSIA CMC ELC CASE NO E025 of 2024 pending the hearing and determination of this appeal.**
- 4) **Any other relief this Court may deem just and expedient to grant.**
- 5) **That the costs of this application be provided for.**

2. The Motion is premised on the grounds set out therein and is also supported by the Appellant's affidavit dated 4th November 2024.
3. The genesis of the Motion arises from the ruling delivered by **HON EDNA NYALOTI CHIEF MAGISTRATE BUSIA** in **CMCC ELC CASE NO E025** of **2024** in which the Magistrate delivered the ruling dated 29th October 2024 injuncting the Appellant from using, continuing to construct, alienating transferring disposing of or in any manner whatsoever putting to use the land parcel **NO SOUTH TESO/ANGOROMO 2168** (the suit land) pending the hearing of the suit in the subordinate Court. It is the Appellant's case that those injunctive orders amount to evicting him from the suit land and also determining the prayers in the plaint before the suit is heard. That the Appellant has buildings on the suit land where he also operates a car wash business. The orders will also mean that his buildings will be vandalized leading to great loss and damage.
4. Annexed to the Motion are the following documents:
 - 1) Copy of the memorandum of appeal.
 - 2) Copy of the ruling delivered on 29th October 2024.

The Motion is opposed and **JOHN MARK OKONDO** (the Respondent) filed a replying affidavit dated 6th December 2024 in which he deposed, inter alia, that he is the registered proprietor of the suit land and cannot therefore be injuncted from using it. That in **BUSIA CMCC ELC CASE NO E061** of **2024**, the subordinate Court had stopped the Appellant from using the suit land. Similarly, the Court in **BUSIA HC ELC CASE NO 212** of **2014** had ruled in his favour.

5. The injunctive order is equivalent to allowing trespassers to utilize the suit land which is his property and the rights of the Appellants have not been violated. The Motion should be dismissed with costs.
6. The following documents are annexed to the replying affidavit:
 - 1) Copy of title deed for the land parcel **SOUTH TESO/ANGOROMO/2168**.
 - 2) Copy of the ruling delivered on 29th October 2024 in **BUSIA CMCC ELC CASE NO E061** of **2024**.
 - 3) Copy of judgment delivered on 13th March 2023 in **BUSIA HC ELC CASE NO 212** of **2014**.

The Motion has been canvassed by way of written submissions. The same have been filed by **MR ATHUNGA** instructed by the firm of **ATHUNGA & COMPANY ADVOCATES** for the Appellant and by **MR ASHIOYA** instructed by the firm of **ASHIOYA & COMPANY ADVOCATES** for the Respondent.

7. I have considered the Motion, the rival affidavits and annexures as well as the submissions by counsel.
8. This Court is not hearing the appeal against the ruling of the trial magistrate delivered on 29th October 2025 at this stage. What I am now concerned with is the prayer seeking a stay of execution of the ruling pending the appeal and I must therefore try as much as possible to guard against delving into the appeal itself.
9. **Order 42 Rule 6(1) and (2) of the Civil Procedure Rules** provides that:
 - 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.”

The relief of stay of execution pending appeal is a discretionary one. However, as is commonly said, such discretion must be exercised judiciously and upon well defined principles of law. Not capriciously or whimsically.

10. The ruling sought to be stayed was delivered on 29th October 2024 and the record shows that it was filed on 12th November 2024 as per the receipt issued on that day. So there was no unreasonable delay.
11. On the issue of substantial loss, it has been stated that it is the **“cornerstone”** of such application - **KENYA SHELL LTD -V- KIBIRU 1980 KLR 410** per **PLATT Ag J.A** (as he then was). The Appellant has deposed in paragraphs 10 to 13 of his supporting affidavit that he operates a car wash business on the suit land which the Respondent will vandalize and the orders are oppressive and will result in great loss to him whereas the Respondent will suffer no damage.
12. The Respondent on his part has deposed in his replying affidavit in paragraphs 4 and 5 that he is the registered proprietor of the suit land and an order had been issued in

his favour in **BUSIA HIGH COURT ELC CASE NO 212** of **2014** and therefore to stay the order of injunction is to allow trespassers on his land. The Appellant however filed a further affidavit dated 19th December 2024 in which he averred that the Respondent's title to the suit land is not genuine at all. I have perused the annexed judgment by **OMOLLO J** delivered in **BUSIA HC ELC CASE NO 212** of **2014** in which the Respondent was the Plaintiff in a dispute over ownership of the suit land and although the Appellant was not a party thereto, the judge in her judgment delivered on 13th March 2023 made a specific finding that the Respondent was the lawful owner of the suit land and issued an order of permanent injunction restraining the Defendants from interfering with the suit land. There is nothing to show that the said judgment was set aside in the Court of Appeal judgment in Kisumu being Civil Appeal **NO E224** of **2023**. The Appellant has also averred in his further affidavit that he was not a party in **BUSIA HC ELC CASE NO 212** of **2014** and so the judgment therein has no bearing on him. It is true he was not a party in that case but for as long as there is a judgment declaring the Respondent as the proprietor of the suit land and for as long as the said judgment has not

been set aside on appeal, the Respondent can wave it in the face of any claimant as evidence that he is the absolute owner of the suit land - **Section 24 Land Registration Act**. The validity of the title does not depend on which party is laying claim on the land and as to whether or not the Appellant has occupied the suit land for over 12 years, there is nothing to show that he has laid claim to the suit land in the subordinate Court by way of adverse possession which, in any event, that Court would not have jurisdiction to determine. It cannot therefore be correct for the Appellant to claim, as he has done in paragraph 5 of his further affidavit:

5: “That I know of my own knowledge that the title the Respondent (sic) is not genuine at all as I have been in the said land for over 12 years without let or hindrance from the Respondent.”

A competent Court having expressed itself on the validity of the Respondent’s title to the suit land, and before that judgment is set aside, it does not fall on the Appellant to question the Respondent’s title. If anything, in a case such as this where the Respondent’s title to the suit land has been affirmed by judicial process, it is the Appellant basically

a trespasser, who should give way until any claim he may have to the suit land is up-held - **JAJ SUPER POWER CASH & CARRY LTD -V- NAIROBI CITY COUNCIL & OTHERS C.A. CIVIL APPEAL NO 111 of 2002**. What substantial loss, therefore, can the Appellant or any other person suffer under those circumstances? I do not see any. There is also no sufficient cause to warrant the orders sought.

13. Finally, the Appellant was required to offer security. As was stated in the case of **WYCLIFFE SIKUKU WALUSAKA -V- PHILIP KAITA WEKESA 2020 eKLR**:

“The offer for security must of course come from the applicant himself as a sign of good faith to demonstrate that the application for stay of execution pending appeal is being pursued in the interest of justice and not merely a decoy to obstruct and delay the Respondent’s right to enjoy the fruits of his judgment.”

The Appellant has not made any such offer of security. He was required to meet all the conditions set out in **Order 42 Rule 6(1) and (2)** of the **Civil Procedure Rules**. He has only met the condition of filing this application without unreasonable delay.

14. The up-shot of the above is that the Notice of Motion dated 4th November 2024 is devoid of any merits. It is dismissed with costs to the Respondent.

BOAZ N. OLAO

JUDGE

7TH OCTOBER 2025

Ruling dated, signed and delivered by way of electronic mail on this 7th day of October 2025.

BOAZ N. OLAO

JUDGE

7TH OCTOBER 2025