



**Muthoka & 2 others v Waita (Environment and Land Appeal
E023 of 2024) [2025] KEELC 6620 (KLR) (2 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6620 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E023 OF 2024**

**EO OBAGA, J
OCTOBER 2, 2025**

BETWEEN

SILVERNUS MUENDO MUTHOKA 1ST APPELLANT

JOHN SAKU TETE 2ND APPELLANT

JOSEPHAT MUSYOKA WANZUU 3RD APPELLANT

AND

ALPHONSE KYALO WAITA RESPONDENT

RULING

1. This is a ruling in respect of a Notice of Motion dated 11th February, 2025 in which the Appellant/
Applicant seek the following orders:
 1. Spent
 2. Spent
 3. That this honourable court be pleased to grant an order of stay of execution of the ruling of
the trial court delivered on 3rd December, 2024 in Makueni Chief Magistrate’s Court ELC
Miscellaneous No. E015 of 2024 – Alphonse Kyalo Waita vs Silvernus Muendo Muthoka
& 2 others and all other consequential orders emanating therein pending the hearing and
determination of the appeal.
 4. That the cost of the application be in the cause.
2. The origin of this matter can be traced from ownership of properties owned by Waita Mwalyangu
(Deceased) who had two wives. The first wife of the deceased was Tete Waita Mwalyangu who had
married Wanzuu Tete Waita under the Kamba tradition of woman to woman marriage.



3. The Applicants contend that the Respondent secretly undertook succession proceedings in respect of the estate of the deceased and distributed the properties of the deceased without considering Wanzuu Tete Waita and her children.
4. The Applicants further contend that they have been on the suit properties for a very long period and that if they were to be evicted from those properties, they will suffer substantial loss which will render their appeal nugatory. They contend that the Respondent has obtained eviction orders against them following an application by the Respondent through a miscellaneous application.
5. The Respondent opposed the Applicants' application through a replying affidavit sworn on 20th February, 2025. The Respondent contends that the clan had distributed the properties of the deceased and that Tete Waita Mwalyangu was allocated LR. No. Konza South/Konza South Block 5/814, Konza South/Konza South Block 5/1575 and Machakos/Konza North Block 1/630.
6. The Respondent then carried out succession in respect of the estate of the deceased and obtained a confirmed grant where the deceased's properties known as Ukia/Kilala/51, 56, 61 and Ukia/Utaati/463 were distributed to the beneficiaries entitled thereto.
7. In a further affidavit sworn on 3rd March, 2025, the Applicant took issue with the Respondent's affidavit of 20th February, 2025 which they stated was based on erroneous understanding of the law and that there was no credible evidence shown that Tete Waita Mwalyangu had been allocated Konza South/Konza South Block 5/814 and 1575 as well as Machakos/Konza North Block 1/630.
8. The Applicants contend that the properties over which the Respondent has a confirmed grant have been their home and are at the core of this appeal.
9. In a further affidavit by the Respondent sworn on 25th March, 2025, the Respondent contends that the orders of eviction were not given at interlocutory stage as alleged by the Applicants. The orders given were final after all the parties concerned were heard. He states that the properties which were given to Tete Waita are in her name and he cannot petition for grant of letters of administration over them. He further states that the ownership of the Kilala properties has already been determined by the succession court.
10. The Respondent states that the Applicants' children have been charged in court for various criminal cases touching on the suit properties and that as the Applicants have been given a share of the deceased's properties at Konza, there is no need of them staying at the Kilala properties and ought to be evicted as per the court's verdict of 3rd December, 2024.
11. The parties herein filed written submissions. The Applicants submitted that they had met the threshold for grant of orders of stay pending appeal. They relied on the case of *Butt -vs- Rent Restriction Tribunal* (1982) 1 KLR where it was held as follows:

“(1) The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. (2) 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. (3) 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. (4) The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements.



The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal. (5) 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 such security as ordered will cause the order of stay of execution to lapse”.

12. The Applicants further relied on the case of Catherine Kangai –vs- Judith Kainda Nyomba & Lydia Kanini Kwenga ELC Misc E003 of 2024 where Justice Yano held as follows:

“The Applicant has a burden to show that substantial loss she is likely to suffer is no stay order is granted..... In this case the Applicant has stated that if the impugned decree is executed and the orders of eviction are issued, her houses standing on the suit properties will be demolished and she, together with her children will be left homeless and will suffer irreparable loss. It is my considered view, if the stay is not granted, the Applicant may be evicted and her houses demolished and therefore the appeal may be rendered nugatory. I am therefore inclined to allow the stay orders”.

13. The Respondent submitted that the Appellants had not demonstrated that they will suffer substantial loss if stay is not granted. He submitted that they have already been given land at Konza. The Applicants’ continued stay at Kilala properties is unlawful and contrary to the confirmed grant.
14. The Respondent submitted that the impugned order was given on 3rd December, 2024 but the Applicants only filed the current application after he started to execute the orders granted to him. On the issue of security, the Respondent submitted that the Applicants had not offered any security for costs.
15. I have carefully considered the Applicants’ application, the opposition thereto by the Respondent as well as the submissions by the parties. The only issue for determination is whether the Applicants have met the threshold for grant of stay of execution pending appeal.
16. The conditions for stay pending appeal are contained in Order 42 Rule 6. The Applicant has to bring an application within a reasonable time. There has to be demonstration of substantial loss should there be no stay granted. There has also to be security given as may ultimately be binding upon the Applicant on the decree.
17. In the instant case, the eviction orders were given on 3rd December, 2024. The Applicants were given 60 days within which to vacate from the suit property. The present application was filed on 11th February, 2025. I therefore find that the application was brought without unreasonable delay given that there was a period of 60 days given for the Applicants to move out.
18. On the issue of substantial loss, there is no contention that the Applicants are residing and have been residing on the suit properties. They have put up permanent houses on the suit properties. If they were to be evicted and their houses demolished, they will indeed suffer substantial loss which may render the appeal nugatory. The Applicants have demonstrated by way of photographs that they have structures on the suit properties. This fact was not disputed.
19. A succession cause deals with distribution of the estate of a deceased. The issue of ownership can only be dealt by the Environment and Land Court which has the jurisdiction to deal with issue of ownership. In the instant case, the Respondent is seeking to evict the Applicants based on a confirmed grant. This issue of ownership is yet to be determined.



20. Security for costs is considered where the court has found that substantial loss will result if stay is not granted. I therefore find that the Applicants' application is merited. The same is allowed in terms of prayer 3 and 4. The applicants shall deposit in court security for costs in the sum of Kshs.100,000/- within 30 days failing which the stay shall automatically lapse without any further recourse to court.

It is so ordered.

HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 2ND DAY OF OCTOBER, 2025.

In the presence of:

Mr. Kithuka for Applicants.

Respondents in person.

Court assistant – Steve Musyoki

