



**Matolo v Kitung'a (Environment and Land Appeal E068 of 2024)
[2025] KEELC 5675 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5675 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E068 OF 2024**

NA MATHEKA, J

JULY 31, 2025

BETWEEN

MICHAEL KIVAI MATOLO APPELLANT

AND

RICHARD KITUNGA' RESPONDENT

RULING

1. The application is dated 25th February 2024 and is brought under Section 79G and 3A of the [Civil Procedure Act](#), Order 42 of the Civil Procedure Rules 2010 seeking the following orders:
 1. That this Application be certified urgent and be heard ex-parte at the first instance.
 2. That pending the hearing and determination of this Application inter-partes, this Honourable Court be pleased to stay the execution of the Judgment and Orders of Honourable J. Omburah SPM delivered on 16th October, 2023 in Machakos SPM Civil Case no E20 of 2020).
 3. That there be stay of execution of the Judgment and Orders of Honourable J. Omburah SPM delivered on 16th October, 2024 in Machakos SPM Civil Case No. E20 of 2020) and all consequential orders arising therefrom pending the hearing and determination of the Appeal.
 4. That the costs be provided for.
2. It is made on the following grounds that the Respondent filed a suit against the Appellant vide a Plaintiff filed on the 2nd November, 2020 seeking to be declared legal owner of land known as Mwala/Manyani/12. That the Appellant/Applicant then filed a Statement of Defence however due to the demise of his counsel on record then he was not represented at the hearing. That the hearing proceeded in the absence of the Appellant and/or his counsel on record then. That by the time the Appellant/Applicant sought services of another counsel matter was pending Judgment and Plaintiff had already filed final submissions. That efforts to arrest the Judgment were futile as the trial court went ahead



and delivered the impugned Judgment herein. That by a Judgment delivered by Hon. J. Omburah the court entered Judgment against the Appellant/Applicant. That in arising at the said decision, the court failed to consider the Applicants/Appellants Defence at the hearing. That the Respondent is about to execute the Judgment as he has moved the trial court with a Notice to show cause against the Applicant why the Judgment herein should not be executed. That Appeal raises arguable points of law as demonstrated in the Memorandum of Appeal dated 15th November, 2024. That if the orders sought are not granted, the Appeal will be rendered nugatory. That it is just and mete in all circumstances of the case for orders sought to be granted.

3. Having considered the application, the respective affidavits and the rival submissions, the only issue that arises for determination is whether the Applicant has satisfied the conditions set out under Order 42 Rule 6 of the Civil Procedure Rules for the grant of stay of execution pending Appeal.
4. Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules outlines the guiding principles to be met for the grant of stay and 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.
 - 6(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 such security of costs for the performance of such decree or order as may ultimately be binding on him has been given by Applicant.
5. Going by the above provisions, it is clear that in an application for stay of execution pending Appeal, the Applicant must satisfy the following three conditions:
 1. The Court is satisfied that substantial loss may result to the Applicant unless the order is made.
 2. The application has been made without unreasonable delay.
 3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the Applicant has been given by the Applicant.
6. In considering an application for stay of execution, I am guided by the case of Butt vs Rent Restriction Tribunal (1982) KLR 417 where the Court of Appeal gave the following guidelines;

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. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's decision. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicants at the end of the proceedings. The court in exercise of its discretion



whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

7. The grant of an order of stay of execution is a discretionary one. In the case of *RWW Vs EKW* (2019) eKLR the Court held that;

...the purpose of an application for stay of execution pending an appeal is to preserve the subject in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and The appeal if successful is not rendered nugatory. However, in doing so the court should weigh the right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of damages.”

8. The Court is therefore called upon to balance the rights of the successful party so as not to hinder him from his fruits of judgment and those of the Appellant whose Appeal may succeed and be rendered nugatory if stay of execution is not granted.

9. The purpose of stay of execution is to preserve the substratum of the case. In the case of *Consolidated Marine vs Nampijja & Another* Civil App No. 93 of 1989 (Nairobi) the Court held that;

10. The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.”

11. The Applicant is seeking for a stay of execution of the judgment delivered on delivered on 16th October, 2024 by Hon. Omburah SPM in Machakos SPM Civil Case No. E20 of 2020 pending the hearing and determination of the appeal.

12. The Court will now determine whether the Applicant has satisfied the conditions upon which the orders sought can be granted. On the first condition of proving that substantial loss may result unless an order of stay is granted, the Applicant should not only state that he is likely to suffer substantial loss, he must prove that he will suffer substantial loss if stay orders are not granted.

13. In so finding, I am persuaded by the holding in the case of *Charles Wahome Gethi Vs Angela Wairimu Gethi* (2008) eKLR where the Court of Appeal held that;

...it is not enough for the Applicants to say that they live or reside on the suit land and they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”

14. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma Vs Abuoga* (1988) KLR as follows;

Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

15. I have perused the pleadings on record and it is in evidence that the Respondent is in possession of the suit land and the and a permanent injunction has been issued against the Applicant from interfering with his occupation. I find that the Appellant is not in possession of the suit plot. I find that the draft memorandum attached to the application on the grounds of appeal does not raise an arguable appeal and I do not find that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the applicant is guilty of laches as judgement was delivered on



16th October 2024 and this application was filed on 26th February 2025. I find that the applicant has failed to fulfil the above grounds mentioned to enable me grant the stay. I find that the application is not merited and is dismissed with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 31ST DAY OF JULY 2025.

N.A. MATHEKA

JUDGE

