



**Mghanga & 2 others v Mwakesi (Environment and Land Appeal E018 of 2024)  
[2025] KEELC 7278 (KLR) (Environment and Land) (23 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7278 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VOI  
ENVIRONMENT AND LAND  
ENVIRONMENT AND LAND APPEAL E018 OF 2024  
EK WABWOTO, J  
OCTOBER 23, 2025**

**BETWEEN**

**FABIAN MGHANGA ..... 1<sup>ST</sup> APPELLANT  
ALOICE MWAVULA MWASHIGHADI ..... 2<sup>ND</sup> APPELLANT  
SAMSON NYANGE MWASHIGHADI ..... 3<sup>RD</sup> APPELLANT**

**AND**

**EVARESTA MWADIME MWAKESI ..... RESPONDENT**

**RULING**

1. Before court for determination is the Appellants' application dated 29<sup>th</sup> June 2025 which seeks a stay of execution of the judgment and decree of this court delivered on 29<sup>th</sup> May 2025 pending the hearing and determination of the appeal at the Court of Appeal.
2. The application was premised on the grounds that;
  - a. That the trial court delivered judgment on 29<sup>th</sup> May 2025 ordering the Appellants to vacate from the suit property L.R Mgange/Dawida/208 within 90 days, failing which eviction and demolition shall issue.
  - b. That the Appellants intend to appeal the said decision at the Court of Appeal in Mombasa and have taken steps to file the appeal.
  - c. That the Appellants are apprehensive of imminent eviction having occupied the suit land for decades as their ancestral property.
  - d. That the appeal raises weighty legal issues, including questions of ownership, adverse possession and res judicata.



- e. That the Appellants stand to suffer irreparable loss unless a stay of execution is granted while the Respondent shall suffer no prejudice.
  - f. That it is in the interests of justice and fairness that the orders sought be granted.
3. The application is also supported by the affidavit sworn by the 1<sup>st</sup> Respondent Fabian Mghanga on 29<sup>th</sup> June 2025.
  4. The application was opposed by the Respondent vide a Replying Affidavit sworn on 23<sup>rd</sup> July 2025. It was averred that the application before this Court is misplaced and lacks merit and ought to be dismissed forthwith, the Court is functus officio therefore cannot proceed to hear this application since it heard and determined the appeal by the Applicants and dismissed the same and that by this Court proceeding to hear application it will be opening litigation which it had earlier closed through its judgment.
  5. It was also averred that this court gave a negative order by dismissing the Appeal therefore there is nothing that this court can stay and that in any event that the Applicant's want to seek stay pending appeal then it will be before the Court of Appeal and not this court pursuant to rule 5(2)b of the Court of Appeal Rules 2022.
  6. It was contended that since the Applicants have notified the court that they have already lodged a notice of appeal; this court is therefore not seized of jurisdiction to entertain this matter save for any correction of judgment pursuant to Section 99 and 100 of the *Civil Procedure Act*.
  7. Parties also filed written submissions in respect to the said application. The Applicants filed written submissions dated 1<sup>st</sup> October 2025 while the Respondent filed written submissions dated 26<sup>th</sup> July 2025.
  8. The Applicants submitted that they had met the conditions set out in Order 42 Rule (6)(2) of the Civil Procedure Code. The said application was filed without unreasonable delay on 29<sup>th</sup> June 2025 after the court had delivered its judgment on 29<sup>th</sup> May 2025. It was also argued that the Applicants are old people who had been living on the land when the court ordered them to vacate within 90 days and hence they will suffer substantial loss.
  9. In respect to security, it was argued that the Applicants are paupers and cannot furnish this court with any security.
  10. The Respondent on the other hand urged the court to dismiss the application. It was submitted that the same lacks merit the same seeks to stay negative court order after the Appeal had been dismissed. Reliance was placed on the cases of *Buchunju =Versus= Muyundo & 7 Others (Environment & Land Case 143 of 2017) (2024) KEELC 5183 (KLR)*, *Kamwara & 5 Others =Versus= Mwenda (Environment and Land Appeal E007 of 2023) (2024) KEELC 5497 (KLR)* and *Dickson Muricho Muriuki =Versus= Timothy Kagondu Muriuki & 6 Others (2013) eKLR*.
  11. The court was urged to dismiss the application with costs.
  12. In the instant application, the Applicants seeks orders to stay the execution and judgment and decree delivered on 29<sup>th</sup> May 2025 pending the hearing and determination of the appeal at the Court of Appeal and that is also the salient issue calling for determination herein.



13. It is trite law that the principles guiding the grant of stay of execution pending appeal are well settled. They are provided under order 42 Rule 6 (2) of the Civil Procedure Rules as follows:

“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
- 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.”

14. It is this court’s finding that having heard and determined the appeal before the court on its merits and rendered a judgment dismissing the said appeal, all pertinent issues of fact and points by law have been fully canvassed and considered. As such, this court conclusively dealt with the issue of whether the applicants’ appeal is an arguable one and concluded that it has no merit.

15. This Court rightfully agrees with the submissions made by the Respondent that having discharged its duty on the appeal which was before it, this court is functus officio. Moreover, there were no positive orders granted by the court as the court simply dismissed the appeal. Therefore, there are no orders that were issued by this court capable of being executed.

16. In view of the above findings, this court has no jurisdiction to delve into the issue whether the applicants have satisfied the conditions for grant of an order of stay of execution pending appeal or intended appeal since court orders are not given in vain.

17. In conclusion, it is the finding of this court that the said application dated 29<sup>th</sup> June 2025 lacks merit and the same is dismissed with an order that each party to bear own costs of the said application.

18. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 23<sup>RD</sup> DAY OF OCTOBER 2025.**

**E. K. WABWOTO**

**JUDGE**

In the presence of:-

Mr. Mudeny for the Appellants.

Mr. Mwzighe for the Respondent.

Court Assistant: Mary Ngoira.

