

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND COURT AT KAKAMEGA
ELC APPEAL NO. E046 OF 2025

ISAAC ORIEDO.....APPELLANT

VERSUS

GILBERT MASHETI KHAYATI.....
RESPONDENT

RULING

Introduction

1. Before court is a notice of motion dated 7th June 2025 filed by the appellant seeking the following orders;

a) Spent

b) Spent

c) Spent

d) That the Honourable court be pleased to grant a stay of implementation and execution of the order given on the 21st day of May and dated the 23rd of May 2025 in Chief Magistrates Court at Kakamega MCELC MISC CASE NO. E037 OF 2025 pending the hearing and determination of the appeal.

e) Spent

f) That the file and record of all proceedings in respect of Chief Magistrates Court at Kakamega MCELC - MISC CASE NO. E037 OF 2025 be moved to this court to aid in the determination of the appeal.

g) That costs be provided for.

2. The application is anchored on the affidavit sworn by the applicant dated 7th June 2025. The applicant's case is that on 27th May 2025, he was served with a court order dated 23rd May 2025 together with a letter from the Ministry of Lands stating that there will be a survey on his land on 13th June 2025. That this came as a shock because he had not been involved in any litigation involving land parcel No. Isukha/ Mukhonje/2673 (suit property). That he later learnt that the respondent filed application seeking to carve out land measuring 0.4 Hectares from the suit property and that the court issued an ex parte order allowing the application without allowing him opportunity to respond to the application. That the court issued an order that would allow the Executive officer of the court to transfer the suit property to the respondent on the applicant's behalf and that he did not understand how a

magistrate issued such an order. That his interests were greatly prejudiced by the impugned order and if it is not stayed, he will suffer substantial loss. He maintained that the application ought to have been heard on merit. He attached the court order and the letter from the County Surveyor dated 26th May 2025.

3. The application was opposed. Gilbert Masheti Khayati, the respondent filed a replying affidavit dated 25th June 2025. He stated that the prayers sought by the applicant requires “evidentiary hearing” and cannot be issued on interim basis. That he bought land parcel measuring 0.4 Hectares to be hived from the original parcel No. Isukha/Mukhonje/608 a share of the applicant’s inheritance, at a consideration of Kshs. 1, 100, 000/= on 24th July 2023, a fact not denied by the applicant. That the applicant gave him vacant possession but after a year, he instructed his cousin to dispossess the respondent. That the applicant had promised to execute a transfer after conclusion of succession proceedings, but that he instead subdivided the suit property into parcel Nos. 2673 and 2674. That parcel No. 2673 although registered in the applicant’s

name belongs to the respondent. That the applicant has without justifiable cause refused to transfer the suit property to the respondent which was the basis of his application dated 20th May 2025 filed in Kakamega CMELC MISC NO. E037 OF 2025. He attached a sale agreement.

4. Parties filed written submissions in support of their respective cases. On record are submissions filed by the applicant dated 7th July 2025 and those filed by the respondent and dated 29th September 2025; both of which this court has duly considered.

Analysis and determination

5. I have carefully considered the application, supporting affidavit and annexures thereto as well as the replying affidavit and annexures thereto. The issue that arises for the court's determination is whether the applicant has met the threshold for grant of orders of stay of execution of the trial court's decision pending appeal.

6. Order 42 Rule 6 of the Civil Procedure Rules provides for the jurisdiction and discretion of the court to grant orders of stay of execution pending appeal 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. 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 stay was sought 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.

8. 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.”

9. 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.”

10. In the instant matter, the applicant stated that he had never been involved in Kakamega MCELC - MISC CASE NO. E037 OF 2025 and that the respondent obtained *ex parte* orders from the subordinate court which ordered that one acre from the suit property be transferred to the respondent. He also received a letter from the Surveyor Kakamega County indicating that survey on the suit property was scheduled for 13th June 2025. The fact that the impugned orders were issued without the court ordering that the applicant be served was not disputed by the respondent. All he says is that he purchased the suit property from the applicant and that the applicant refused to transfer it to him prompting him to move the trial court in Kakamega MCELC -MISC CASE NO. E037 OF 2025.

11. It is trite that no one should be condemned unheard as provided for in Article 50 of the Constitution. The fact that the respondent does not contest the fact that he sued the applicant in a court of law and that that court without directing him to serve whatever accusations he had against the applicant, granted him the orders the same

day the application was came up in court, is apparent that the applicant's right to be heard before being condemned was violated. I therefore agree with the applicant that he stands to suffer substantial loss if stay is not granted, because being denied an opportunity to be heard amounts to substantial loss.

12. Regarding the applicant's prayer that the trial court file be availed, this court notes that the said file which contains certified proceedings is already before this court and therefore that prayer is superfluous.

13. For the above reasons, I am persuaded that the applicant deserves an order of stay of execution. In the premises, the application dated 7th June 2025 is hereby allowed as follows;

a) That the Honourable court hereby grants an order staying the implementation and execution of the order given on the 21st day of May 2025 and dated the 23rd May 2025 in Kakamega MCELC MISC CASE NO. E037 OF 2025, pending the hearing and determination of this appeal.

b) The costs of the application herein are hereby awarded to the applicant/appellant.

14. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA
IN OPEN COURT/VIRTUALLY THROUGH
MICROSOFT TEAMS VIDEO CONFERENCING
PLATFORM THIS 30TH DAY OF OCTOBER, 2025**

**A. NYUKURI
JUDGE**

In the presence of;

Ms. Mburu for the appellant
The respondent in person
Court Assistant- Delphine