



REPUBLIC OF KENYA



KENYA LAW
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Pote alias Masika Michael & 3 others v Banzi & 4 others (Environment and Land Appeal E027 of 2025) [2025] KEELC 7674 (KLR) (22 October 2025) (Ruling)

Neutral citation: [2025] KEELC 7674 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E027 OF 2025
EK MAKORI, J
OCTOBER 22, 2025

BETWEEN

SANTA MBURA POTE ALIAS MASIKA MICHAEL 1ST APPELLANT
SAIDI CHARO NGOVI 2ND APPELLANT
ALARICK BAHATI TUKU 3RD APPELLANT
CHARO KATIMBO KATANA 4TH APPELLANT

AND

CHENGO BANZI 1ST RESPONDENT
CHEA KALUME CHEA 2ND RESPONDENT
HEZRON KAHINDI KITSAO 3RD RESPONDENT
KABIBI KEAH THOYA 4TH RESPONDENT
**MWANATUMU NYAMAWI CHABOGO (SUED AS THE LEGAL
REPRESENTATIVE OF THE ESTATE OF KAZUNGU WANJE IHA -
DECEASED) 5TH RESPONDENT**

(An appeal from the judgment of the Chief Magistrate's Court at Kaloleni by Honourable R.M. AMWAYI made on April 15, 2025, in MCEL NO E008 OF 2023)

RULING

1. The matter before this court concerns the appellants' notice of motion dated June 10, 2025, seeking a stay of execution pending appeal, and the notice of preliminary objection (PO) submitted by the respondents on June 26, 2025. The respondents argue that the issues raised in the application for stay were never raised in the trial court, and therefore, the application should have been struck out.



2. I directed that the two be heard together and that the same be disposed of through written submissions. I acknowledge receipt of submissions from learned counsel for the appellant, Mr. Messah, and learned counsel for the respondent, Mr. Kadzo. I appreciate the submissions, as they assisted the court in reaching a decision on the issues raised in the motions.
3. I frame for the determination of this court whether this Court lacks jurisdiction to entertain the stay application dated 20 June 2025. I also consider whether the appellants have satisfied the conditions for the grant of a stay of execution under Order 42 Rule 6 of the Civil Procedure Rules, and who should bear the costs of the motions.

Does the court lack jurisdiction to entertain the stay application dated June 20, 2025?

4. The respondent argues that the supporting affidavit submitted by the appellants, sworn by the 3rd appellant, particularly paragraphs 6, 7, 8, and 9 in support of the stay application dated June 10, 2025, clearly attempts to introduce new matters and evidence that were neither pleaded nor raised by the appellants or respondents and were not presented to the trial court for determination. Paragraphs 6, 7, 8, and 9 of the appellants' supporting affidavit state as follows:
 - “6. That I aver that our title deed was acquired through letters of administration of our late father's estate. Annexed is a copy grant marked “ABT-5”
 7. That we are advised by our Advocates on record which advice I believe to be true that our title deed being issued by the High Court it can only challenged in Environment and Land Court of the same status of the High Court Annexed is a copy of the title deed marked “ABT 6”
 8. That I aver that the said letters of administration has never been revoked.
 9. That the respondents allege to have purchased their distinct portion of land from our late father at different date.”
5. The respondent argues that the appellants' reliance on the mentioned parameters to support their application, without adhering to the established criteria, clearly violates Section 78 of the *Civil Procedure Act* in conjunction with Order 42 Rule 27 of the Civil Procedure Rules. This, therefore, constitutes a breach of statutory requirements. To support this argument, the respondent cites the case of Kenya Hotels Limited v Oriental Commercial Bank Limited [2018] KECA 692 (KLR), where the Court of Appeal stated that new matters cannot be introduced on appeal, and if they are, they should be introduced sparingly.
6. The respondent further states that, regarding the introduction of new issues on appeal, the Court's jurisdiction is limited to matters properly before it. This Court lacks jurisdiction to entertain the stay application dated June 10, 2025, as the application is based on extraneous issues that were not part of the matters discussed at the trial court.
7. Furthermore, the respondent argues that once the Magistrate's Court has heard and decided the case, it becomes functus officio. No new issues can be raised on appeal or through a stay application. The doctrine of functus officio guarantees finality in judicial proceedings, preventing courts from revisiting matters already decided. The Appellants' application, in effect, attempts to review the trial court's decision under the pretense of a stay. This violates the appellate structure of Kenyan civil litigation.
8. Conversely, the appellant argues that the respondents' PO does not meet the requirements set by law and, therefore, is not sustainable. In the well-known case of Mukisa Biscuit Manufacturing Ltd v Wet



End Distributors (1969) EA 696—known for addressing what constitutes a preliminary objection—held that a PO should solely be based on a point of law. The court will need to examine the facts to determine whether the issues raised in the appeal were actually presented to the lower court.

9. I have reviewed the decisions cited by the parties concerning the definition of a PO, as outlined in Mukisa Biscuit Case (supra), distinguished for its discourse on preliminary objections. The Court noted that:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleading, if argued as preliminary points may dispose of the suit.”

10. Sir Charles Newbold P. stated:

“A preliminary objection is in nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the side are correct. It cannot be raised of judicial discretion. The improper raising of preliminary objection does nothing but unnecessary increase costs and on occasion confuse the issue and this improper practice should stop.”

11. The PO as raised contends that the appellant has introduced or seeks to introduce new matters as submitted and that the issues were never raised in the trial court. In my opinion, the simple answer is that the issues raised by the respondent cannot be resolved without examining the main appeal; it would be jumping the gun to delve into the issues raised before this court is adequately seized with the appeal. In my view, the issues raised by the respondent should be addressed when arguing the main appeal.

12. To that extent, the PO does not raise a pure point of law. It is hereby dismissed.

Have the Appellants met the requirements for granting a stay of execution under Order 42 Rule 6 of the Civil Procedure Rules?

13. Having reviewed the submissions and allegations by the parties, the principles guiding the court when deciding applications for a stay of execution pending an appeal are well established by Order 42 Rule 6(2) of the Civil Procedure Rules. To grant the application for a stay of execution pending appeal, the Court must ensure that:

- a. Substantial loss may result to the Appellants unless the order is made;
- b. The application has been made without unreasonable delay and;
- c. The applicant has furnished security for the due performance of the decree being appealed from.

14. These principles have been cited in many judicial precedents, which I cannot rehash here. See, for example, the case of Elena Dondaladova Korii vs. Kenya University (2012) eKLR:

“The High Court’s discretion to order stay of execution of its orders or decree is fettered by three conditions namely sufficient cause, substantial loss would ensue from a refusal to grant stay, the Applicants must furnish security, the application must be made without unreasonable delay”

15. In stay applications, the court typically aims to balance the respondent’s interest in enjoying the benefits of the judgment with the appellant’s right to appeal.



16. The decision in *RWW v EKW* [2019] eKLR provides valuable insight into the purpose of an order for stay of execution pending appeal. In that case, the court held:

“The purpose of an application for stay of execution pending an Appeal is to preserve the subject matter 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 this 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 costs.”

17. Based on the claims made by the parties, since the issue at hand is the subdivision of the suit properties, the same can be stayed, and the status quo on the suit property persists until the current appeal is heard and determined.

18. Therefore, the application dated June 10, 2025, is approved to the extent that the status quo remains in place regarding the suit property until the current appeal is heard and decided.

19. Costs in the intended appeal.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 22ND DAY OF OCTOBER 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Ms. Mulewa for the Applicants

Happy: Court Assistant

In the Absence of:

Mr. Messah for the Respondents

