

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KAKAMEGA
ELC APPEAL CASE NO. 068 OF 2025

ZAHARA HAMISI SHIBWABO.....APPELLANT

VERSUS

**HAMISI SAID ROBERT (Sued as the
Administrator and legal representative of the estate of
REHEMA MUSITOKI ALI(DECEASED)
.....RESPONDENT**

RULING

Introduction

1. Before court is a notice of motion dated 4th August 2025 filed by the appellant seeking stay of execution of the orders issued on 30th July 2025 in Kakamega CMC ELC NO. 494 OF 2018 (OS) pending hearing and determination of this appeal.
2. The application is supported by the affidavit sworn by the appellant on 4th August 2025. The applicant's case is that she had never been served with a notice of motion dated

30th July 2025 but that on 1st August 2025, she was only served with eviction orders issued in her absence without a fair hearing. That on 29th July 2025, the subordinate court dismissed the appellant's claim in Kakamega MC L & E Case No. 494 of 2018 (OS) for want of jurisdiction without further directions despite being informed that there was a formal application filed before the ELC in Kakamega ELC Case No. Misc Appl. No. E052 OF 2025 seeking retransfer of the suit back to the ELC where it had originally been filed, before the court transferred it to the subordinate court, on its own motion, an act which the appellant should not be punished for.

3. That in a surprising turn of events, the respondent secretly filed an ex parte application seeking eviction orders against the appellant from her home, which the trial court allowed and consequently determined the respondent's counterclaim which sought eviction, which was irregular, unprocedural and unlawful as a counterclaim ought to have been made in the usual manner. That she has a right to be heard and has no other home apart from the suit property and if stay is not

granted, she will be rendered homeless. That if eviction proceeds, the appeal will be rendered nugatory. She attached the order dated 30th July 2025.

4. The application was opposed. The respondent filed a replying affidavit dated 12th August 2025. He stated that the respondent filed a counterclaim to the appellant's suit in the lower court seeking eviction against the appellant who is a trespasser where she has been illegally collecting rent from tenants in the sum of over Kshs. 3, 000, 000/=.

5. That a preliminary objection can be raised any time before judgment is pronounced. That the respondent filed a preliminary objection dated 25th June 2025, contesting the court's jurisdiction to entertain a claim for adverse possession and that on 29th July 2025 the court dismissed the applicant's case for want of jurisdiction. That the appellant filed application to transfer the lower court suit on 23rd July 2025 which he failed to serve the respondent and hence failed to demonstrate to the trial court that he had filed such application.

6. That as the trial court had no jurisdiction, it ought to have allowed the counterclaim as prayed in the preliminary objection and the replying affidavit. That the court made an error on the face of the record by not pronouncing itself on the counterclaim hence the application of 30/07/2025 was to correct that error. That it is illegal and unscrupulous for this court to exercise its powers under section 18 of the Civil Procedure Act by transferring a suit filed in a court lacking jurisdiction as that will amount to sanctifying an incompetent suit.

Analysis and determination

7. The court has carefully considered the application together with the response. Parties herein deviated from the only issue for determination at this stage that of whether the threshold for grant of stay of execution had been met. They went into the merits of the appeal and the respondent went further, arguing that if this court allows Kakamega ELC Miscellaneous Application No. 52 of 2018 seeking to transfer the dispute from the lower court to

this court, that order would be illegal, unscrupulous, and amount to “muddling waters, and creating the reign of confusion”. That notwithstanding, this court will not address the merits of the appeal and other matters that have nothing to do with the instant application at this stage, so as not to embarrass the hearing of the appeal. What is before court today and which the court will address is the issue of whether the appellant has met the threshold for grant of orders of stay of execution pending appeal.

8. 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.

9. 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.

10. In the cases of **Kenya Power & Lighting CO. Ltd v Kigata Ngare Unduthu & 36 Others [2020] e KLR** and **Kenya Shell Limited v Benjamin Karuga Kibiru & Anothr [1986] KLR** the court held that substantial loss is the corner stone of the jurisdiction to grant stay pending appeal.

11. In the instant matter, it is not contested that the application dated 30/07/2025 was heard on the same day it was presented in court and the trial court did not order service of that application on the appellant before granting the orders appealed against. The orders issued were eviction orders. The appellant has deponed that she

is being evicted from the only home she has with her family. From the history of this matter, it is clear that the appellant has an arguable appeal, because she has raised the issue of being ordered evicted without being accorded an opportunity of being heard. As the appellant stated that she will be rendered homeless with her children, if evicted without due process, I am therefore convinced that the appellant stands to suffer substantial loss if stay is not granted in these circumstances.

12. In the premises, I find and hold that the application dated 4th August 2025 is merited and the same is hereby allowed. An order of stay of execution is hereby issued staying execution of the orders issued on 30th July 2025 in Kakamega CM L&E No. 494 of 2018 (OS) pending the hearing and determination of this appeal. The costs of this application shall be borne by the respondent.

13. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA
IN OPEN COURT/VIRTUALLY THROUGH
MICROSOFT TEAMS VIDEO CONFERENCING
PLATFORM THIS 5TH DAY OF NOVEMBER, 2025**

A. NYUKURI
JUDGE

In the presence of

Mr. Akwala for the appellant

Mr. Shaka holding brief for Mr. Mukavale for the respondent

Court Assistant: Delphine