



**Wauna v Messo (Environment and Land Appeal E045 of 2024)
[2025] KEELC 7661 (KLR) (6 November 2025) (Ruling)**

Neutral citation: [2025] KEELC 7661 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E045 OF 2024**

AE DENA, J

NOVEMBER 6, 2025

BETWEEN

JAMES AWUOR WAUNA APPELLANT

AND

ERIC AJUOGA MESSO RESPONDENT

*(Arising from the judgment and decree of Hon. B.Limo
(PM) in Siaya MCELC/E039/2023 delivered on 25/10/2024)*

RULING

1. This ruling is the subject of the Notice of Motion application dated 10th April 2025. The application is brought under sections 1A, 1B and 3A of the Civil Procedure Act, Order 42 Rule 6 and Order 51 of the Civil Procedure Rules, 2010. The same is supported by a supporting affidavit sworn on even date by James Awuor Wauna the Applicant herein
2. The application seeks the following orders:
 - i. Spent
 - ii. That pending the interpartes hearing, the Honorable court be pleased to issue an order for stay of execution against the Judgment and decree of the subordinate court issued in Siaya MCELC No. E039 of 2023 Eric Ajuoga Meso vs James Awuor Wauna delivered on 25/10/2024.
 - iii. That pending the hearing and determination of the appeal, the honorable court be pleased to issue an order for stay of execution against the judgment and decree of the subordinate court issued in Siaya MCELC No. E039 of 2023 Eric Ajuoga Meso vs James Awuor Wauna delivered on 25/10/2024.
 - iv. That the Respondent be condemned to pay costs of the application.



3. The application is supported by an affidavit sworn by James Awuor Wauna the Applicant herein.
4. The deponent avers that being dissatisfied with the judgement of the trial court he has lodged an appeal vide a Memorandum of appeal dated 29th October 2024.
5. That the Respondent in execution of the said decree is threatening to evict the Appellant/Applicant. That the intended appeal will be rendered nugatory if the order for stay is not granted, as the appellant /Applicant has called the suit property home for the last 25 years since the year 2000; and the Respondent is in the process of evicting him and his family. Photos of the developments are annexed as JAW2.
6. The Appellant/Applicant is ready and willing to give security for costs if the court so directs.
7. The Respondent has opposed the application by a replying affidavit dated 9th July 2025. It is averred that the suit in the lower court was based on a claim of adverse possession and the magistrate courts have no jurisdiction to hear and determine cases of adverse possession.
8. That the trial court dismissed the Applicant's counterclaim on adverse possession and allowed the respondents case on merit. That the appeal seeks to have the counterclaim allowed in terms of the adverse possession; thus, the appeal has no chances of success.
9. The Respondent further disclosed that the Respondent approached him with an offer to compromise the judgement by offering an alternative land which the Respondent accepted. The applicant also surrendered the title deed for the land offered and executes LCB consents. The settlement culminated into signing of a consent which was annexed. The Respondent stated that the present application came to him as a surprise. The applicant has come to court with unclean hands and is guilty of material non disclosure.

Submissions

10. The application was canvassed by way of written submissions. The applicant filed submission dated 23/05/2025. The Respondent did not file submissions.

Applicants Submissions

11. The Applicant submitted that he stands to suffer substantial loss if the order for stay is not granted as the judgment involves land parcel no. Gem/Anyiko/558 which is disputed and wherein he has built his home.

He placed reliance on the case of James Wangalwa & Another vs Agness Naliaka Cheseto(2012)Eklr and Gathna vs Nyanogo & 2 (2024)KEELC 1687 (KLR).
12. The Applicant submitted further that the application has been made promptly without undue delay. The judgment was delivered on 25/10/2024 but there were no threats of execution until recently when the Respondent made certain steps towards execution of the decree.
13. Finally, it was the Applicants submission that he is ready and willing to abide by any condition as security that this Honorable court may impose.

Determination

14. Having considered the application together with the rival affidavits and submissions on record, I find the main issue for determination is whether the Applicants have satisfied the conditions for grant of stay of execution set out under Order 42 Rule 6 of the Civil Procedure Rules.



15. The principles guiding the grant of a stay of execution pending appeal are laid out under Order 42 rule 6(2) of the Civil Procedure Rules which provide; -

“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.

16. It is evident from the above provisions that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant. See *Amal Hauliers Limited Vs Abdulnasi Abukar Hassan* (2017) eKLR & *Butt Vs Rent Tribunal* (1982) KLR 417.

17. I must focus on the aspect of substantial loss as it is the main consideration that the court must focus on. The court in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, stated 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, it 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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...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.”

18. In the instant case, the Applicant depones that the Respondent has threatened to evict him based on the trial courts judgment. I must state at the outset that this perse cannot be a sufficient cause for a court to order a stay of execution. Execution is a lawful process. The applicant must go beyond this and prove that there will be substantial loss.

19. The Applicant avers that he has lived on the property, built a home and lived there with his family since the year 2000 making it 25 years of occupation. I have seen photos annexed showing the developments. The Respondent also confirms at paragraph 25 of the replying affidavit that the applicant chose to settle on the suit property. Should execution proceed clearly it will create a state of affairs that will irreparably affect the family. This to me establishes a very high likelihood of suffering substantial loss if the stay is denied.



20. The court is further persuaded by the dictum in High Court Civil Appeal No.106 of 2023: Abson Motors Limited vs Nyongesa (2023) KEHC 23643(KLR) where Magare J cited the case of RWW V EKW (2019) KEHC 6523 (KLR) which considered the purpose of stay of execution pending appeal as follows:

“The purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory. However, in so doing, the court should weigh this right against the right of a successful litigant who should not be deprived of the fruits of his/her judgment....”

21. On the aspect of undue delay, the applicant argued that the application was filed without undue delay. I note from the record that the trial magistrate rendered his judgment on 25th October 2024, the appeal was filed on 29th October 2024 and the application for stay was made and filed on 10th April 2025. I note that the Application for stay was made six months after delivery of judgement and filing of the appeal. I also note that the Respondent has not raised that as an issue. I therefore find that the said period does not amount to undue delay as I have seen parties were engaging with a view to compromising this appeal. The Applicant stated in his submissions that there was no threat of execution until recently which called for the filling of the instant application.

22. I have noted the Respondents deposition that the appeal herein stands no chance of success. It is trite that an arguable appeal need not be one that must necessarily succeed.

23. On the aspect of security for costs, the Applicant expressed his willingness to abide by the conditions as the court may direct. I have noted that the applicant has not been fully honest with this court and consequently I must set very stringent terms for security.

24. Considering all relevant factors, and in order not to render the intended appeal illusory, I do hereby grant a stay of execution of the decree herein pending the hearing and determination of this appeal on the following terms:

1. The Applicant is debarred from selling, transferring and or by any means dealing with the parcel East Gem/Anyiko/558 in a manner that will defeat justice, either by himself or by proxy pending the hearing and determination of the appeal.
2. The Applicant shall deposit in a joint interest earning account of the law firms on record in this appeal a sum of Kshs. 100,000 or a bank guarantee from a reputable financial institution of equivalent amount within 30 days of this ruling
3. Costs of this application are awarded to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 6TH DAY OF NOVEMBER 2025

JUDGE

HON. A. E. DENA

JUDGE

6/11/2025

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:



N/A for the applicant

N/A for the respondent

Court assistant: Ishmael Orwa

