

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ELC APPEAL NO. ELCLA E041 OF 2025

FRANSCISCA AUMA AKWANALO.....1st
APPLICANT/APPELANT
AMOS MUKAVALE MATE.....2nd
APPLICANT/APPELLANT

VERSUS

ALICE NANGEKHE SONGWAH.....1st
RESPONDENT
HUDSON MADE SAJIDA.....2nd
RESPONDENT

RULING

1. Vide an application dated 03/09/2025, the Applicants herein are seeking orders for *inter alia* stay of execution of the ruling delivered on 21/08/2025 in Kimilili SPM ELC E021 of 2025 in which the trial Court discharged interim orders it had issued on 19/05/2025 pending the hearing and determination of the intended appeal.

2. The application is based on grounds on the face of the application supported by the affidavits of the 1st Applicant sworn on 03/09/2025 and 07/10/2025 wherein he stated that the said orders were issued on the basis that they planted cane on the suit land and that while discharging the said orders, the trial court found that the land in issue was registered in the names of Respondents. They argued that their application was not

contested and that the Respondents are not the registered owners of the said land and that the trial court misapprehended all evidence and reached at a wrong verdict. They argued that the effect of the trial court's ruling allowed the Respondents to access the canes that they invested on and would therefore be highly prejudiced if the orders sought are not issued.

3. The 1st Respondent filed a replying affidavit dated 29/09/2025 wherein she stated that the Applicants chamber summons application is bad in law and ought to be struck out. That the Applicant seeks to stay a negative order dismissing the Applicants' Application with costs in the cause which cannot be stayed. She deposed that as opposed to the contention that the said application before the trial court was not opposed, she had filed a replying affidavit which was placed in the court record and served upon the Applicants. She therefore urged the court to find that the Applicants have approached this court with unclean hands and are therefore not deserving of the orders sought.

4. The 2nd Respondent also filed a replying affidavit sworn on 29/09/2025 wherein he reiterated the averments by the 1st Respondent in her replying affidavit.

5. When the application came for directions, the parties agreed to have the application canvassed by written submissions. The Applicants filed their submissions dated 10/09/2025 through the

firm of M/S Walunya Indimuli Advocates while respondents filed joint submissions dated 29/09/2025 through the firm of M/S Kerubo Makori & Associate Advocates which this court has carefully considered.

6. I have carefully considered the parties' respective submissions alongside the pleadings, affidavits, and documentary evidence on record. In doing so, I have also evaluated the issues raised through the lens of the applicable statutory provisions and binding judicial precedents. I have as well weighed into the competing positions advanced by both sides to ascertain whether the arguments presented sufficiently establish the legal and factual thresholds necessary to warrant the orders sought. Having undertaken this holistic assessment, I am now properly guided on the matters requiring determination.

7. Order 42 Rule 6 of the Civil Procedure Rules outlines the guiding principles for the grant of stay of execution pending appeal. The power to grant or not to grant an application for stay of execution is discretionary. (See the pronouncements of the Court of Appeal in **Butt vs Rent Restriction Tribunal (1982) KLR 417** and **RWW vs EKW (2019) eKLR**). Further, stay of execution is to intended to preserve the substratum of the case. (See the case of **Consolidated Marine vs Nampijja & Another Civil App No. 93 of 1989 (Nairobi)**)

8. The first condition for the grant of stay pending appeal is substantial loss. The Applicant is expected to prove what substantial loss may result to him unless stay orders are granted. I refer to the findings in the case of **Charles Wahome Gethi Vs Angela Wairimu Gethi (2008) eKLR.** The Applicants herein allege that they have planted sugarcane on the suit land and in the event the order for stay is not granted, they stand to lose the plantation which they argue they have invested in with their resources and is now accessible to the Respondents.

9. From the material placed before this court, I am not persuaded that the Applicants have demonstrated the nature or extent of loss they stand to suffer should the orders of stay be declined.

10. It is imperative to note that the trial court dismissed the applicant's application seeking for a temporary injunction pending determination of the main suit, which is in effect a negative order. Notably, the court cannot grant stay of the impugned ruling as it dismissed the Applicants application which in essence is a negative order and incapable of execution. This principle was enunciated by the Court of Appeal in **Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya) [2015] eKLR** where the court held as follows:-

“An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the

performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay - called a positive order - either an order that has not been complied with or has partly been complied with.

11. Further see the case of **Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others [2016] eKLR** where the Court of Appeal expounded on stay of execution and quoted the case of In **Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah [2008] eKLR** while dealing with a similar application for stay of a negative order.

12. In light of the above, the order sought to be stayed being a negative order incapable of execution, this court cannot order stay of execution of that negative order. Accordingly, it is my considered view that the applicant has not demonstrated the substantial loss he stands to suffer.

13. As to the reasonableness of the period taken to file the present application, the record shows that the application is dated 03/09/2025, whereas the impugned ruling was delivered on 21/08/2025. This reflects a delay of approximately thirteen (13) days. In the circumstances, and in the absence of any demonstration that such delay was inordinate, or prejudicial, I

am satisfied that the application was brought within a reasonable time.

14. The Applicants have not also given or expressed willingness to provide security but then again for what purposes noting the nature of the orders issued.

15. Consequently, I find the application dated 7th June 2024 lacking merit and the same is hereby dismissed. The Respondents shall have the costs of the application.

16. It is so ordered.

DATED, SIGNED and DELIVERED at **BUNGOMA** this 04th day of December, 2025.

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HON.E.C CHERONO
ELC JUDGE

In the presence of;

1. Mr. Indimuli for the Applicant.
2. Mr. Maramba for the Respondent.
3. Bett C/A.