

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KAKAMEGA
ELC CASE NO. 041 OF 2022

VALENTINE KHAMINWA & ANOTHER

(Suing as the legal representative of the estate of

CHARLES FORD KHAMINWA.....PLAINTIFFS

VERSUS

JOSEPH MIRIMO MULAMA & 6 OTHERS.....

DEFENDANTS

RULING

Introduction

1. This ruling is in regard to two applications, namely; the application dated 18th September 2025 filed by the defendants seeking inter alia, orders of stay of execution pending appeal and the application dated 16th October 2025 filed by the plaintiffs seeking to cite the defendants for contempt of the decree of this court.

Application dated 18th September 2025

2. In the notice of motion dated 18th September 2025, the defendants sought orders that the firm of Ayata & Omondi Advocates be granted leave to come on record for them in the place of Andia & Company Advocates. They also sought stay of execution of the judgment herein made on 16th June 2025 pending hearing and determination of their appeal to the Court of Appeal.

3. The application is supported by the affidavit sworn by the 1st defendant on 18th September 2025. The applicants' case is that they have resided on the suit property for over 40 years, where they have put up houses and where they eke livelihoods. That this has been done with the plaintiffs' full knowledge. That in its judgment of 16th June 2025, this court ordered them to grant the plaintiffs vacant possession of the suit property within 90 days. That they were dissatisfied with the court's decision and filed an appeal at the Court of Appeal being Civil Appeal Case No. E191 OF 2025, which appeal raises arguable grounds. Further that the plaintiffs have been bringing police officers on the suit property, who have threatened to evict them despite the pendency of the appeal. That

since they have been on the suit property for over 40 years, the plaintiffs will not suffer any prejudice if orders of stay of execution are granted.

4. The application was opposed. The 1st plaintiff/respondent filed a replying affidavit dated 14th October 2025. She stated that the decree issued herein was served on the defendants on 16th July 2025. That the proper forum for the defendants to seek stay of execution would be the Court of Appeal and not this court, as the defendants are seeking to reopen matters already determined by this court. Further that although this court ordered the applicants to remove illegal structures and vacate the suit property in 90 days, the 90 days lapsed on 15th September 2025 and so they continue to be in contempt of the decree hence have no audience before this court. That the applicants cannot benefit from contempt and that they brought their application after inordinate delay. That the grounds raised in the instant application were already considered by this court when it made its decision, hence this court cannot revisit the same issues. That in an attempt to defeat the decree the defendants are intending

to bury on the suit property, the remains of one Agatha Mulama, the youngest son of Florence Mulama the 7th Defendant who died on 3rd October 2025.

Application dated 16th October 2025

5. In the application dated 16th October 2025, the plaintiffs sought the following orders;

a) Spent

b) Spent

c) That the defendant/respondents JOSEPH MIRIMO MULAMA, EMILY MWERESI, KENYATTA MULAMA, ANTHONY MAJIMBO CLEMENT MIRIMO AND FLORENCE MULAMA the 1st, 2nd, 3rd, 4th, 5th and 6th contemnors be cited for contempt of court for contravening and violating the terms of the decree and penal notice dated 16th June 2025 and issued on 16th July 2025.

d) That an order of committal to be made against JOSEPH MIRIMO MULAMA, EMILY MWERESI, KENYATTA MULAMA, ANTHONY MAJIMBO CLEMENT MIRIMO AND FLORENCE MULAMA the 1st, 2nd, 3rd, 4th, 5th and 6th contemnors directing their committal to prison for such

period as this Honourable court may deem fit for disobeying the decree and orders of this court issued on 16th June 2025 arising from the judgment issued herein.

e) That in enforcing the committal orders above, this honourable court be pleased to summon the alleged contemnors to attend this court for sentencing and in default issue the necessary warrants of arrest, directing the Officer Commanding Station, Khayega Police Station to cause the arrest and presentation of the alleged contemnors JOSEPH MIRIMO MULAMA, EMILY MWERESI, KENYATTA MULAMA, ANTHONY MAJIMBO CLEMENT MIRIMO AND FLORENCE MULAMA to appear before this honourable court to show cause why they should not be committed to civil jail and for sentencing.

f) That the officer commanding station, OCS Khayega Police Station to superintend and enforce the orders issued herein.

g) That costs of the application be met by the cited contemnors.

6. The application was supported by the affidavit sworn by the 1st plaintiff. She stated that in the judgment made by this court on 16th June 2025, this court made orders inter

alia ordering the defendants to vacate the suit property in 90 days, remove their illegal structures therefrom and stop interfering with the same. That 90 days lapsed on 16th September 2025, yet the defendants have refused to vacate the suit property, despite having been served with the decree on 16th July 2025. That the decree has a penal notice indicating consequences for noncompliance. That although the defendants appealed against the judgment of this court, no orders of stay of execution were sought before lapse of the time granted by court. That the defendants have not removed illegal structures, or their crops from the suit property and that on 14th October 2025 they put up makeshift structures on the suit property in readiness for burial rites in respect of the remains of their kin one Agatha Mulama, which acts are in contempt of the decree. That the defendants' actions are deliberate and wilful and ought to be punished. She attached the decree, evidence of service of the decree and photographs showing structures on the suit property.

7. The application was opposed. The 1st defendant/respondent filed a replying affidavit dated 28th

October 2025. He stated that they were aware of the judgment herein but that they were under the impression and believed that 90 days mentioned in the judgment referred only to business days and excluded weekends and holidays, which was the reason for noncompliance. Further that the said honest belief was because of the advice they got from their advocate when they sought clarification on what the judgment meant. That while looking for alternative land, they were advised that the best way to deal with the issue was to file an appeal and seek stay of execution. That after the police visited the suit property is when they instructed their current advocate who filed the application for stay of execution. That the issue of burial of Agatha Mulama may be true, but that one Daniel Harambee the husband of the deceased was the one who did the activities complained of, and who is not party to this suit or who was not under their control. That the deceased has since been buried at her parents' home in Malinya in Kakamega County. That the defendants have not done any act in contempt of the decree.

8. Parties filed written submissions in support of their respective positions. On record are submissions filed by the plaintiffs dated 29th October 2025 and those filed by the defendants dated 22nd October 2025, both of which this court has duly considered.

Analysis and determination

9. The court has carefully considered the two applications, their respective responses and parties' rival submissions. The defendants sought inter alia that the firm of Ayata & Omondi Advocates be allowed to come on record for them in the place of their former advocates, Andia & Company Advocates. That prayer was not opposed by the plaintiffs. Order 9 Rule 9 of the Civil Procedure Rules provides that where a party intends to act in person or change their advocate in a matter where judgment has already been made, they can only do so with leave of court. Legal representation is a Constitutional right and therefore, in the instant matter, there being no impediment for the firm of Ayata & Omondi Advocates to come on record for the defendants in this matter in the place of Andia &

Company Advocates, that prayer is merited and the same is hereby allowed.

10. Therefore, two substantive issues arise for the court's determination, namely;

a) Whether the defendants have met the threshold for grant of stay of execution.

b) Whether the plaintiffs have proved contempt against the defendants

11. 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.

12. Essentially, to succeed in in an application seeking stay of execution pending appeal, an applicant ought to demonstrate that they stand to suffer substantial loss; that stay was sought without unreasonable delay and demonstrate willingness to provide security for the due performance of the decree that may issue against them.

13. 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 & Another [1986] KLR** the court held that substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal.

14. Therefore, imminent execution alone, including imminent eviction, cannot be the basis for grant of stay. In acknowledging that execution is a legal process which should not be injudiciously halted, the court in the case of **James Wangalwa & Another vs. 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, 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.”

15. Regarding substantial loss, in **Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation)** [2004] 2 EA 331 the court stated thus;

“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.”

16. In the instant matter, the record shows that in its judgment of 16th June 2025, this court ordered the defendants to remove illegal structures on the suit property, stop interfering with it and grant the plaintiffs vacant possession of the same “within 90 (ninety) days from the date of delivery of this judgment.” The defendants argued that they honestly believed and were advised by their counsel that the above statement meant “90 business days only, excluding weekends and holidays”. I take the view that the defendants’ argument is implausible as the court did not mention business days, weekends or holidays in reference to the 90 days, and therefore, I reject their contention that there could be any reasonable or honest belief that the 90 days period stated in the judgment could mean that the 90 days only referred to business days and excluded weekends and holidays. The court only referred to 90 days. There was no mention of exclusion of weekends and holidays in the judgment. Weekends and holidays are also days, hence it

is obvious that they were included in the 90 days. Therefore, I have no doubt in my mind that the defendants understood the judgment as plain as it is and by granting them 90 days, the court had already granted them stay of execution for 90 days. Therefore, the stay lapsed on 14th September 2025. By filing the application for stay on 18th of September 2025, there was inordinate delay on the part of the defendants which shows that the instant application was an afterthought meant to circumvent the execution process.

17. In addition, the defendants maintained that because they have been on the suit property for 40 years, they should not be evicted because they have an appeal. The issue of being on the suit property for 40 years was already considered by this court before judgment was made, and therefore cannot be the sole basis for grant of stay of execution. In my view, there is no proof of substantial loss because in the circumstances of this case, imminent eviction alone cannot justify grant of stay of execution since it is the court that ordered eviction as a consequence of noncompliance with the decree.

18. Therefore, I am not convinced that the defendants have met the threshold for grant of stay of execution of judgment pending appeal and hence save for the order allowing the firm of Ayata & Omondi to come on record for them, their application dated 18th September 2025 lacks merit and is hereby dismissed with costs.

19. I now turn to the issue of contempt. Contempt is any conduct that despises the authority and dignity of the court. The Black's Law Dictionary 9th Edition defines Contempt as;

“The act or state of despising; conduct of being despised. Conduct that defies the authority of a court or legislature, because such conduct interferes with the administration of justice.”

20. The legal framework on contempt is anchored on section 5 of the Judicature Act particularly under Act. That section confers jurisdiction on superior courts to punish for contempt and uphold the dignity and authority of courts. Contempt of court is essentially defiance of the authority of the court.

21. Courts punish contempt of court to uphold the rule of law which is the cornerstone of any democratic state like ours. In the case of **Econet Wireless Kenya Limited Vs Minister For Information and Communication of Kenya Authority [2005] eKLR**, the court stated as follows: -

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void.”

22. Similarly, in the case of **T.N Gadavarman Thiru Mulpad v Ashok Khot and anor [2005] 5 SCC**, the

Supreme Court of India in emphasizing the dangers of disobeying court orders held as follows:

“Disobedience of this Court’s order strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. Hence, it is not only the third pillar but also the central pillar of the democratic State. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the Courts have to be respected and protected at all costs. Otherwise, the very corner stone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. That is why it is imperative and invariable that Court’s orders are to be followed and complied with.”

23. Civil contempt proceedings are quasi-criminal proceedings since the consequence thereof may result in deprivation of the liberty of a proven contemnor. Therefore, the standard of proof for contempt is higher than the standard of proof required in ordinary civil cases of the balance of probabilities, although the same is

slightly below the standard of beyond reasonable doubt required in criminal cases.

24. To prove contempt of a court order, an applicant ought to show that there exists terms of a court order that are clear and unambiguous; that the respondent was aware of the clear terms of the order; and that the respondent wilfully disobeyed the terms of the order.

25. In the instant matter, it is not disputed that there is a decree dated 16th June 2025 with clear terms requiring the defendants to remove illegal structures from the suit property; to stop interfering with the suit property and to vacate the suit property in 90 days from the date of the judgment.

26. The defendants confirmed in their replying affidavit that they were aware of the judgment and decree. On whether wilful disobedience thereof on the part of the defendants was proved, the defendants denied wilfully disobeying the decree, insisting that they understood the decree to mean that 90 days did not include weekends and holidays. As earlier observed above in this ruling,

there could not have existed any genuine or reasonable belief that 90 days stated by this court excluded weekends and holidays, because no such exclusion was stated in the judgment and the language used by the court was plain. Hence the allegation that weekends and holidays were excluded are a creation of the defendants meant to circumvent the consequences of their defiance of the decree. As the 90 days lapsed on 14th September 2025, and the defendants in their replying affidavit of 28th October 2025 confirmed not to have removed their structures, or ceased their occupation of the suit property within the 90 days granted by the court, it is therefore clear to me that they defied and disobeyed the decree of this court their defiance and disobedience was deliberate and wilful.

27. The decree herein has a penal notice that stated as follows;

“TAKE NOTICE that any disobedience or non-observance of the orders of the court given herein served herewith will result in penal consequences to you and any persons so disobeying and not observing the same.”

28. Therefore, I find and hold that the defendants were aware of the clear terms of the decree issued by this court and the penal notice therein but deliberately and wilfully violated the same by refusing to stop interfering with the suit property and failing to vacate the same within the period stated in the decree. I therefore find and hold that the defendants herein namely, **JOSEPH MIRIMO MULAMA, EMILY MWERESI, KENYATTA MULAMA, ANTHONY MAJIMBO, CLEMENT MIRIMO AND FLORENCE MULAMA** are in contempt of the decree herein dated 16th June 2025.

29. In the result, **JOSEPH MIRIMO MULAMA, EMILY MWERESI, KENYATTA MULAMA, ANTHONY MAJIMBO, CLEMENT MIRIMO AND FLORENCE MULAMA** are hereby ordered to appear before this court for purposes of mitigation and sentencing on 23rd February 2026.

30. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA
IN OPEN COURT/VIRTUALLY THROUGH**

**MICROSOFT TEAMS VIDEO CONFERENCING
PLATFORM THIS 21ST DAY OF JANUARY, 2026**

**A. NYUKURI
JUDGE**

In the presence of

Mr. Amalemba for the plaintiffs

Ms Ihachi for the defendants

1st, 2nd, 4th and 6th defendants in person

Court Assistant: Delphine