



REPUBLIC OF KENYA



KENYA LAW
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**Wabuyabo v Ali & 2 others (Environment and Land Appeal
E031 of 2025) [2026] KEELC 300 (KLR) (28 January 2026) (Ruling)**

Neutral citation: [2026] KEELC 300 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E031 OF 2025**

**A NYUKURI, J
JANUARY 28, 2026**

BETWEEN

SYLVESTER ODHIAMBO WABUYABO APPELLANT

AND

ALI ABDALLA ALI 1ST RESPONDENT

BAKARI MAKOKHA 2ND RESPONDENT

THE LAND REGISTRAR KAKAMEGA 3RD RESPONDENT

RULING

Introduction

1. Before court is a Notice of motion dated 30th April 2025 filed by the appellant seeking orders that there be stay of execution of the judgment delivered on 24th April 2025 by the lower court pending the hearing and determination of this appeal.
2. The application is supported by the annexed affidavit of the applicant. The applicant's case is that he was dissatisfied with the judgment of the lower court whereof he filed this appeal. That this appeal has high chances of success as he was condemned without being heard and that he had no capacity to be sued as the suit property belonged to his late father the late Nicholas Wabuyabo. That he is not the registered proprietor of the suit property hence has no proprietary interest therein. That the plaintiff amended his plaint long after the appellant had given his evidence. That parcel No. N. Wanga/ Mayoni/1108 does not exist on the ground as per the survey report. That the appellant was never served with a fresh hearing notice after the amendment of the plaint. That although the suit property belongs to his late father, he has occupied and developed it for decades in trust for his family and will suffer irreparably if orders sought are not granted as the respondents have commenced eviction process. That if execution proceeds, he will be evicted from the suit property and will suffer substantial loss.



He attached a copy of the judgment, memorandum of appeal, certificate of title, survey report and amended plaint.

3. The application was opposed. Ali Abdalla Ali the 1st respondent swore a replying affidavit dated 18th May 2025 opposing the application. He stated that the trial court in its judgment found that the applicant was in occupation of a title that had been impeached due to illegal subdivision, hence his continued occupation thereof has no basis. That the 1st respondent is in the process of implementing the judgment. That the applicant has not demonstrated substantial loss or any development on the land and that if the decree is reversed on appeal restitution will be done. That the applicant's assertion that she stands to lose the land in dispute is merely speculative and misplaced. That the applicant has not met the threshold in Order 42 Rule 6 of the Civil Procedure Rules.
4. The application was disposed by way of written submissions. On record are submissions filed by the applicant dated 22nd May 2025 which the court has duly considered.

Analysis and determination.

5. The court has carefully considered the application, response thereto and parties' rival submissions. The sole issue for the court's determination is whether the applicant has met the threshold for grant of orders of stay of execution pending appeal.
6. This court has the discretion and jurisdiction to grant orders of stay of execution pending appeal. Order 42 Rule 6 of the Civil Procedure Rules provides 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.
7. Thus, to succeed in seeking stay of execution pending appeal, an applicant ought to demonstrate imminent substantial loss; that they have sought stay without unreasonable delay and that they are willing to provide security for the due performance of the decree that may issue against them.
8. In the case of *Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd* (in liquidation) [2004] 2 EA 331 the court discussed the element of substantial loss 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.”



9. In the instant matter, the applicant stated that if stay is not granted, he will suffer substantial loss as he will be evicted from the suit property. That the suit property is registered in the name of his deceased father and that he had no locus standi to be sued. That he was never granted opportunity to be heard and thus has a triable appeal. The respondent contested the allegations that the applicant stands to suffer substantial loss and argued that no evidence of development was presented. I have considered the documents on record. From the judgment, it is clear that the appellant was in occupation of the suit property, whereof the court ordered him to vacate the same. From the amended plaint, it is clear that the applicants father became the registered proprietor of the suit property in 1987. The issues raised by the applicant regarding capacity to be sued in so far as the averments in the amended plaint are concerned are matters that raise triable issues.
10. I am therefore satisfied that the applicant has demonstrated substantial loss in view of the fact that he has, for some time been in occupation of the suit property. Besides, the applicant filed the application herein six days after delivery of judgment and therefore approached court timeously and without delay. In the premises, I find and hold that the application dated 30th April 2025, is merited and the same is hereby allowed. I therefore grant orders of stay of execution of judgment of the lower court delivered on 24th April 2025 in Mumias ELC Case No. E131 of 2022, pending hearing and determination of this appeal. The costs of the application shall be in the cause.
11. It is so ordered

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 28TH DAY OF JANUARY, 2026

A. NYUKURI

JUDGE

In the presence of;

Ms Mideva holding brief for Mr. Maina for the appellant/applicant

Mr. Juma for the 3rd respondent

No appearance for the 1st and 2nd respondents

Court Assistant: Delphine

