



**Tengeya v Mogoba & 2 others (Environment and Land Appeal
E015 of 2024) [2025] KEELC 5590 (KLR) (29 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5590 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL E015 OF 2024**

**DO OHUNGO, J
JULY 29, 2025**

BETWEEN

STEPHEN OBENGA TENGEYA APPELLANT

AND

ELIJAH OBARE MOGOBA 1ST RESPONDENT

EUNICE NYABOKE OBARE 2ND RESPONDENT

CHARLES MORWABE TENGEYA 3RD RESPONDENT

*(Being an appeal from the ruling and order of the Chief Magistrate's
Court at Nyamira (W.K. Chepseba, Chief Magistrate) delivered on
28th November 2024 in Nyamira MCELCMISC No. E012 of 2024)*

RULING

1. Litigation leading to this appeal commenced in the Subordinate Court on 14th August 2024 as a miscellaneous cause when the First and Second Respondents filed Notice of Motion dated 14th August 2024, against the Third Respondent herein and the Appellant as First Respondent and Second Respondents, respectively. The First and Second Respondents averred that they were purchasers of a 16250 square feet portion of the parcel of land known as West Mugirango/Siamani/4275 [the suit property] and that the Third respondent herein was the registered proprietor of the suit property through transmission in trust for himself and other beneficiaries.
2. The First and Second Respondents further averred that the Third Respondent herein and the Appellant had refused, without any legal justification, to transfer to them the portion of the suit property that they had purchased. They therefore prayed for the following orders:
 1. That this matter be certified urgent and same be heard ex-parte in the first instance.



2. Upon prayer I [sic] hereinabove being granted the Honourable Court be pleased to compel the 1st Respondent to sign the Land Transfer Papers, Mutation Forms and Nyamira Lnad [sic] Control Board Application Forms in favour of the 1st and 2nd Applicant's portion in the said parcel of land West Mugirango/Siamani/4275 measuring 16250 FT².
 3. The Honourable Court be pleased to issue an Order to the Court Executive Officer/Administrator to Land Transfer Papers, Mutation Forms and Nyamira Land Control Board Application Forms if the 1st Respondent fails to do so.
 4. That the Honourable Court be pleased to issue an Order to the Land Registrar Nyamira to effect the Registration of the 1st and 2nd Applicant name as proprietors in the Proprietorship section of the land register and or Books of Record.
 5. Costs of this application be provided for.
 6. Such other/or further relief as the court may deem fit and Expedient.
3. Upon hearing the Notice of Motion, the Subordinate Court [W.K. Chepseba, Chief Magistrate] delivered ruling on 28th November 2024 and allowed the application as prayed.
 4. Dissatisfied with the outcome, the Appellant filed this appeal on 11th December 2024, through Memorandum of Appeal dated the same date. Subsequently, with leave of the Court, he filed Amended Memorandum of Appeal dated 24th January 2025 through which he prayed that the appeal be allowed with costs and that the First and Second Respondents' application in the Subordinate Court be dismissed.
 5. Thereafter, the Appellant filed Amended Notice of Motion dated 5th March 2025, seeking stay of execution of the ruling and order appealed against pending hearing and determination of this appeal. This ruling is in respect of Amended Notice of Motion dated 5th March 2025.
 6. The application is supported by an affidavit sworn by the Appellant. He deposed that unless stay is granted, he stands the risk of being disinherited and that since the First and Second Respondents are in possession, that should be treated as security for purposes of the application. He added that he had timeously filed the application since the Learned Magistrate granted 30 days stay of execution upon delivery of the ruling.
 7. The First and Second Respondents opposed the application through a joint replying affidavit in which they deposed that the Appellant had not demonstrated substantial loss or sufficient reasons to warrant granting stay pending appeal. They also deposed that it would be unfair to be denied an opportunity to have their portion of the suit property transferred to them, yet they are purchasers for value. They also deposed to other matters which I have not rehashed since they go to the merit of the appeal.
 8. The third Respondent opposed the application through a replying affidavit in which he deposed that the suit property forms part of the estate of Antanas Tengeya Onkangi in respect of which he is an administrator and that he has been willing and ready to distribute the estate to rightful beneficiaries. That the First and Second Respondents should be allowed to enjoy the fruits of their litigation.
 9. The application was canvassed through written submissions. The Appellant filed submissions dated 28th March 2025, the First and Second Respondents filed submissions dated 20th May 2025 while the Third Respondent filed submissions dated 22nd May 2025.



10. I have carefully considered the application, affidavits and the submissions. The sole issue for determination is whether stay of execution pending hearing and determination of this appeal should be granted.
11. Jurisdiction to grant stay of execution pending appeal is circumscribed by Order 42 rule 6 [1] and [2] of the Civil Procedure Rules which provide as follows:
 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 sub rule [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. It follows therefore that a litigant seeking stay pending appeal must demonstrate that substantial loss will result to him if stay is not granted, and that the application has been made without unreasonable delay. Such a litigant is also required to give such security as the court may order for the due performance of the decree. See *Kenya Power & Lighting Co. Ltd v Kigaita Ngare Unduthu & 36 others* [2020] eKLR and *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR. As Platt Ag JA [as he then was] stated in *Kenya Shell Limited v Benjamin Karuga Kibiru & another*, substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. It is virtually impossible for such an application to succeed if an applicant fails to demonstrate that he will suffer substantial loss if stay is not granted.
13. I note that the order appealed against requires transfer of the disputed portion of the suit property to the First and Second Respondents. If the transfer were to go ahead yet the appeal ultimately succeeds, the Appellant will have lost the said portion. I am satisfied that the Appellant has satisfied the test of substantial loss.
14. Regarding the requirement that such an application be made without unreasonable delay, the order appealed against was made on 28th November 2024. This appeal was filed less than two weeks later on 11th December 2024. A week after filing the appeal, the Appellant filed Notice of Motion dated 18th December 2024, through which he sought stay pending appeal pursuant to prayer 3 thereof. That initial application was replaced by Amended Notice of Motion dated 5th March 2025 following amendment of the Memorandum of Appeal. I am satisfied that there has been no unreasonable delay.
15. In view of the foregoing discourse, I find merit in Amended Notice of Motion dated 5th March 2025. Considering that the appeal is pending before this Court and that both the record of the Subordinate



Court and typed and certified proceedings have been availed, I will further give directions to facilitate its early hearing and determination. I make the following orders:

- a. I grant stay of execution of the ruling and order of the Chief Magistrate's Court at Nyamira delivered on 28th November 2024 in Nyamira MCELCMISC No. E012 of 2024 pending hearing and determination of this appeal.
- b. The Appellant to file and serve Record of Appeal and written submissions in respect of the appeal within 21 [Twenty One] days from the date of delivery of this ruling.
- c. The Respondents to file and serve written submissions in respect of the appeal within 14 [Fourteen] days of service of the Appellant's submissions.
- d. Costs of Amended Notice of Motion dated 5th March 2025 shall be in the appeal.

DATED, SIGNED, AND DELIVERED AT NYAMIRA, THIS 29TH DAY OF JULY 2025.

D.O.OHUNGO

JUDGE

Delivered in the presence of:

Mr Onyancha for the Appellant

Mr Mongare for the First and Second Respondents

Mr Mongare holding brief for Mr Nyamwange for the Third Respondent

Court Assistant: K Misiko

