

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND COURT AT KAKAMEGA
ELC NO. 318 OF 2017

STEPHEN SARAMBA VIRAGI.....
PLAINTIFF

VERSUS

HILLARY SAVARI..... 1ST
DEFENDANT

WALTER MUDAKI.....2ND
DEFENDANT

AND

SIMON MUSYOKI & 4 OTHERS.....INTERESTED
PARTIES/OBJECTORS

RULING

Introduction

1. Before court is a notice of motion dated 17th March 2025 filed by the interested parties/ objectors seeking the following orders;

a) Spent

b) Spent

c) That the entire execution proceedings be stayed pending the hearing and determination of Court of Appeal proceedings

d) That this Honourable court be pleased to stay further proceedings herein pending the hearing and determination of the appeal in the Court of Appeal at Kisumu being Civil Application COACAPPL/E165/2024 Pharaz Nyabera Zavani VS Stephen Salamba Viragi

e) That the Court be pleased to set aside the entire execution proceedings as far as they are directed to the parties not involved in this case.

f) That the Court be pleased to declare that any purported eviction orders directed to the objectors are illegal, unlawful, null and void as they are not parties to this suit.

g) That the costs of this application be awarded to the defendant/ applicant.

2. The application is predicated on the affidavit sworn by the 2nd applicant/ objector. The applicants' case is that Gospel Centre Mbale was constructed on land

parcel No. Kakamega/Bugonda/2163 since 1989 and the said church has been paying rates since 1989 for 30 years.

3. Further that the objectors filed suit against the plaintiff herein which suit was dismissed and that they appealed against the same. That they immediately filed an application for stay before the Court of Appeal which application was certified urgent. That the application for stay before the Court of Appeal was heard and the same is reserved for ruling on 9th May 2025.
4. He also averred that when the plaintiff filed application herein dated 14th January 2025, he was guilty of material non-disclosure and failed to disclose the fact that there is a case between him and the objectors in the Court of Appeal and the objectors herein are not the correct parties in this case. Further that the plaintiff failed to disclose that the defendants are not in occupation of the suit property.

5. That the defendants are not known to the applicants and that it is the church that is in occupation. That there is a case between the plaintiff and Gospel Centre Mbale over the same suit property pending before the Court of Appeal at Kisumu. That it is prudent for this matter to be stayed pending determination of the appeal before the Court of Appeal. That if the plaintiff's application proceeds, the applicants appeal is going to be rendered nugatory. That no prejudice will be suffered by the plaintiff if the orders sought are granted.
6. The application was opposed. The plaintiff/respondent filed a replying affidavit dated 3rd March 2025, opposing the application. It was his case that the application was an abuse of the court process. That the applicants are not parties in this suit and there is no application for joinder, hence have no locus standi. That a stranger to proceedings cannot seek stay of execution.
7. Further that Appeal No. E130 OF 2022 was duly heard and dismissed by the Court of Appeal in a

ruling dated 9th June 2023. That there is no pending appeal upon which stay can be granted under provisions of Order 42 Rule 6 of the Civil Procedure Rules. That this court is *functus officio* and the prayer for stay is spent.

8. That the issues raised herein have been canvassed and conclusively determined vide SRMCC NO. 40 OF 2018 where Hamisi Law Courts ruled in favour of the respondent declaring them legitimate owners of the suit property. That this matter was also heard in ELC CASE 218 OF 2017 where the court on 31st May 2018 delivered judgment. That in ELC CASE NO. 22 OF 2020, the court found that the applicant failed to meet the threshold of adverse possession and dismissed their case and that in Application No. 130 of 2022, the appeal was dismissed by the Court of Appeal.

9. That all decisions above were in favour of the respondent. That therefore the applicant cannot be allowed to relitigate matters already decided

between the same parties by courts of competent jurisdiction.

10. Further that the applicant is engaged in forum shopping for filing repetitive applications in different courts after suffering dismissal, which is an abuse of the court process. That the applicants conduct is oppressive and meant to delay execution. That the applicant has failed to meet the mandatory threshold of provisions of Order 42 Rule 6. That he will suffer prejudice if orders sought are granted as he will be denied fruits of a lawful judgment

11. In a rejoinder, Kevin Mushieba Ngogede, the Secretary of Gospel Centre Mbale swore a further affidavit dated 9th June 2025. He stated that they filed application NO. E 165 OF 2024 seeking stay of execution in Kisumu No. 22 of 2024 and injunctive orders which application is pending hearing and determination. That on 4th April 2025, the Court of Appeal granted their prayers and issued injunctive orders. He prayed that this court adopts the ruling in Court of Appeal Application No. E165 OF 2024.

12. Parties filed submissions in support of their respective positions. On record are the applicant's submissions dated 7th November 2025 and the respondent's submissions dated 3rd March 2026, both of which the court has duly considered.

Analysis and determination.

13. The court has carefully considered the application, response thereto and submissions. The single issue that arise for the court's determination is whether the applicants deserve the orders sought.

14. The application before me is brought under provisions of sections 1A, 1B, 3, 3A of the Civil Procedure Act and Order 22 Rules 51, and 52 and Order 51 Rule 1 of the Civil Procedure Rules. Order 22 Rules 51 and 52 provide for objection to attachment as follows;

“51. Objection to attachment [Order 22, rule 51]

(1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out

of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.

(2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.

(3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties.

52. Stay of execution [Order 22, rule 52]

Upon receipt of a valid notice and application as provided under rule 51, the court may order a stay of the execution for not more than fourteen days and shall call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within seven days whether he proposes to proceed with the attachment and execution thereunder wholly or in part.”

15. Therefore, where any person has a legal or equitable interest in property sought to be attached, they may

object to execution proceedings in respect of such property. That person need not be a party to the suit.

16. In the instant case, the applicant sought for stay of further proceedings in this matter pending hearing and determination of COA CIVIL APPLICATION NO. E165 OF 2024 **Pharaz Nyabera Zavani v Stephen Salamba Viragi**. He attached a ruling in regard of the said matter where the Court of Appeal granted the applicant an injunction to restrain the respondent from dealing with parcel Kakamega/ Bugonda/2163 pending the hearing of the intended appeal.

17. It is therefore clear to me that parcel No. Kakamega/ Bugonda/2163 is the common subject matter in the instant matter and in Kakamega ELC Case No. 22 of 2020, where the plaintiffs herein is a party in the two matters. In both cases, the ELC court decided in favour of the respondent herein. The applicants' claim of adverse possession in Kakamega ELC NO. 22 OF 2020 was dismissed, as a result of which they obtained injunction to restrain the respondent herein from dealing with the suit property pending the

hearing of their intended appeal, vide Kisumu CA No. E165 OF 2024. Therefore, two parallel proceedings have been ongoing in one case, between the plaintiff and the defendants herein and between the plaintiff and objectors herein in another case.

18.The applicants' appeal is yet to be heard. Therefore, this court has no jurisdiction in this matter to declare that they are the legal or equitable owners of the suit property as that question has already been determined by this court in ELC Case No. 22 of 2020.

19.However, as applicants/objectors have obtained injunction against the respondent/plaintiff herein who has been restrained from dealing with the suit property pending intended appeal, vide Civil Appeal No. 165 of 2024, and have demonstrated an arguable appeal before the Court of Appeal, they have shown an apparent equitable interest in the suit property worthy of protection for the period up to the determination of their appeal against the judgment in Kakamega ELC No. 22 of 2020. In the premises, I

allow the application dated 17th March 2025, as follows;

- a) That execution proceedings against the objectors are hereby stayed pending hearing and determination of Court of appeal proceedings in regard to the objectors' appeal regarding the suit property.**
- b) That further proceedings herein are stayed pending hearing and determination of the Appeal against the judgment in Kakamega ELC Case 22 of 2020, only in regard to the objectors. The orders issued herein do not affect the defendants.**
- c) That execution proceedings as far as are directed against the objectors are held in abeyance pending determination of the appeal against the judgment in Kakamega ELC Case No. 22 of 2020.**
- d) Each party shall bear its own costs**

20. It is so ordered.

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

**MICROSOFT TEAMS VIDEO CONFERENCING
PLATFORM THIS 11TH DAY OF MARCH, 2026**

**A. NYUKURI
JUDGE**

In the presence of;

Ms Odhiambo holding brief for Mr. Mwamu for the
applicants

No appearance for the respondents

Court Assistant: Delphine