

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT MILIMANI
ELCA NO. E140 OF 2025

SULEIMAN MOHAMMED - APPELLANT
/APPLICANT

VS

DENNIS MURIITHI MUSYOKA - RESPONDENT

AND

GIDEON MWANGI KABARU - 1ST INTERESTED
PARTY

GRACE KINYA MUCHIOKA - 2ND INERESTED
PARTY

RULING

(In respect of Applicant's application dated 29/7/25 and the Respondent's application dated 18/8/25

1. The applicant's motion dated 29/7/25 seeks orders for a stay of execution of the trial court's Ruling dated 18/7/2025 in CMELC No E421 of 2025, Dennis Muriithi Musyoka v. Suleiman Mohammed & Gideon Mwangi Kabaru & Anor. Additionally, the applicant seeks an order for a stay of further proceedings in the trial court in CMELC No. E421 of 2025, Dennis Muriithi Musyoka v. Suleiman Mohammed & Gideon Mwangi Kabaru & Anor.

2. The applicant asserts that the trial court ordered him to vacate the suit land within 30 days, warning that failure to do so would result in his forced eviction, despite there being a dispute over the ownership and occupation of the land. The applicant is also aggrieved that the court granted final orders in an interlocutory application despite the ongoing dispute. He stated that he has lived on the land for over 19 years, considering it his home for himself and his family, and therefore he would suffer irreparable loss if evicted before his appeal is heard and decided. Furthermore, he argues that unless the court stays further proceedings in the trial court, the core of his appeal will become nugatory. He filed the application without undue delay and is willing to provide security for costs as the court may direct.
3. The Respondent, in response to the application of 29/7/25, stated that there was no claim for adverse possession in the trial court, and the same is now being raised on appeal without any legal basis. He argued that the applicant sought review of the trial magistrate's decision, for which the court has issued directions, and therefore he is now barred from pursuing an appeal on the same decision. The Respondent also contended that the applicant's action of filing the appeal after the failed review constitutes an abuse of the court's process. The court was urged to strike out the memorandum of appeal.
4. In his application dated 18/8/25, the respondent sought orders that the court discharge the review and/or set aside the orders

of the court issued on 31/7/25, and that the memorandum of appeal and the application filed by the applicant be struck out for want of jurisdiction, being incompetent, misconceived, and an abuse of the process of the court.

5. He averred that on 22/7/25, the applicant moved the trial court for review of its orders and, when it failed to obtain a stay, mounted the current appeal. Effectively, the applicant is appealing against the decision that he sought to review. The applicant is barred by Section 80 of the Civil Procedure Act read together with Order 45 of the Civil Procedure Rules. She urged the court to strike out the appeal and the application.
6. The applicant's response to the respondent's application is that the application for review dated 21/7/25 was withdrawn on 6/11/25 before it was heard and determined. The effect of such withdrawal under Order 25 of the Civil Procedure Rules is that the review application became a nullity. He argued that filing of the appeal on 29/7/25 was lawful and did not constitute any forum shopping.
7. On direction by the court parties have filed written submissions which I have read and considered.
8. As to whether there is a competent appeal on account of a previous application for review, I have seen the notice of withdrawal of the application for review dated the 6/11/25 and am satisfied that the appeal before me is competent.
9. On stay of execution, it is trite that no Appeal can operate as a stay; hence, an application for stay shall be made to the court

by the desiring party. The principles upon which stay of execution pending appeal may be allowed are now well settled from the authorities of this court and from the superior courts. Generally, stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules which provide as follows: -

- (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, an 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 of 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 undue 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.”

10. In considering an application for stay of execution, I am guided by the case of Butt -vs- Rent Restriction Tribunal (1982) KLR 417 where the Court of Appeal gave the following guidelines: -

“The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s decision. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicants at the end of the proceedings. The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

11. The grant of an order of stay of execution is a discretionary one. In the case of RWW -vs- EKW (2019) eKLR the Court held that: -

“...the purpose of an application for stay of execution pending an appeal is to preserve the subject in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and The appeal if successful is not rendered nugatory. However,

in doing so the court should weigh the right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of damages.”

12. The Court is therefore called upon to balance the rights of the successful party so as not to prevent him from enjoying the fruits of his judgment, and those of the Appellant, whose appeal may succeed and be rendered nugatory if a stay of execution is not granted.
13. The purpose of a stay of execution is to preserve the substratum of the case. When the first condition requires proving that substantial loss may occur if a stay is not granted, the Applicant must not only state that they are likely to suffer significant loss, but must also demonstrate that they will indeed suffer substantial loss if stay orders are not granted.
14. Substantial loss was clearly explained in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR: -
"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. In this case, the applicant is concerned that the eviction orders will make the appeal futile while a dispute that is yet to be heard remains unresolved. For that reason, the court finds that granting a stay of execution is appropriate to allow the parties to address the dispute before the court.
16. That said I order the applicant to provide security for the due performance of the costs as may be applicable in the sum of Kshs 200,000/- to be deposited in court within a period of 15 days in default, the orders herein granted shall expire automatically.
17. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF APRIL 2026 VIA MICROSOFT TEAMS.

J. G. KEMEI
JUDGE

Delivered Online in the Presence of:

1. Ms Masomi for the Appellant
2. Mr Wanyama for the Respondent
3. CA- Mr Duncan Muusya

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