



**Munyasia v Makhanu & 3 others (Environment and Land Case E007 of 2022) [2025] KEELC 5676 (KLR) (24 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5676 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND CASE E007 OF 2022  
EC CHERONO, J  
JULY 24, 2025**

**BETWEEN**

**MARGARET NABANGALA MUNYASIA ..... PLAINTIFF**

**AND**

**PIUS MUNYASIA MAKHANU ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR BUNGOMA COUNTY ..... 2<sup>ND</sup> DEFENDANT**

**LAND SURVEYOR BUNGOMA COUNTY ..... 3<sup>RD</sup> DEFENDANT**

**NATIONAL LAND COMMISSION ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. Pius Makhanu Munyasia, the Applicant herein moved this Court vide a Notice of Motion dated 28<sup>th</sup> April 2025 seeking the following orders;
  - a. (Spent)
  - b. That there be a stay of execution of the judgment/Decree delivered on the 3<sup>rd</sup> April 2025 pending inter-partes hearing of this Application.
  - c. That there be a stay of execution of the judgment/Decree delivered on the 3/4/2025 pending hearing and determination of the Appeal in the Court of Appeal at Kisumu No. E088 of 2028.
  - d. Costs.
2. The application which was filed under certificate of urgency is based on nine grounds apparent on the face of the said application supported by the affidavit of the Applicant and a further affidavit sworn on 28<sup>th</sup> April 2025 and 30<sup>th</sup> April 202 respectively. According to the Applicant, he was aggrieved with the Judgment of this Court delivered on 3/4/2025 and that he has preferred an appeal to the Court of Appeal at Kisumu being C.A NO. E088 of 2025. He deposed that the plaintiff through M/



S Dominion Yards Auctioneers have proclaimed his moveable properties in execution of the decree herein and will be moved away in seven days from 23/04/2025. He stated that unless the stay of execution orders is granted, his appeal at the Court of Appeal will be rendered academic, useless and of no purpose and that he will cause great prejudice. She stated that she will suffer substantial loss if the order for stay of execution of the judgment entered herein is not granted.

3. The Applicant further deposed that should the order for re-survey and restoration of beacons be carried out and 0.36Ha. Curved out, he stands evicted from the suit property, an act that will cause great loss and prejudice to him and will also render the appeal nugatory and academic. He stated that the plaintiff/Decree Holder is a person of no known means of income and will not be able to make good Ksh. 100,000/ as ordered in the decree, should his appeal NO. E088 of 2025 at the Court of Appeal at Kisumu succeed.
4. The application is opposed by the Respondent/Decree Holder vide grounds of opposition dated 8<sup>th</sup> May, 2025. The said grounds of opposition raise four (4) grounds as follows;
  1. The application is incompetent, fatally defective and abuse of the court process
  2. The court is functus officio.
  3. The court has no jurisdiction to deal with the application.
  4. The application be dismissed with costs.
  5. When the said application, filed under certificate of Urgency was placed before me sitting as the Duty Judge, I declined to certify the same as urgent and directed that the same to be canvassed by written submissions. On 28/08/2025, the said application came up for mention for compliance and parties confirmed that they had all complied.

#### **Applicant's Written Submissions**

6. The Applicant through the Firm of Omundi Bw'onchiri Advocates filed his submissions dated 30<sup>th</sup> April 2025 based on two issues as follows;
  - a. Whether the 1<sup>st</sup> Defendant/Applicant has made out a case for stay of execution pending the hearing and determination of the Appeal in the Court of Appeal
  - b. Who is to pay costs.
7. On the first issue, the learned counsel referred to Order 42 Rule 6(2) CPR and submitted that he has fully satisfied the conditions for the grant of stay pending appeal and that the Appellant has shown that he will suffer substantial loss unless the application is allowed, that the application has been made without unreasonable delay and has given an undertaking for such security as the court orders for the due performance as may be binding on him. Finally, he submitted that the Applicant has shown sufficient cause in light of the overriding objective stipulated under section 1A & 1B of the Civil Procedure Act. On whether the application is made without unreasonable delay, the Applicant answered in the affirmative and cited the following cases; Silverstein v Chesoni (2002) 1 KLR 867, Harun Gikongo & Another v Wachuka Kamau (2022) KLR, RWW V EKW (2019) eKLR; Cotton LJ in Wilson v Church (No.2) (1879) 12 ChD 454 at page 458; Butt v Rent Restriction Tribunal (1982) KLR 417; Clement Wakari Njoroge v Daniel Mwangi Wahome (2022) eKLR.
8. While explaining that the application under review was brought without unreasonable delay, the Applicant submitted that despite the delay in being supplied with the Decree and certified proceedings, he was able to file the present application on 28/04/2025, a period of 24 days after the impugned



judgment was delivered on 3/4/2025. He relied in the case of Halal & Another v Thorntone & Turpin (1963) Ltd (1990) eKLR.

9. On security of costs, the learned Counsel submitted that at paragraph 7 of the supporting affidavit, the Applicant deposed that he is ready and willing to offer security for the due performance as this Honourable court may order. He relied in the case of Vishram Ravji Halai v Thornton & Turpin Civil Application NO. 15 of 1990 (1990) KLR 365
10. Regarding sufficient cause, the learned Counsel submitted that in order not to have the 1<sup>st</sup> Defendant/Applicant evicted from the parcels in question if Re-survey and restoration of Beacons were to go on as decreed acts that will too render the appeal nugatory. He relied in the case of Harun Gikonyo & Another v Martha Wachuka Kamau (2020) eKLR.

### **Plaintiff/Respondent's Submissions**

11. The Plaintiff/Respondent through the Firm of Wattangah & Co. Advocates submitted on the following three issues;
  - a. Whether the court is functus officio.
  - b. Whether the court lacks jurisdiction.
  - c. Costs of the application.
12. On the first issue, the learned Counsel submitted after judgment was delivered by this Honourable court on 3/4/2025, the Applicant filed a Notice of Appeal which was later forwarded to Kisumu and registered as C.A Case No. E088 of 2025. The learned Counsel submitted that having moved the Court of Appeal, the present application is akin to re-opening the case afresh yet the court had already rendered itself in its judgment delivered on 3/4/2025. He submitted that having already moved the court of Appeal vide CA No.E088 of 2025, it renders this Court functus officio.
13. On the second issue whether this court lacks jurisdiction to deal with the application, the learned Counsel answered in the affirmative and submitted that after he preferred an appeal to the Court of Appeal at Kisumu being C.A No. E088 of 2025, the 1<sup>st</sup> Defendant/Applicant is challenging the entire judgment of this Court arguing that the proposed appeal is merited. He argued that after rendering itself on 3/4/2025, this Court has only one jurisdiction to entertain review but not appeal. He submitted that the 1<sup>st</sup> defendant/Applicant cannot be heard asking this Court to stay its judgment which determined the dispute between the parties in finality. He submitted that after receiving the Notice of Appeal and forwarding the same to the Court of Appeal at Kisumu and registered as C.A No. E088 of 2025, this Court ceased to have jurisdiction to entertain the present application and must therefore down its tools. He cited the case of Maikuma Wekesa Buchunju v Donald Wekesa Muyundo & 7 Others, Bungoma ELC No. 143 of 2017 (UR).

### **Legal Analysis and Determination.**

14. I have considered the application, the supporting affidavit, the further affidavit, grounds of opposition, rival submissions and the applicable law. The application under review is brought under Order 42 Rule 6 Civil Procedure Rules which provides as hereunder;

“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 deem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may appeal 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.”

15. Rule 5(2)(b) of the Court of Appeal rules provides as follows;

- “(b) in any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.

16. An application for stay of execution under order 42 Rule 6 of the Civil Procedure Rules applies to stay of execution from the subordinate courts and Tribunals to the Environment and Land Court. On the other hand, Rule 5 of the Court of Appeal Rules apply to Appeals from the Environment and Land Court to the Court of Appeal. In my view, where a subordinate court or Tribunal has heard and determined a dispute between parties in finality, the court/Tribunal becomes functus officio and any party who is aggrieved with such decision may prefer an appeal to the Environment and Land Court. The same scenario applies to disputes before the Environment and Land Court to the Court of Appeal. Suffice to say that an aggrieved party may make an oral application for stay of execution before the trial court and the court may, on sufficient reasons grant the orders. After the expiry of the appeal period, the trial court becomes functus officio and thereafter, the stage moved to the appellate court, except for judicial Review and applications under section 100 of the Civil Procedure Act.

17. In this case, this court delivered judgment in respect of the dispute between the parties herein on 3/4/2025. The parties’ right of appeal lapsed 14 days thereafter. The Applicant herein filed a Notice of Appeal which was received by this court and forwarded to the Court of Appeal at Kisumu and registered as C.A No. E088 of 2025.

18. I agree with the submissions by Counsel for the plaintiff/Respondent that once this Court rendered itself vide its judgment delivered on 3/4/2025 and the 1<sup>st</sup> Defendant/Applicant filed a Notice of Appeal which was received at the Court of Appeal at Kisumu and registered as C.A No. E088 of 2025, the stage moved to the Court of Appeal and this Court therefore became functus officio. To entertain this application is like re-opening the suit afresh, despite having heard and determined the dispute in finality. I also agree with the learned Counsel for the Plaintiff/Respondent that after preferring an appeal to the court of Appeal which was registered as C.A No. E088 of 2025, this court was further rendered functus officio.

19. Whereas it is the undoubted right of an aggrieved party to appeal to the higher court, it is the duty and obligation of the trial court to enforce its judgment/order as a decree/order cannot be issued vain.



20. In view of the foregoing, I find the Notice of Motion application dated 28<sup>th</sup> April, 2025 devoid of merit and the same is hereby dismissed with costs.

21. Orders accordingly.

**READ, DELIVERED AND SIGNED AT BUNGOMA THIS 24<sup>TH</sup> DAY OF JULY, 2025**

**HON. E.C CHERONO**

**ELC JUDGE.**

In the presence of;

Mr. Maloba H/B for Mr. Bw'onchiri for the Appellant/Applicant

Mr. Wattangah for the Respondent

Bett C/A.

