



**Siahi & another v Muhindi (Environment and Land Appeal
E056 of 2025) [2025] KEELC 5530 (KLR) (23 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5530 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E056 OF 2025**

**A NYUKURI, J
JULY 23, 2025**

BETWEEN

JAPHETH MUYALE SIAHI 1ST APPELLANT

WYCLIFFE LUSENO 2ND APPELLANT

AND

JANE SHISIA MUHINDI RESPONDENT

RULING

Introduction

1. Before court is a notice of motion dated 23rd June 2025 filed by the appellants seeking orders of temporary stay of execution of the ruling of the Principal Magistrate, Butali delivered in Butali MC L& E CASE No. E034 of 2025 on 13th May 2025, pending the hearing and determination of this appeal. They further sought for a prayer that status quo prevailing before the issuance of the injunction dated 13th May 2025 in Butali MC SPMC ELC CASE NO. E034 OF 2025 be maintained. They also sought costs.
2. The application is anchored on the affidavit sworn by the 1st applicant dated 23rd June 2025. The applicants' case was that they were sued in Butali SPMC ELC No. E034 OF 2025 and the respondent simultaneously filed application against them dated 15th April 2025. Further that the respondent caused their arrest, detention and charging with the offence of forcible detainer and threatening to kill in relation to parcel No. Kakamega/Lugari/1537. That they have not been served with witness statements in the criminal case.
3. That upon service, they instructed their advocate who filed Memorandum of Appearance on 28th April 2025 but found that the matter was pending ruling on 13th May 2025. That in the ruling the respondent's application for injunction was allowed in its entirety.



4. That the applicant filed an application to set aside the ruling of 13th May 2025, but the same was dismissed in a ruling dated 16th June 2025, which ruling is subject of the appeal herein. They stated that the appeal raises arguable grounds as the trial court had no jurisdiction to determine the matter raised in the defence. That the injunction granted on 13th May 2025, essentially allowed the prayers in the plaint and that the same has the effect of evicting the applicant and curtail their use of the suit property.
5. They maintained that they were not heard even after seeking to set aside orders of 13th May 2025. That since the trial court had no jurisdiction, the applicants have filed Kakamega ELCOS NO. E034 of 2025 to assert their claim. That if orders sought are not granted the applicants shall suffer irreparable loss because they are in actual possession and use of the suit property. They attached copies of plaint and application in Butali SPMC E034 OF 2025; cash bail receipts, charge sheet, ruling dated 13th May 2025, application seeking orders to set aside orders of 13th May 2025 and the ruling thereof.
6. The application was opposed. Jane Shisia Muhindi, the respondent swore a replying affidavit dated 1st July 2025, opposing the application. It was her case that service of witness statements and documents in the criminal case is within the purview of the ODPP. That in any event those statements have no bearing on this appeal.
7. That the appellants never raised a preliminary objection on the jurisdiction of the court in Butali SPMC ELC E034 OF 2025 and that raising that issue now is an afterthought. She stated that denial of the orders will not render the appeal nugatory as the orders granted were temporary. That orders sought in the plaint are not the same as those granted by court as the plaint seeks permanent injunction while the court granted temporary injunction and that just because they restrain the respondent from using the suit property, does not make them final orders.
8. That as regards the respondent's application dated 15th April 2025, the appellants were granted an opportunity to be heard, as the advocate entered appearance but failed to respond to the application. That failure to comply with court directions cannot be faulted on any other person apart from the applicants. That the applicants are not entitled to occupation or use of the suit property and the court cannot endorse an illegality. That the applicants have not shown that they will suffer irreparable injury.
9. The application was disposed by way of written submissions. On record are submissions filed by the applicants dated 16th July 2025 and those filed by the respondent dated 15th July 2025; which this court has duly considered.

analysis and determination.

10. The court has carefully considered the application, response thereto and filed submissions. The single issue that arise for the court's determination is whether the applicant has met the threshold for grant of orders of stay of execution and orders for maintenance of status quo.
11. Orders of maintenance of status quo are in the nature of a temporary injunction as they restrain parties from interfering with the subject matter of the suit.
12. Order 42 Rule 6 (1) (2) and (6) of the Civil Procedure Rules provides for the jurisdiction of the court to grant orders of stay of execution and temporary injunction pending appeal 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.
 3.
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 5.
 6. Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
13. Thus, for an application for stay of execution pending appeal to succeed, the applicant must demonstrate that they stand to suffer substantial loss if stay is not granted; that they have sought for stay without unreasonable delay and show willingness to provide security for the due performance of the decree, that may issue against them.
14. In the case of *Butt vs Rent Restriction Tribunal* [1979]KLR the Court of Appeal enumerated elements to be considered in considering an application for stay pending appeal as follows:
- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion.
 - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.



15. Execution is a legal process which should not be unjustifiably or injudiciously halted. In the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, the court expressed itself thus:

“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.”
16. On the other hand, where an applicant demonstrates that they have complied with the procedures of filing an appeal, as well as satisfy the conditions for grant of temporary injunction, the court may grant orders of temporary injunction pending appeal. The conditions for grant of temporary injunction are well settled. An applicant must demonstrate an arguable case; that if the injunction is not granted they will suffer irreparable injury and the balance of convenience should tilt in favour of the applicant. (See *Giella v Cassman Brown* (1973) EA 358)
17. In the instant matter, the applicants stated that they are in occupation of the suit property from time immemorial and that the injunction granted in favour of the respondent amounts to an eviction order. That they were condemned unheard and that their appeal has overwhelming chances of success as the trial court has no jurisdiction to hear the dispute.
18. Although, the applicants stated that they were in occupation and use of the suit property and that the orders of 13th May 2025 would amount to eviction, they did not disclose the nature of use or occupation for the court to conclude that the orders issued would amount to eviction.
19. I have considered the plaint in Butali SPMCC E034 OF 2025, and the same seeks permanent injunction. The applicants stated that the acquisition of the suit property by the respondent was fraudulent and that they had acquired the same through the doctrine of adverse possession. Adverse possession is simply described as “a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a period of 12 years (See *Mtana Lewa v Kahindi Ngala* (2015) e KLR)
20. Essentially, adverse possession arises where a trespasser dispossesses the true owner of land by occupying the same continuously, openly and as of right for uninterrupted period of 12 years. The person against whom adverse possession can successfully be sought is the person who is ordinarily the true owner; a person whose validity of title is not in question. However, in this case, the appellants allege that the respondent acquired title by fraud. Fraud and adverse possession, in my view cannot properly coexist in one claim. A person holding a fraudulent title is not the true owner thereof. In any event, the trial court has no jurisdiction to entertain a claim for adverse possession, and therefore it is the appellant’s case that the trial court has no power to decide; but it has power to decide the question of trespass raised by the respondent.
21. Having considered the Memorandum of Appeal, as well as the application for injunction before the trial court, the ruling of 13th May 2025 and the application for setting aside dated 21st May 2025, there is nothing in the applications by the appellants that demonstrated occupation. Alleging that they have



been in occupation of the suit property from time immemorial with no iota of evidence, knowing too well that their lives did not start from time immemorial, it is clear that the appellants have all along, from the trial court to this court been making empty allegations without any evidential backing. The applicants have therefore not demonstrated the justification of their trespass. At this point therefore, I am not convinced that the appeal before me raises triable issues to justify orders for maintenance of status quo.

22. The argument by the applicants that they shall suffer irreparable injury and substantial loss if orders sought are not granted, was anchored on their allegation that they are in occupation of the suit property. Since there was no proof of occupation, of the suit property as no valuer's report or even at the most basic level, photographic evidence, was availed to show occupation, their allegations regarding occupation remains unproved. That being the case, I take the view that the applicants have failed to demonstrate substantial loss or irreparable injury if orders of stay of execution and maintenance of status quo are denied.
23. Ultimately, I find and hold that the application dated 23rd June 2025 lacks merit and the same is hereby dismissed with costs.
24. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 23RD DAY OF JULY, 2025

A. NYUKURI

JUDGE

In the presence of;

Mr. Athunga for the appellants/applicants

Ms. Omuya for the respondents

Court Assistant: M. Nguyai

