



**Moina v Mukweya (Environment and Land Appeal E052 of 2025)
[2025] KEELC 5526 (KLR) (22 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5526 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E052 OF 2025**

**A NYUKURI, J
JULY 22, 2025**

BETWEEN

ELIUD MWELEME MOINA APPELLANT

AND

ROSE MUESHI MUKWEYA RESPONDENT

RULING

Introduction

1. Before court is a notice of motion dated 1st July 2025 filed by the appellant seeking orders of stay of execution of the Judgment of Hon. Angeline Odawo, PM delivered in Kakamega MC L& E No. E03 of 2023 on 21st May 2025, pending the hearing and determination of this appeal. He sought an alternative prayer of temporary injunction to bar the respondent from evicting him from the suit property pending the hearing and determination of this appeal. He also sought costs.
2. The application is anchored on the affidavit sworn by the applicant dated 1st July 2025. His case was that he was born on and had lived on the suit property since 1980 to date and that the portion claimed by the respondent is where he had built his residence which is part of his father's compound.
3. That his father had his own land parcel No. Idakho/Shivakala/1025 which was adjacent to parcel No. 1024, the latter belonging to Solomon Bakhuya alias Solomon Luseno, a paternal uncle of the applicant's father. That Solomon and the applicant's father lived peacefully till their respective deaths. That the applicant's father died in 1973 leaving the applicant and his family in his father's compound which had been created in 1973. That his father's compound was partially on parcel No. 1024 and No. 1025. That he occupies part of the compound bought by his father now comprised in Idakho/Shivakala/4082, which is a subdivision of parcel No. 1024. That the respondent alleges to have bought the said title in 2008 although he got registered in 2022 and that she lied that the applicant encroached on the land in 2020.



4. The applicant argued that the trial court was wrong in deciding against him and that unless stay is granted, he is at risk of eviction and that his wife and children shall suffer. That he believes he has a good appeal with chances of success.
5. The application was opposed. Rose Museshi Mukweya the respondent, swore a replying affidavit dated 10th July 2025, opposing the application. It was her case that the instant application was predicated on falsehoods for purposes of frustrating her. That on 14th February 2023, she filed suit seeking eviction orders against the respondent, his family members, servants and agents and that on 21st May 2025 the court allowed her claim ordering the applicant to vacate the suit property. She stated that the applicant had not exhibited substantial loss that he would suffer if orders sought are not granted as the suit land is not his but the respondent's.
6. She further stated that the applicant had failed to offer security. That in 2008 she purchased parcel No. Idakho/Shivakala/4082 from one Deresina Mmanani Shipaka and thereafter obtained title. She insisted that the applicant's allegation that he had occupied the suit property since 1980 was false as he does not live on the suit property but stays on his father's parcel of land No. 1025. She maintained that the applicant has never been in exclusive occupation of the suit property and has no legal right over the same hence his appeal has no chance of success. She stated that the application was meant to frustrate her and that the application was brought after a delay. That the applicant had failed to show that he would suffer irreparable loss or that he is entitled to the suit property.
7. The application was disposed by way of written submissions. On record are submissions filed by the applicant dated 14th July 2025 which this court has carefully considered.

Analysis and Determination.

8. 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 temporary injunction, pending hearing and determination of this appeal.
9. 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 as well as 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.

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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.”

10. 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.

11. In the case of *Butt v Rent Restriction Tribunal* [1979] KLR, the Court of Appeal enumerated elements to be considered in considering an application for stay of execution 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.”

12. Execution is a legal process which ought not be injudiciously hampered or halted. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the court had the following to say;

“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.”

13. On the other hand, where an applicant demonstrates that they have complied with the procedures for instituting an appeal from a subordinate court or tribunal, and further 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 with chances of success; show that if the injunction is not granted, they stand to suffer irreparable injury and the balance of convenience should tilt in favour of the applicant. (See *Giella v Cassman Brown* [1973] EA 358)
14. In the instant matter, the applicant stated that he was born on the suit property in 1980 and has lived on part thereof since then to date. He also stated that if eviction proceeds, his wife and children will have nowhere to stay. On the other hand, the respondent insisted that the applicant does not live on the suit property but lives on parcel No. 1025 which he inherited from his late father Stephen Moina Mpaka and that he has never exclusively used the suit property.
15. In the lower court, it appears that the applicant herein only filed defence with no counterclaim, which means that he has no claim against the respondent. His appeal faulted the conclusions made by the trial court regarding the rights of the respondent and even if the respondent’s case were to be dismissed, that would not necessarily mean that the appellant is the lawful owner of the suit property, since it is not registered in his name and he had not sued the respondent or made a claim against her.
16. Having considered the Memorandum of Appeal, the appellant’s claim is that the trial court ignored provisions of section 28 (h) and (j) of the *Land Registration Act*. The same provides for overriding interests against a registered title and more specifically rights acquired by virtue of the law regarding limitation of actions, or by prescription and any other rights provided under any written law. By stating that he was born on the suit property in 1980 and has been in occupation since then to date, and relying on section 28 (h) and (j), the applicant, who has declined to name or state the specific rights he acquired by prescription, is in essence stating that he was entitled to the suit property by way of adverse possession. It is trite that claims for land under the doctrine of adverse possession can only be filed before the ELC as provided for in section 37 of the *Limitation of Actions Act* and as pronounced by the Court of Appeal in the case of *Sugawara v Kiritu (Suing in her capacity as the administratrix of the estate of Mutarakwa Kiritu Lepaso alias Mutarakwa Kiroti Lepose and in her own capacity) & 3 Others* (Civil Appeal E141 of 2022) [2024] KECA 1417 (KLR) (11 October 2024) (Judgment) which was delivered on 11th October 2024, way before the trial court delivered its judgment of in May 2025. It is therefore clear that even if such claim had been before the trial court, it would as a matter of course be struck out for want of jurisdiction and if allowed, it would be a nullity for having been granted without jurisdiction. For those reasons, I am not persuaded that the appeal before me raises any triable issues.
17. The argument by the applicant that he shall suffer substantial loss and irreparable injury if orders sought are not granted, was anchored on his allegation that he is in occupation of the suit property. Since that allegation has been vehemently denied by the respondent, it was upon the applicant to prove occupation.
18. Section 109 of the *Evidence Act* places the burden of proof of a fact on the person alleging its existence. In this case, the applicant did not make any attempt to present any evidence demonstrating that he was in occupation of the suit property. No valuer’s report or even at the most basic level, photographic



evidence was availed to show occupation. His allegations regarding occupation therefore, remains unproved. In addition, the applicant stated that he has parcel No. 1025 and that this parcel borders the suit property. That his father's compound was on the two parcels. That being the case, his allegation that his family will suffer if execution proceeds is unjustified. For those reasons, I take the view that the applicant has failed to demonstrate substantial loss or irreparable injury if stay of execution and or temporary injunction are denied.

19. Ultimately, I find and hold that the application dated 1st July 2025 lacks merit and the same is hereby dismissed with costs.
20. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 22ND DAY OF JULY, 2025

A. NYUKURI

JUDGE

In the presence of;

Mr. Nyikuli for the appellants/applicants

Mr. Shiloya for the respondents

Court Assistant: M. Nguyai

