



**Inshwill Builders Engineering Company Limited v Mwihi  
Farmers Company Limited & 8 others (Environment and Land Case  
1373 of 2014) [2025] KEELC 5959 (KLR) (27 August 2025) (Ruling)**

Neutral citation: [2025] KEELC 5959 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE 1373 OF 2014  
CG MBOGO, J  
AUGUST 27, 2025**

**BETWEEN**

**INSHWILL BUILDERS ENGINEERING COMPANY LIMITED ..... PLAINTIFF**

**AND**

**MWIHIKE FARMERS COMPANY LIMITED ..... RESPONDENT**

**AND**

**KIBANYU KIMANI ..... 1<sup>ST</sup> DEFENDANT**  
**GITHAIGA MWIHIKE ..... 2<sup>ND</sup> DEFENDANT**  
**GEOFFREY WACHIRA KIGO ..... 3<sup>RD</sup> DEFENDANT**  
**MUGAMBI MWAI ..... 4<sup>TH</sup> DEFENDANT**  
**KIIRU MUGAMBI WAMWAI ..... 5<sup>TH</sup> DEFENDANT**  
**MWAURA WANGAI ..... 6<sup>TH</sup> DEFENDANT**  
**NJOGU NJOROGE ..... 7<sup>TH</sup> DEFENDANT**  
**KIMSON HOLDING COMPANY LIMITED ..... 8<sup>TH</sup> DEFENDANT**

**RULING**

1. Before this court for determination is the notice of motion dated 19<sup>th</sup> September, 2024 filed by the plaintiff/applicant and it is expressed to be brought under Order 22 Rule 22, Order 42 Rules 6 and 7, Section 79G of the *Civil Procedure Act*, Order 51 Rules 1,3,4 & 13 of the Civil Procedure Rules and Sections 3 and 3A of the *Civil Procedure Act* seeking the following orders:-

1. Spent.



2. Spent.
  3. That pending the hearing and determination of an intended appeal against the judgment and decree issued by this honourable court on 30<sup>th</sup> August, 2024 this honourable court be pleased to grant an order of stay of execution of the said judgment.
  4. That the costs of this application be provided for.
2. The application is premised on the grounds on its face. The application is further supported by the affidavit of Patrick Newton Gikura Muraya, the director of the plaintiff/applicant sworn on even date. The plaintiff/applicant deposed that the effect of the judgment delivered on 30<sup>th</sup> August, 2024 by Justice Wabwoto is to lose a portion of its land measuring 0.8 acres, and that being dissatisfied with the same, it has preferred an appeal to the Court of Appeal. The plaintiff/applicant further deposed that a notice of appeal was filed on time, and that the intended appeal is arguable and raises pertinent points of law.
  3. That unless stay is granted, the 1<sup>st</sup> to 8<sup>th</sup> defendants/respondents will proceed to execute judgment, and the appeal will be rendered nugatory. Further, that the instant application has been filed without delay and that it is in the interest of justice that the application should be allowed.
  4. The application was further supported by the affidavit of Joseph Kimani Mbugua the director of the 10<sup>th</sup> defendant/respondent which was sworn on 20<sup>th</sup> November, 2024. The 10<sup>th</sup> defendant/respondent deposed that the application is warranted to preserve the subject matter of the suit pending the hearing and determination of the appeal. Further, that stay would ensure that the appeal is not rendered nugatory and a mere academic exercise.
  5. The application was opposed vide the replying affidavit of the 2<sup>nd</sup> defendant/respondent sworn on 4<sup>th</sup> November, 2024. The 2<sup>nd</sup> defendant/respondent deposed to the issues that were raised in the hearing of the main suit on acquisition and ownership of the suit property. He deposed that the plaintiff/applicant has never occupied the 1.8 acres of land, and that there is no prejudice if the orders are not granted. He deposed that the suit property is fully developed by the 1<sup>st</sup> defendant/respondent and its members who will be prejudiced if the orders sought are granted.
  6. The application was further opposed vide the replying affidavit of Kinyanjui Theuri, the learned counsel on record for the 9<sup>th</sup> defendant/respondent which was sworn on 29<sup>th</sup> October, 2024. The learned counsel deposed that the application is irregular for want of jurisdiction, and this court became functus officio and cannot grant stay for a matter pending before the court of appeal. Further, he deposed that the application has not addressed the issue of security which is a pre-condition for issuance of stay orders.
  7. The plaintiff/applicant filed a supplementary affidavit in response to the reply by the 2<sup>nd</sup> defendant/respondent sworn on 10<sup>th</sup> August, 2025. The plaintiff/applicant reiterated the issues of occupation, use and development of the 1.8 acres comprising the suit property. He maintained that the defendants/respondents will not suffer any prejudice if the orders are granted as they will continue occupying the one acre of land.
  8. The application was canvassed by way of written submissions. The 5<sup>th</sup> and 6<sup>th</sup> defendants/respondents filed their written submissions dated 11<sup>th</sup> August 2025, where they raised two issues for determination as follows: -
    - a. Whether the court can issue stay of execution orders against declaratory and injunctive orders.



- b. Whether the principles of stay of execution of judgment have been met.
9. On the first issue, the 5<sup>th</sup> and 6<sup>th</sup> defendants/respondents submitted that the orders issued by the court are declaratory and injunctive in nature, and that there is nothing that will change on the ground. Reliance was placed in the cases of Johana Nyokwonyo Buti v Walter Rasugu Omariba & 2 Others [2011] eKLR, and Katiba Institute v President of the Republic of Kenya & 2 Others; Judicial Service Commission & 3 others (Interested Parties) [2020] eKLR. They further submitted that the court did not issue any positive order requiring the 1<sup>st</sup> to 8<sup>th</sup> defendants/respondents to take any action against the plaintiff/applicant which would warrant a stay. Rather, the court acknowledged their occupation of the portion of the suit property.
10. On the second issue, and while relying on the cases of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, and Machira t/a Machira & Co. Advocates v East African Standard [2002] eKLR, the 5<sup>th</sup> and 6<sup>th</sup> defendants/respondents submitted that the plaintiff/applicant has not proved loss to the requisite standard, and based on the site visit report, he stands to suffer no loss as it is not in occupation of the 1.8 acre portion of the suit property. They further submitted that the plaintiff/applicant has not made any offer for security in their application as required under Order 42 Rule 6 (2)(b) of the Civil Procedure Rules.
11. The plaintiff/applicant did not file its written submissions. Be that as it may, I have considered the application, the replies thereof and the written submissions filed by the 5<sup>th</sup> and 6<sup>th</sup> defendants/respondents. The issue for determination is whether the plaintiff/applicant has met the threshold for grant of the orders of stay of execution pending appeal.
12. This court delivered judgment on 30<sup>th</sup> August, 2024 and directed cancellation of 1.8 acres out of LR. No. 6845/106 registered in the name of the plaintiff/applicant and in place the registration of the 1<sup>st</sup> to 8<sup>th</sup> defendants/respondents. The court also issued a permanent injunction restraining the plaintiff/applicant and the 10<sup>th</sup> defendant from interfering with the occupation of the 1<sup>st</sup> to 8<sup>th</sup> defendants/respondents on the suit property. Being dissatisfied with the said judgment, the plaintiff/applicant intends to appeal against the said judgment.
13. In doing so, the plaintiff/applicant has filed a notice of appeal, and while at it, filed the instant application seeking orders of stay of execution pending appeal.
14. Order 42 Rule (6) of the Civil Procedure Rules provides as follows:-

“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 orders set aside.

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 1<sup>st</sup> 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. In the case of Masisi Mwita versus Damaris Wanjiku Njeri [2016] eKLR, the Court of Appeal held that: -

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of “Halal & Another v Thornton & Turpin Ltd. where the Court of Appeal Gicheru J.A., Chesoni & Coker AG JA) held that: “The High Court’s discretion to order stay of execution of its order or decree is fettered by three (3) conditions namely:- sufficient cause, substantial loss would ensue from a refusal to grant stay the applicant must furnish security, the application may be made without unreasonable delay. In addition the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakolo v Straman E.A. Ltd.[2013] as follows:-

“In addition the appellant must prove that if the orders sought are not granted and his appeal eventually succeeded them the same shall have been rendered nugatory”. These twin principles go hand in hand and failure to prove one dislodges the other. The court notes with great humility the plaintiff/applicant agrees with it by citing the case of Vishram Rouji Halal v Thrornton & Turpour Civil Appeal No. 15 of [1990] KLR 365,”

16. For the court to order a stay of execution there must be sufficient cause, substantial loss, no unreasonable delay and security for costs. It is not in doubt that the instant application has been made without delay. On whether there is sufficient reason and substantial loss, the plaintiff/applicant argued that the effect of the judgment of the court was that it would lose 1.8 acres of the suit property. Further, that the appeal raises pertinent issues of law and if the orders are not granted, the appeal will be rendered nugatory. From the averments of the plaintiff/applicant, there is no substantial loss that has been proven, as it is not in occupation of the suit property with the risk of eviction. What the plaintiff/applicant is afraid of is the due process of the law taking place in terms of registration of the portion of the suit property in the names of the 1<sup>st</sup> to 8<sup>th</sup> defendants/respondent pursuant to the judgment of the court. I do also note that it was contended that the appeal is arguable and raises pertinent issues of law. On this issue, this court cannot comment for the reason that it was not afforded a draft memorandum of appeal to ascertain this position.
17. In my view, the plaintiff/applicant has not established substantial loss to enable this court to find in its favour. Even more so, there has been no mention of security for costs, which leaves doubt whether the application has been made with genuine intentions.
18. From the above, this court finds no merit in the notice of motion dated 19<sup>th</sup> September, 2024. The same is hereby dismissed. Each party to bear their own costs.

Orders accordingly.

**DATED, SIGNED & DELIVERED VIRTUALLY**

**THIS 27<sup>TH</sup> DAY OF AUGUST, 2025.**

**HON. MBOGO C.G.**

**JUDGE**

**27/08/2025.**

In the presence of:



Mr. Benson Agunga - Court assistant

Mr. Ndurumo for the Plaintiff/Applicant

Mr. Kingara for the 1<sup>st</sup> to 8<sup>th</sup> Defendants/Respondents

Mr. Kinyanjui for the 10<sup>th</sup> Defendant/Respondent

