



**Bunusei & 2 others v Tomas (Environment & Land Case
E023 of 2023) [2025] KEELC 991 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 991 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E023 OF 2023
EC CHERONO, J
FEBRUARY 27, 2025**

BETWEEN

MEKII HENRRY BUNUSEI 1ST APPELLANT

MEKII SAMUEL JUMA 2ND APPELLANT

ANDREW KIPROTICH 3RD APPELLANT

AND

JAMES KISHANHGAN TOMAS RESPONDENT

RULING

1. By a Notice of Motion dated 05/04/2024, the Appellant/Applicant citing the provisions of Sections 1, 1B, 3 and 3A of the [Civil Procedure Act](#) Order 42 Rule 7 and Order 1 & 15 of the [Civil Procedure Rules](#) seeks the following orders:
 - a. Spent.
 - b. Spent
 - c. That there be temporary stay of proceedings and the execution of an order and ruling in Kimilili SPM ELC No. E006 of 2024 made on 22/11/2023 pending the hearing and determination of the appeal.
 - d. Costs of the application be provided for.
2. The application is based on the grounds on the face of the said application supported by the affidavit sworn on 03/04/2024. It is deposed that they are dissatisfied with the judgment delivered on 22/11/2023 in favour of the Respondent in Kimilili SPM ELC No. E006/2024 and have preferred this appeal which they argue is meritorious. They urged the court to stay execution of the same to avoid rendering the appeal nugatory. They further filed a supplementary affidavit sworn on 25/01/2025



where he stated that since he was born, he has been living on the suit land until the year 2023 and 2024 when the Respondent demolished their houses. That there is still a house, trees, coffee stems and banana trees on the suit land that belong to them. They argued that the Respondent was hellbent on disinheriting them despite having his own land.

3. The Respondent filed a replying affidavit sworn on 11/11/2024 where he deposed that there is no pending suit between the parties herein that can be stayed and neither is there a pending ruling for execution that can be stayed since a judgment was delivered on 22/11/2023 which dismissed the suit with costs. He further stated that this application has been filed too late in the day. That the Applicants are not in occupation of the suit land and have never been in occupation and that he is the one utilizing the entire land.
4. When this matter came for directions, the parties agreed to have the application canvassed by written submissions. By the time the court withdrew to write this ruling, neither of the parties had filed submissions.

Legal Analysis and Decision

5. I have considered the application, the supporting affidavit, the Replying affidavit as well as the annexures thereto. Before, I delve into the merits or otherwise of the application, there are a few issues that I need to put into context. The appellant/applicant seems to be referring to a ruling and order but having perused the court record, I believe he meant to refer to the judgment of the trial court delivered on 22/1/2023 since his appeal is pegged on the same. I will therefore proceed on this basis for the above reasons. This therefore means that there are no proceedings to stay. I shall therefore proceed to discuss the single issue of this application which is whether the Appellants/Applicants have made a case to warrant stay of execution pending the intended appeal.
6. The relevant law governing orders for stay of execution pending appeal is Order 42 Rule 6 1(2) of the Civil Procedure Rules which provides as follows:-
 - “(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.”
7. Thus, under Order 42 Rule 6(2) of the [Civil Procedure Rules](#), an applicant should satisfy the court that:
 - a. Substantial loss may result to him unless the order is made;
 - b. That the application has been made without unreasonable delay; and
 - c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him. See *Butt vs Rent Restriction Tribunal* [1979]



8. Further to the above, stay may be granted for sufficient cause and the Courts are also enjoined to give effect to the overriding objective in the exercise of their powers under the Civil Procedure Act or the interpretation of any of its provisions. Section 1A(2) of the Civil Procedure Act provides that:

“the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective”

while under section 1B some of the aims of the said objectives are to facilitate;

“the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”

9. The Court, in RWW v EKW [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter 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 this 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 costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

10. Before I can proceed to discuss the three elements as described above, it is noted that the impugned judgment in Kimilili SPM ELC No. E006 of 2024 was delivered on 23/11/2023 in the following terms;

I therefore find that the plaintiffs have failed to prove their case against the defendant on a balance of probabilities and dismiss the plaintiffs’ case with costs to the defendant.

As such, the orders in the impugned judgement are negative and not capable of being stayed. The court did not order the parties to do anything or refrain from doing anything that the Appellants/Applicants are now seeking to be stayed.

11. I have considered the averments by the Appellants/Applicants that their houses were demolished in 2023 and 2024. The Appellants/Applicants in their supplementary affidavit contradicted themselves and stated that their houses are still standing and that there are coffee stems, bananas and indigenous trees still on the land. He also attaches photographs which are ambiguous as they seem to show a general view of an area which cannot be ascertained by this court.
12. Nevertheless, since the case has been lost and the orders issued are negative, I find that there is no decree capable of being executed in this matter, except for the order regarding payment of costs, which from the memorandum of appeal is clear the issue of costs is not what has been challenged. In my considered opinion, the Appellants/Applicants have failed to demonstrate that they will suffer any substantial loss if the orders sought are not granted.
13. Consequently, I find no merit in the application dated 4th April, 2024 and the same is hereby dismissed with costs to the Respondent.



14. It is hereby so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF FEBRUARY, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of:

1. Juma Waswa for the Appellants/Applicants.
2. M/S Kibonei for the Respondent.
3. Bett C/A.

