



**Oduor & another v Ofula & another (Environment & Land Petition
E001 of 2022) [2024] KEELC 701 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 701 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND PETITION E001 OF 2022
DO OHUNGO, J
FEBRUARY 15, 2024**

BETWEEN

RAEL OTIENO ODUOR 1ST PETITIONER

ROSEMARY NALIKA 2ND PETITIONER

AND

STANLEY KEFA OFULA 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. I delivered judgment in this matter on 3rd May 2023. I held that the matter was wrongly filed as a constitutional petition and that consequently, this court, while exercising the constitutional jurisdiction, did not have jurisdiction to determine it. I proceeded to strike out the petition with costs to the first respondent.
2. Subsequently, the petitioners filed Notice of Motion dated 22nd May 2023, which is the subject of this ruling. The following orders are sought in the application:
 1. [Spent]
 2. [Spent]
 3. That the status quo obtaining at the time of filing the intended appeal be maintained pending hearing and determination of the intended appeal for avoidance of doubt; the 2nd Applicant continues to reside and utilize Land Parcel South/Wanga/Bungasi/418 pending hearing and determination of the intended appeal.
 4. [Spent]



5. That there be stay of execution of the decree in Mumias Miscellaneous Land application no. 48 of 2010 pending the hearing and determination of the intended appeal.
6. The costs of application be provided for.
3. The application is based on the grounds listed on its face and is supported by an affidavit sworn by the first petitioner. She deposed that the petitioners had filed Notice of Appeal against the judgment and that they stand to suffer irreparable loss if the orders sought are not granted since they would be evicted from their home.
4. The first respondent opposed the application through grounds of opposition in which he contended that having held that it did not have jurisdiction, the court cannot hear the application. That granting the orders would aid the petitioners who continue breaching orders issued in Mumias Miscellaneous Land Application No. 48 of 2010 and that stay of execution cannot issue against a negative order.
5. The second respondent did not respond to the application.
6. The application was canvassed through written submissions which the petitioners and the first respondent duly filed. I have carefully considered the application, the supporting affidavit, grounds of opposition and the submissions. The issue that arises for determination is whether the orders sought should issue.
7. The principles that guide this court's exercise of jurisdiction to grant stay of execution pending hearing and determination of an appeal are outlined at order 42 rule 6 (1) and (2) of the [Civil Procedure Rules, 2010](#) which provide as follows:
 - 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 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.
8. The import of the forgoing provisions is that an applicant seeking stay pending appeal must demonstrate that substantial loss will result to her if stay is not granted, and that the application has been made without unreasonable delay. Such an applicant is further required to give such security as the court may order for the due performance of the decree. See [Kenya Power & Lighting Co. Ltd v Kigaita Ngare Unduthu & 36 others](#) [2020] eKLR and [Kenya Shell Limited v Benjamin Karuga Kibiru & another](#) [1986] eKLR. As Platt Ag JA (as he then was) stated in [Kenya Shell Limited v Benjamin Karuga Kibiru & another](#) (supra), substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. It is virtually impossible for such an application to succeed if an applicant fails to demonstrate that she will suffer substantial loss if stay is not granted.



DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 15TH DAY OF FEBRUARY 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Anono for the petitioners

Ms Obware for the first respondent

No appearance for the second respondent

Court Assistant: E. Juma

