



**Mwasunguia & another v Kimbio (Civil Appeal (Application)
E223 of 2024) [2025] KECA 934 (KLR) (23 May 2025) (Ruling)**

Neutral citation: [2025] KECA 934 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E223 OF 2024
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
MAY 23, 2025**

BETWEEN

CALVIN MWAKABA MWASUNGUIA 1ST APPLICANT

BETHUEL NGUTA 2ND APPLICANT

AND

THOMSA WANDETO KIMBIO RESPONDENT

(Being an application for stay of execution pending appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Voi (E. K. Wabwoto, J.) delivered on 19th September 2024 in E.L.C.A No. E005 of 2023)

RULING

1. The respondent, Thomas Wandeto Kimbio, filed suit against the applicants, Calvin Mwakaba Mwasungia and Bethwel Nguta, in the Chief Magistrate’s Court at Voi in MCELC Case No. E040 of 2021 seeking orders of eviction and an injunction to restrain them from trespassing, selling, leasing or interfering with the suit property located at Junction Area along the Mombasa-Nairobi Highway within Kishamba B Group Ranch. The applicants’ defence was unsuccessful.
2. By a judgment dated 30th October 2023, the trial Court (C. Kithinji, PM.): granted the orders of injunction as sought in the respondent’s suit; directed the applicants to vacate and hand over the suit property to the respondent by close of business on 30th December 2023 and, in default, the respondent be at liberty to evict them; and awarded the respondent costs of the suit.



3. Dissatisfied by the decision of the learned Magistrate, the applicants moved to the Environment and Land Court at Voi in ELC Appeal No. E005 of 2023, which was dismissed with costs to the respondent vide the judgment of E. K. Wabwoto, J. dated 19th September 2024. In the words of the learned Judge:

“ 30. ... it is the finding of this court that the respondent has satisfactorily established his root of the ownership of the suit property.”

4. Aggrieved by the learned Judge’s decision, the applicants moved to this Court on appeal on 8 grounds set out in their memorandum of appeal dated 18th November 2024 faulting the learned Judge for, inter alia: failing to analyse and evaluate the evidence on record; failing to dismiss or disallow inadmissible or improperly produced documents; upholding hearsay evidence; relying on the purported site visit report; finding that there was credible and uncontroverted evidence in favour of the respondent; and for failing to find fault in the decision of the lower court in the face of glaring inconsistencies in evidence and irregularities on record.

5. By a Notice of Motion dated 28th November 2024, the applicants prayed:

“ 1. Spent

2. That the court be pleased to order and direct that execution of the judgment and decree in Voi Chief Magistrates Court Environment and Land Case NO E040 OF 2021 which are the subject of these appellate proceedings, be stayed pending the hearing and final determination of this application inter parties and or until such other or further time as the court may deem fit and just to order and or direct.

3. That the court be pleased to order and direct that execution of the judgment and decree in Voi Chief Magistrates Court Environment and Land Case NO E040 OF 2021 which are the subject of these appellate proceedings be stayed pending the hearing and final determination of the appeal from the judgment of this court to the Court of Appeal of Kenya, and /or until such further or other time as the court may deem fit and just to order and or direct.

4. That such further and other orders and or directions be made and or granted as this court deems fit and expedient in the circumstance.

5. That the cost hereof be provided for.”

6. The applicants’ Motion is supported by the annexed affidavit of Calvin Mwakaba Mwasungia (the 1st applicant) sworn on 28th November 2024 essentially deposing to the 9 grounds on which their Motion was made, but which we need not replicate here. Suffice it to observe that counsel for the applicants filed written submissions dated 15th January 2025 citing 4 judicial authorities on, inter alia, the Court’s jurisdiction under rule 5(2) (b); and on the twin principles for grant of the stay orders sought. However, the respondent did not file any affidavit or written submissions in response.

7. This Court’s discretionary power to stay execution of an impugned decision of a superior court, or to grant injunctive relief to preserve the substratum of the appeal, pending determination thereof, is anchored on rule 5(2) (b) of the Court of Appeal Rules, 2022, which reads:

5.

(1)



(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—

a.

b. in any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.

8. Rule 5(2) (b) empowers the Court to stay execution of the decision challenged on appeal, and not that of a subordinate court already dealt with in the impugned judgment. What is on appeal to this Court is the judgment and decree of the ELC at Voi (E. K. Wabwoto, J.). For all intents and purposes of the Rules of this Court, that is the decision which may be considered for stay orders pending appeal if sought. Prayer 3 in the applicants’ Motion seeks stay of the judgment and decree of the Chief Magistrate’s Court at Voi. Needless to say, that prayer is beyond this Court’s remit to grant. In any event, stay of the Magistrate’s court’s judgment and decree would be tantamount to reversing the decision of the ELC at an interlocutory stage, which decision dismissed the applicants’ appeal to the ELC, and which constitutes negative orders incapable of being stayed (see *Western College of Arts and Applied Sciences v E. P. Oranga & 3 others* [1976] eKLR; and *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR).

2. Having considered the applicants’ Motion, the affidavit in support, their submissions and the law, we reach the inescapable conclusion that the instant Application has no merit and is hereby dismissed. The respondent having failed to file any reply to the Motion or to file written submissions, and having further failed to appear in court at the hearing of the Motion, we make no order as to costs.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF MAY 2025.

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CARB, FCIARB.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

