



**Namwoso v Waswa (Environment and Land Appeal E018 of 2024)  
[2024] KEELC 4976 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4976 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL E018 OF 2024**

**EC CHERONO, J**

**MAY 30, 2024**

**BETWEEN**

**LINUS WEKESA NAMWOSO ..... APPELLANT**

**AND**

**VALERIA NAKUMINCHA WASWA ..... RESPONDENT**

**RULING**

1. This ruling determines the applicants Notice of Motion dated 24<sup>th</sup> April 2024 brought under the provisions of Section 1A, 1B, 3 & 3A of the *[civil procedure act](#)* and order 40, rule 1, order 42 rule 6 and order 51, rule 1 of the *[Civil Procedure Rules](#)* seeking the following orders;
  - a. Spent
  - b. Spent
  - c. That pending the hearing and determination of this Appeal, there be stay of execution of the Judgment and the decree in BGM MC ELC NO. E036 OF 2021 delivered and issued on 17<sup>th</sup> April 2024 and all other consequential orders.
  - d. Spent
  - e. That the Honourable court be pleased to issue a temporal Injunction restraining the respondent herein either personally or through her agents, servants and or employees or any other person acting under her direction from leasing, subdividing planting, ploughing, erecting, fencing, cutting down trees and/ or use of the portion of land comprised in land title No. EAST Bukusu/north Kanduyi/255 pending hearing and determination of this appeal.
  - f. The costs of this application be provided for.



2. The application is premised on the grounds apparent on the face and supported by the supporting affidavit sworn on 4<sup>th</sup> April, 2024 by Linus Wekesa Namwoso-the applicant herein.
3. The applicant deposed that the respondent sued him in BGM CMC ELC E036 OF 2021 seeking to be declared the owner and that I am holding in trust land parcel No. EAST Bukusu/north KanduyI/255 on her behalf and in trust of her family. The trial court in its judgment delivered on 17<sup>th</sup> April, 2024 entered judgment in favour of the respondent and ordered for the suit land to be shared equally between the applicant and the respondent. It is the applicant's case that he is dissatisfied with the courts judgment and has preferred this current appeal. He further deposed that the respondent has since entered the land and forcefully leased and started sub-dividing, fencing, planting, ploughing and cutting down trees and is on the verge of sub-dividing the suit land in execution of the judgment. The applicant states that he has an arguable appeal with chances of success and if stay is not granted as sought then he shall suffer irreparable damages and the appeal shall be rendered nugatory.
4. The application is not opposed since at the time of preparing this ruling no response had been filed by the respondents. There are no submissions on record from either party as well.
5. I have considered the application and annexures. I have also considered the relevant legal framework and jurisprudence on the key issues in this application. The applicant seeks two substantive remedies being for stay of execution and injunction pending appeal.
6. The granting of an order for stay of execution pending appeal by the High Court is governed by Order 42 Rule 6 of the *Civil Procedure Rules* and it is granted by the Court as a discretionary remedy on sufficient cause being established by the applicant. The applicant must satisfy the Court on the following requirements:-
  - a. Substantial loss may result unless the order is granted.
  - b. The application has been made without un-reasonable delay, and
  - c. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given.
7. Further to the above, stay can only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay ought to be guided by the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*. The purpose of stay of execution is to preserve the substratum of the appeal. In the case of *Consolidated Marine. vs. Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi), the Court held:-

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
8. What is the status quo on the suit land? The Applicant contends that they would suffer substantial loss if stay is not granted, because the respondent has begun to lease and is sub-dividing, fencing, planting, ploughing and cutting down trees and is on the verge of sub-dividing the suit land in execution of the judgment. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma vs Abuoga* (1988) KLR 645 where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”



9. It was held by the trial court in the impugned judgment that the suit land should be shared in the ration of 50:50 between the applicant and the respondent and the respondent was aggrieved by the trial court's decision and preferred the current appeal. The appellant/applicant further contends that the respondent has entered into the suit land and has taken steps in executing the judgment and decree of the trial court. He also states that the respondent is leasing out the land to third parties, putting up a fence and cutting down the applicants' trees.
10. In deciding whether substantial loss has been established, this court has to balance the interest of the Applicant who is exercising his undoubted right of appeal to preserve the status quo so that his Appeal is not rendered nugatory. The applicant has attached a bundle of photographs showing the actions of the respondent complained of and which he (the applicant) claims will cause animosity and breach of peace.
11. On the second issue, it is noted that judgment was entered on 17<sup>th</sup> April, 2021 while the current application was filed on 24<sup>th</sup> April, 2024 which is 7 days after the date of the impugned judgment. Therefore, I find that this application was filed in a timely fashion.
12. With regard to the issue of security, it is imperative for the applicant as a matter of good practice to give an undertaking to abide by such order as the Court may require or better still offer or propose such security as may be reasonable. The applicant in this case has not given any security or made any offer or undertaking for the due performance of the decree as may be binding on him. This however is not detrimental since the same can be imposed by the court at its own discretion as a condition.
13. The applicant has also sought for a temporary injunctive orders against the respondent herein either personally or through her agents, servants an or employees or any other person acting under her direction from leasing, subdividing planting, ploughing, erecting, fencing, cutting down trees and/ or use of the portion of land comprised in land title No. East Bukusu/north Kanduyi/255 pending hearing and determination of this appeal. As earlier mentioned, the purpose of granting stay orders is to preserve the substratum of the dispute pending hearing and determination of the intended appeal. In my considered view, the prayers for stay and a temporary injunction as in this case are overlapping as either will serve the purpose of preserving the status quo.
14. In view of the matters aforesaid, I find the Notice of Motion application dated 24/04/2024 merited and the same allowed on the following terms;
  - a. Stay of the execution of the judgment/decree herein is granted pending hearing and determination of the Applicants' intended Appeal.
  - b. The appellant shall deposit the original title deed of the suit land with the court within 30 days of this judgment or in the alternative deposit Kshs. 100,000/= with the court within 30 days and in default the stay orders shall automatically lapse.
  - c. The applicant shall compile, file and serve the Respondent the record of appeal within 45 days of this ruling.
  - d. Costs shall be in the cause.
15. It is so ordered

**DATED SIGNED AND DELIVERED AT BUNGOMA THIS 30<sup>TH</sup> DAY OF MAY, 2024.**

.....

**HON.E.C CHERONO**



## **ELC JUDGE**

In the presence of;

1. Mr. Wafula H/B for Juma Waswa for applicant/appellant
2. Respondent/Advocate-absent
3. Bett C/A

