



**Songol & another v Kipkebut (Environment and Land Appeal  
E012 of 2024) [2025] KEELC 916 (KLR) (24 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 916 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KABARNET  
ENVIRONMENT AND LAND APPEAL E012 OF 2024**

**L WAITHAKA, J  
FEBRUARY 24, 2025**

**BETWEEN**

**JULIUS SONGOL ..... 1<sup>ST</sup> APPELLANT**

**KIPRUTO SONGOL ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ZAKARIA YATOR KIPKEBUT ..... RESPONDENT**

**RULING**

**Introduction**

1. This ruling is in respect of the notice of motion application dated 23<sup>rd</sup> October, 2024. Through the application, the applicants seeks an order of stay of execution of decree arising from the judgment Hon. Purity Kosgei delivered on 5<sup>th</sup> September 2022 in Kabarnet MCELC Case No.26 of 2018 and all consequential orders or proceedings pending the hearing and determination of: -
  - i. The application (spent);
  - ii. The appeal.
2. As can be discerned from the grounds on the face of the application and the affidavit sworn in support, the application is premised on the grounds that the applicants were dissatisfied with the decision of the lower court and filed an appeal against the decision; that this being a land matter, unless the orders sought are granted in his favour, the respondent may proceed and assess his bill of costs, assume possession and evict them from the suit property in execution of the decree thereby occasioning them great prejudice and rendering their appeal nugatory.
3. In reply and opposition to the application, the respondent filed the affidavit (replying) he swore on 18<sup>th</sup> November 2024, in which he has inter alia deposed that the decree issued in his favour has since been executed rendering the application overtaken by events; that the applicants do not deserve the orders



sought because the application has been brought in bad faith and that the applicants have not satisfied the conditions for being granted an order of stay.

4. In a rejoinder, the applicants filed a further affidavit on 2nd December 2024 (the affidavit is not commissioned hence it is found to be fatally defective).
5. Pursuant to directions given on 3<sup>rd</sup> December 2024, the application was disposed off by way of written submission.

### **Applicants' submissions**

6. In their submissions filed on 13<sup>th</sup> December 2024, the applicants have given a detailed background of the circumstances leading to the instant application and framed two issues for the court's determination. These are: -
  - i. Whether the application for stay of execution is merited; and
  - ii. Whether there are weighty issues of fact and law in the application to justify grant of the orders sought;
7. On whether the application is merited, the applicants have made reference to Order 42 Rule 6 of the *Civil Procedure Rules* and several decided cases (*Macharia T/A Machira & Co. Advocates v East Africa Standard (No.2)*(2002) KLR 63; *Samvir Trustee Limited v. Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997; *Amarnath (Suing on behalf of the Estate of the late Amarnath Gupta) v. Kazungu & 2 others* (Civil Appeal E033 of 2021) and *Luxus Woods (K) Limited v. Patrick Amug Re Kamadi* (2016)e KLR and submitted that in the circumstances of this case, the applicants have demonstrated that unless an order of stay is granted, the respondent may execute the decree issued in his favour thereby occasioning the applicant great loss and prejudice (the applicants may be forcibly evicted from the suit property).
8. On whether there are weighty issues of fact and law in the application to justify grant of the orders sought, the applicants reiterate their apprehension that unless the orders sought are granted, the respondent may execute the orders issued in his favour thereby compromising their right of appeal (rendering the appeal nugatory).

### **Respondent's submissions**

9. In his submissions filed on 19th December 2024, the respondent has made reference to Order 42 Rule 6(2) of the *Civil Procedure Rules* which gives conditions to be fulfilled by an applicant before he can be granted an order for stay of execution pending appeal and submitted that the applicants have not satisfied the conditions. For instance, as to whether the applicants' have demonstrated that unless stay is granted they may suffer substantial loss; the respondent submits that the applicants have not demonstrated the substantial loss they will suffer and/or how they would suffer substantial loss if stay is not granted. He relied on the following cases, *Multichoice Kenya Limited vs. Francis Omondi* (2018)e KLR- Cases referenced in the case *James Wangalwa & another vs. Agnes Naliaka Cheseto; Equity Bank Limited v. Taiga Adams Company Ltd.* Also referenced as quoted in *Multichoice Kenya Limited* is the case of *Machira T/A Machira & Co. Advocates*
10. The respondent further submits that the applicants have not demonstrated how failure to grant the orders sought would render their appeal nugatory in the event the appeal is successful.



11. On whether the application was made without unreasonable delay, the respondent submits that it was not, as it was filed at the last minute in what he describes as bad faith to deprive him of the fruits of his judgment.
12. Regarding security for performance of such obligations as may ultimately be binding on the applicants, the respondent submits that the applicants have not demonstrated capacity and willingness to offer security for compliance of such obligations as may ultimately be binding on them.
13. Explaining that he stands to suffer more harm than the applicants if stay of execution is granted, he submits that he will be unable to access the suit property yet he is the registered proprietor. The applicant urges the court to refuse to accede to the applicants' prayers.

### **Analysis and determination**

14. I have read and considered the application, the affidavits in support and opposition and the rival submissions. I find the sole issue for the court's determination to be whether the applicants have made up a case for being granted an order of stay pending the hearing and determination of the appeal.
15. Vide the judgment appealed from, the respondent was adjudged the bona fide owner of the parcel of land formerly known as Baringo/ Kapchomuso "A"/147 (suit property). As can be discerned from the judgment appealed from and the affidavit sworn in support of the application for stay, at the time of delivery of the judgment in favour of the respondent, it was the applicants who were in use and occupation of the suit property. The trial court declared the respondent the rightful owner of the suit property and the defendants' trespassers /encroachers on the suit property. Consequently, the trial court issued an order of eviction of the applicants from the suit property. The trial court also issued a permanent injunction restraining the defendants from encroaching into the suit property.
16. In the circumstances, this court is called upon to balance the competing interests of the respondent as the successful litigant and the appellants who are exercising their right of appeal.
17. The subject matter of the appeal being land that has been declared to belong to the respondent but is occupied by the applicants, I am convinced that if an order of stay of execution is denied and the respondent takes over the suit property, he may deal with it in a manner prejudicial to the outcome of the appeal should the appellants succeed in their appeal.
18. Whereas grant of an order for stay pending appeal will compromise the respondent's right to access the fruits of his judgment, it is the considered view of this court that the prejudice to be suffered by the respondent can be address or lessened by fast tracking the hearing and determination of the appeal.
19. Consequently, in balancing the rights of the applicants and those of the respondent as the successful litigant, I allow the applicants' prayer for stay pending hearing and determination of the appeal on condition that the applicants shall, within 21 days from the date of delivery of this ruling deposit with the court Kshs.200,000/= being security for performance of such decree or order as may ultimately be binding on them, failing which the application shall automatically stand dismissed with costs to the respondent.
20. To fasttrack the hearing and determination of the appeal, the appellant is directed to, with the help of the Deputy Registrar of this court, ensure that the appeal is processed for hearing and heard within 120 days from the date of delivery of this ruling, failing which it shall stand automatically dismissed with costs to the respondent upon lapse of the time herein given.
21. Orders accordingly.



**DATED, SIGNED AND DELIVERED AT KABARNET THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**L. N. WAITHAKA**

**JUDGE**

Ruling delivered virtually in the presence of;-

Mr. Lelei holding brief for Mr. Kibet for the appellants

Mr. Zakaria Yator for the respondent

Court Asst.: Ian

