



REPUBLIC OF KENYA



KENYA LAW
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**Kuya & another v Kutondo & another (Environmental and Land Originating
Summons E004 of 2020) [2025] KEELC 307 (KLR) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 307 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2020**

EC CHERONO, J

JANUARY 30, 2025

IN THE MATTER OF LAND PARCELS NO. NDIVISI/MIHUU/89

AND

**IN THE MATTER OF SECTIONS 17, 18, 37 NAD
38 OF THE LIMITATION OF ACTIONS ACT**

AND

IN THE MATTER OF ADVERSE POSSESSIO

BETWEEN

RICHARD MALABA KUYA 1ST RESPONDENT

PATRICK WANJALA MALABA 2ND RESPONDENT

AND

SERAPHINE KUTONDO APPLICANT

AND

CHRISTOPHER WESONGA WANJALA RESPONDENT

RULING

1. This ruling is in respect of the notice of motion brought under Section 1A, 1B, 3 and 3A [CPA](#), Order 46 Rule 6 (1) and (2) [CPR](#) dated 23/08/2023 in the Applicant is seeking the following orders;
 - a. Spent.
 - b. Spent.
 - c. Spent.



- d. That pending the hearing of the intended appeal, this honourable court be pleased to stay execution of the judgment and or order of this court delivered on 25/07/2024.
 - e. That the costs of this application be in the course.
2. The application is based on five (5) grounds shown on the face of the said application supported by the affidavit of Seraphine Kutondo Washiko sworn on 23/04/2024. In the supporting affidavit, the Applicant deposed that judgment was delivered on 25/07/2024 and that she promptly filed a memorandum of appeal at the court of Appeal at Kisumu. She averred that her proposed appeal is arguable and that unless the orders sought are granted, she will suffer irreparable loss and damage.
 3. The 1st Respondent, Richard Malaba Kuya filed a replying affidavit sworn on 11/09/2024 where he deposed that when judgment was delivered on 25/07/2024, the Applicant/Appellant was granted 30 days stay of execution. He stated that despite filing a record of appeal, the Applicant has never filed a record of appeal and that there is ideally no prima facie/arguable appeal. The Respondents argue that the Applicant has not established the grounds for the grant of the orders of stay under Order 42 of the *Civil Procedure Rules*. They argue that they are in the process of executing the decree of this court and that the application is res judicata for seeking similar orders initially sought vide an application dated 11/03/2024 which application was dismissed vide a ruling delivered on 13/6/2024. Further, the Respondents stated that the Applicant had initially logged a notice of appeal dated 7/11/2023 endorsed by the deputy registrar on 10/11/2023 which has never been withdrawn and that the appeal referred to herein is sub judice.
 4. The Applicant filed a supplementary affidavit pursuant to the leave of the court sworn 22/10/2024 and stated that upon delivery of impugned judgment, she filed a notice of appeal dated 26/07/2021 and later a memorandum of appeal dated 12/08/2024 and she further filed her record of dated 06/09/2024 which was within the 30 days period. She stated that the allegations by the Respondent that the appeal is res judicata or sub judice is false.
 5. The Applicant hererein filed submissions dated 25/11/2024 and argued that she has met the threshold for the grant of the orders sought pursuant to Order 42 Rule 6. He relied in the case of *Ena Investment Limited vs. Benard Ochau Mose & 2 Others* (2022) eKLR.
 6. The Respondents also filed submissions dated 02/10/2024 and argued that the Applicant has not met the requirements for the grant of the orders sought. He relied in the cases of *Hellen Cheronon w/o Joel Kimutai Keino vs. John Kipkemoi Mutai & 3 Others* (2018) eKLR, Kwobavs. Musudi (Environment and Land Appeal E004 od 2023 KEELC 16822(KLR)). The Respondents also argued that this court is functus offico for having initially granted stay of 30 days and that the Applicant should have moved the Court of Appeal pursuant to Rule 5(2)B of the *Court of Appeal Rules*.

Analysis and Decision

7. I have considered the application and grounds on the face thereof, the supporting affidavit and annexures thereto. I have also considered the Replying affidavit and submissions together with case law relied by both counsel on behalf of their respective clients. In my view, the issues that arise for determination are:
 - i. Whether the applicant herein has satisfied the conditions to warrant grant of an order for stay of execution pending appeal to the Court of Appeal?
 - ii. Who will bear the costs of the application?



8. Under order 46 Rule 6 (1) and (2), an applicant seeking stay of execution of a judgment/decree or order pending appeal must satisfy the court the following three conditions;
 - a. The application has been made without unreasonable delay.
 - b. That substantial loss may result to the Applicant unless the order is made.
 - c. The Applicant has given security or undertaking for the due performance of such decree or order as may ultimately be binding on him.

9. On the first condition, it is not in dispute that the impugned Judgment was delivered by this Honourable court on 25/7/2024. On the said date, M/S Masengeli Advocate appearing for the Applicant herein made an oral application for stay of execution for 30 days which was allowed as Mr. Wamalwa R. for the Respondent herein did not oppose. On 29/09/2024, the Applicant filed the present application under certificate of urgency. In my view, the application has been brought without unreasonable delay.

10. The second condition which is the cornerstone of the stay order is for the Applicant to demonstrate that she will suffer substantial loss unless the order is made. In the case of *James Wangalwa & Others v Agnes Naliaka Cheseto* (2012) KLR, the court defined what constitutes substantial loss and held as follows;

The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal....the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

11. Under this limb, the Applicant is required to demonstrate that the appeal would be rendered nugatory and that he would reap a barren judgment in the event his appeal succeeds. At paragraph 6 of her supporting affidavit, the Applicant stated that she will suffer irreparable loss and damage unless the court intervenes. However, the Applicant did not demonstrate how she will suffer such loss. It was imperative for the Applicant to demonstrate how she would suffer substantial loss unless the order of stay is granted. I find that the applicant has not met the second condition.

12. On the final condition, the Applicant is required to either give security for the due performance of the decree as may ultimately be binding on her or give an undertaking to abide by such terms and conditions as the court may order. Looking at the affidavit in support of the application, I note that nowhere has the Applicant given security or undertaking to abide by any condition for security as may be given by this court for the due performance of the decree as may be binding on her. As such, I find that the third condition has not also been satisfied.

13. In order to succeed in the grant of stay pending appeal, an applicant must establish all the three conditions sequentially. Consequently, the Notice of Motion dated 23rd August, 2024 is devoid of merit and the same is hereby dismissed with cost.

14. Order accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF JANUARY, 2025.

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HON.E.C CHERONO



ELC JUDGE

In the presence of;

1. M/s. Masengeli for the Applicant.
2. Mr. Wamalwa R for the Respondent.
3. Bett C/A

