



**Kilama v Kidhembe & another (Appeal 2 of 2024)  
[2024] KEELC 14099 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 14099 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
APPEAL 2 OF 2024  
EK MAKORI, J  
DECEMBER 18, 2024**

**BETWEEN**

**ERINE MGOI KILAMA ..... APPLICANT**

**AND**

**KAZUNGU SAMINI KIDHEMBE ..... 1<sup>ST</sup> RESPONDENT**

**HILTON KAZUNGU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant's application, dated 14<sup>th</sup> August 2024, seeks orders of stay of execution pending appeal against the Respondents, Kazungu Samini Kithembe and Hilton Kazungu. The Respondents filed a Reply Affidavit opposing the stay. The crux of this application is that the Applicant possesses the disputed property. At the same time, the Respondents seek to evict her based on their success in Kilifi Miscellaneous Land Case No. 15 of 2023. The appeal challenges the decision that currently favors the Respondents.
2. The Applicant, facing the imminent threat of eviction, argues that she will suffer irreparable harm if evicted. She asserts her legal right to appeal the lower court's decision and the fact that she is in possession of the property.
3. From the materials and submissions placed before me, I frame the issues for determining whether to grant a stay pending appeal of this court's decision and who should bear costs.
4. Stay of execution is governed by Order 42 Rule 6 of the Civil Procedure Rules, which establishes conditions that must be met for the court to grant a stay:
  - a. The application must be made without unreasonable delay.
  - b. The Applicant must demonstrate that substantial loss may result if the stay is not granted.



- c. The Applicant must be willing to provide security for the due performance of the decree.
5. The court must ensure that the appeal once filed and submitted, is not rendered ineffective by permitting the decree-holder to carry out the judgment beforehand.
6. Significantly, at the ELC, when dealing with land, the goal is to ensure the suit's substratum is maintained pending appeal. The Court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal, if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her Judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for a stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

7. The Appellant is said to be in occupation of the suit property—a decree obtained from the Lower Court is to have her evicted. If executed, it will change the substratum of the suit by dispossessing her of the suit property, rendering the appeal nugatory.
8. At this juncture, it is crucial to maintain the status quo. Therefore, the appellant should continue to occupy the suit property until the appeal is resolved, ensuring the appeal process is not compromised.
9. Consequently, the Court orders that the Appellant should not be evicted until the appeal is concluded. The issue of costs will be determined based on the appeal's outcome.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 18<sup>TH</sup> DAY OF DECEMBER 2024.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

Ms. Mwangi, for the Appellant

Ms. Katama, H/B for Mr. Mwangunya for the Respondents

Hap: Court Assistant

