



**Wambua (Suing as the Personal Representative of the Estate of Samuel Muindi) & another v Katheka Kai Farmers Co-operative Society Ltd & 2 others (Environment and Land Appeal E069 of 2024) [2025] KEELC 1476 (KLR) (25 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1476 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ENVIRONMENT AND LAND APPEAL E069 OF 2024**  
**AY KOROSS, J**  
**MARCH 25, 2025**

**BETWEEN**

**FLORENCE WAMBUA ALIAS FLORENCE KAVATA MWINDI (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF SAMUEL MUINDI) ..... 1<sup>ST</sup> APPELLANT**

**JOE OSBORNS PETER MWAI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**KATHEKA KAI FARMERS CO-OPERATIVE SOCIETY LTD 1<sup>ST</sup> RESPONDENT**

**PETER MBITHUKA ..... 2<sup>ND</sup> RESPONDENT**

**MUTUKU MANTHI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The notice of motion subject to this ruling is dated 25/11/2024. It has been filed by the appellants who have sought several reliefs, some of which are spent, and the main prayers pending determination are: -
  - a. Pending the hearing and determination of the appeal, the Hon. Court grants an order of stay of execution of the judgment and decree in Machakos CM ELC No. 40 of 2023.
  - b. The OCS Konza Police Station supervises compliance with the orders of the court.
  - c. That the costs of the motion be provided for.
2. The motion is predicated on grounds particularised on its face and on the 1<sup>st</sup> appellant's affidavit That she was deposed with the 2<sup>nd</sup> appellant's authority on 25/11/2024. This affidavit has several annexures attached to it.



3. In summary, it was stated That based on a notice of preliminary objection, the appellants' suit was dismissed. Consequently, thereafter, it was asserted That the respondents had fenced the suit property and were developing it.
4. Moreover, it was contended an appeal had been lodged against this decision as evidenced by the memorandum of appeal dated 15/11/2024, and the appellants were apprehensive if the developments continued, the appeal would be an academic exercise.
5. It was concluded the appellants would suffer irreparable loss and damage, and their appeal was merited, good and with high chances of success.

#### **Respondents' case**

6. The 1<sup>st</sup> respondent did not participate in the proceedings, whilst the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' law firm, on record of B.M. Mung'ata & Co. Advocates, opposed the motion by filing a replying affidavit That was deposed by the 2<sup>nd</sup> respondent with the authority of the 3<sup>rd</sup> respondent. It was deposed on 19/12/2024.
7. In it, the 2<sup>nd</sup> respondent asserted the motion was misconceived, failed to meet the principles of a stay of execution and was unmerited.
8. He asserted the grounds of appeal were not merited and had no chances of success, the substantial loss had not been demonstrated, and security had not been offered, and he stated the 2<sup>nd</sup> and 3<sup>rd</sup> respondents should be allowed to enjoy the fruits of the outcome of the decision of the lower court.

#### **Parties' submissions**

9. The court directed parties to file written submissions. In compliance, the law firm of M/s. R.M. Mutiso & Associates, who are on record for the appellants, filed written submissions dated 6/03/2025, and the 2<sup>nd</sup> and 3<sup>rd</sup> counsel who were disclosed earlier filed written submissions dated 19/12/2024.
10. Therefore, upon identifying and considering the issues for determination, this ruling shall, later on in its analysis and determination, consider the arguments contained on the particular issue and also bear in mind the law and judicial precedents.

#### **Issues for determination, Analysis, and Determination**

11. Having carefully considered the motion, affidavits, as well as the rival submissions, and cited provisions of law and precedents, the main issue for determination is whether the motion is merited.
12. As rightfully submitted by both counsels, when dealing with applications for a stay of execution pending appeal, this court has to satisfy itself That the principles enunciated in Order 42 Rule 6 (2) of the Civil Procedure Rules have been met and it provides as follows:

“No order for stay of execution shall be made under sub rule (1) unless:

- (a) the court is satisfied That substantial loss may result to the applicant unless the order is made and That the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”  
Emphasis added.”



13. Being an appellate court and not a court from whose decision an appeal is being lodged, the principles That guide this court in this instance are much wider than those stated in Order 42 Rule 6 (2) of the Civil Procedure Rules.
14. In considering these principles, this court exercises judicious discretion That is based on law and reason.
15. In their submissions, both counsels argued on the principles of a stay of execution, and some of these principles were well summarised by the recent Court of Appeal decision of Teacher Service Commission & another v Mutisya [2024] KECA 80 (KLR) That has been relied upon by the appellants' counsel. This decision stated: -
 

“ 12...An applicant under rule 5(2)(b) of the Court of Appeal Rules will be entitled to any of the remedies under That rule once they have filed an appeal or a notice of appeal and satisfy the court That the intended appeal is arguable and will be rendered nugatory if it succeeds. (See Trust Bank Ltd and another v Investech Bank Ltd and 3 Others [2000] eKLR). It has been stated time and again That an arguable appeal is not one That must succeed when it is heard, but merely an appeal That is not frivolous and raises even one bona fide ground of appeal That deserves consideration by the Court (See Ahmed Musa Ismael v Kumba Ole Ntamorua & 4 Others [2014] eKLR).

13. On the other hand, whether an appeal will be rendered nugatory depends on the circumstances of each case. (See Reliance Bank Ltd Norlake Investments Ltd (2002) 1 EA 227). As the court explained in Ahmed Musa Ismael v Kumba Ole Ntamorua & 4 Others, supra, the purpose of this consideration is:

“to preserve the integrity of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or succour by reason of intervening loss, harm or destruction That turns the appeal into a mere academic ritual.”

14. An appeal will be rendered nugatory if what is sought to be forestalled cannot be reversed or can only be reversed at great expense or cannot be adequately compensated with damages. (See Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR). Lastly, the applicant is obliged to satisfy both considerations. It will not suffice to satisfy only one of the considerations. (See Republic v Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31).”
16. The purpose of a stay of execution is to preserve the substratum of the case so That the rights of the appellants, who are exercising their undoubted right of appeal, are safeguarded and the appeal, if successful, is not rendered nugatory.
17. Turning to the merits of this motion That is before this court and taking into consideration the disposal orders That were issued in the ruling rendered on 25/10/2024 by the lower court, this court is constrained from applying the tests of a stay of execution as the lower court merely dismissed the appellants' suit, save on the issue of costs. Put another way, the court merely issued a negative order except for costs.
18. As a result, there is nothing to be executed or capable of being stayed. Reliance on this is placed on the persuasive decision of Western College Farts and Applied Sciences vs. Oranga & Others [1976] KLR 63 That was cited with approval by the Court of Appeal decision of Kaushik Panchamatia & 3 others v Prime Bank Limited & another [2020] KECA 418 (KLR).



19. In this Western College (Supra) decision, the court stated as follows, which I hereby adopt: -

“But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs.....”

The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction.”

20. Given the above, I need not say more. Thus, I find the notice of motion dated 25/11/2024 is not merited, and I hereby dismiss it with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. In the end, I hereby issue the following final orders: -

- a. That the notice of motion dated 25/11/2024 is hereby dismissed with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
- b. That the appellants shall file and serve the record of appeal within 30 days from the date hereof.
- c. That the appeal is hereby admitted.
- d. That calling letter to issue to the lower court.
- e. That this matter shall be mentioned before the Deputy Registrar for further directions on 8.05.2025.

It is so ordered.

**DELIVERED AND DATED AT MACHAKOS THIS 25<sup>TH</sup> DAY OF MARCH, 2025.**

**HON. A. Y. KOROSS**

**JUDGE**

**25.03.2025**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Mr. Muema for 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

Mr. Mutiso for applicant

N/A for 1<sup>st</sup> respondent

Ms Kanja- Court Assistant

