



**Gikeria v Solomon (Environment and Land Appeal 44 of 2023)
[2025] KEELC 1450 (KLR) (20 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1450 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 44 OF 2023**

**JM ONYANGO, J
MARCH 20, 2025**

BETWEEN

AHMED CHEGE GIKERIA APPELLANT

AND

LUCY WANJIRU SOLOMON RESPONDENT

RULING

1. Before me are two applications filed by way of Notice of Motion. The first one which is dated 26.9.2023 is an application by the Respondent seeking an order that the sum of Kshs. 280,400 deposited in court on 13.12.2023 pending appeal be released to the Respondent now that the appeal has been determined and dismissed with costs.
2. The application is predicated on the Respondents Supporting affidavit sworn on 24.9.25. It is opposed by the Appellant through his Replying Affidavit sworn on 7th October 2024 in which he states that he has filed an appeal in the Court of Appeal. He therefore prays that the amount deposited in continues to remain in court as a condition for stay until the appeal in the Court of Appeal is heard and determined.
3. The second application is dated 7th October 2024 is filed by the Appellant. He seeks a stay of execution of the judgment and orders issued on 20.9.2024 or in the alternative that an order of status quo be issued allowing the Appellant to remain in possession of land parcel no Ruiru/Kiu Block 2/4793 pending the hearing and determination of the appeal at the Court of Appeal.
4. In his supporting affidavit sworn on 7th October 2024, the Appellant deposes that he has filed a Notice of Appeal dated 2.10 24 against the judgment delivered by Justice Eboso on 20.9.24. He prays that the amount of Kshs. 280,000 deposited in court by the Appellant during the pendency of this appeal be allowed to remain in court pending the hearing and determination of the appeal at the Court of Appeal.



He depones that if the said amount is released before the appeal is heard, he shall suffer prejudice. He is of the view that his appeal has a high chance of success.

5. The court directed that both applications be canvassed simultaneously by way of written submissions. By the time of writing this ruling only the Respondent had filed his submissions.

Respondent's Submissions

6. With regard to the application for release of the funds deposited in court by the Appellant, learned counsel for the Respondent submitted the appeal having been dismissed, the said amount ought to be released to the Respondent. It was his submission that since the appeal had been dismissed, this amounted to a negative order which could not be stayed. He relied on the case of *RWW v EKW* (2019 eKLR) for the proposition that the court must balance the interests of the parties before granting a stay. He further relied on *City Trustees of Majengo Muslim Women's Group v Kagendo & 3 others Environment and Land Appeal E040 of 2022 [2024] KEEL* where the court held that in exercising its discretion, the court should weigh the rights of the Appellant against the successful litigant who should not be prevented from enjoying the fruits of his judgment. In the same judgment, the court observed that after dismissing the appeal, there was nothing to be stayed. The court further observed that where a negative order has been given, the question of substantial loss does not arise since there is no positive order that is capable of execution save for costs.
7. Counsel also relied on *Machira T/A Machira & C Advocates V East African Standard* (2002) eKLR.
8. He urged the court to consider that the Respondent had been deprived of his property for over 9 years. He submitted that the Notice of Appeal annexed to the Appellant's supporting affidavit was not signed by the Deputy Registrar of this Honourable court nor was it served upon the Respondent. It was his contention that this was in contravention of rules 77 and 81 of the Court of Appeal Rules. He therefore argued that there was in fact no appeal.
9. Counsel further submitted that the Appellant had not demonstrated that he would suffer substantial loss as required by Order 42 Rule 6 of the Civil Procedure Rules. He urged the court to dismiss the application.

Analysis and Determination

10. Having considered the two applications, the Replying affidavits and the submissions filed by the Respondent as well as the applicable law the authorities cited to me the issues for determination are twofold:
 - i. Whether a stay of execution should be granted pending appeal
 - ii. Whether the sum of Kshs. 280,400 deposited in court by the Appellant ought to be released to the Respondent.
11. It has been pointed out that the Notice of Appeal filed by the Appellant was not endorsed by the Deputy registrar of this Court nor was it served upon the Respondent as required by Rules 77 and 81 of the Court of Appeal Rules. I have perused the Notice of Appeal on CTS and indeed the same is not signed by the Deputy Registrar. The Appellant has also not furnished any proof of service of the said notice upon the Respondent. These are omissions which cannot be wished away.
12. Be that as it may, I will proceed to consider whether the Appellant has made out a case for stay of execution pending appeal. Stay of execution pending appeal is governed by Order 42, Rule 6 of the Civil Procedure Rules, 2010 which provides as follows:-



1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
2. 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.
3. Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”
13. Therefore, in deciding whether to grant an order for stay of execution of a decree or order pending appeal, the court has to ensure that the following conditions have been met:
 - a. substantial loss may result to the applicant unless the order is made,
 - b. the application has been made without unreasonable delay, and
 - c. such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
14. In addition to the above, stay may also be granted for sufficient cause. The Court in deciding whether or not to grant the stay, also gives regard to the overriding objectives stipulated in Sections 1A and 1B of the *Civil Procedure Act*. Courts are now enjoined to give effect to them, hence the Court is no longer limited to the conditions set out in the foregoing provisions.
15. The first requirement this Court must determine whether not granting the order will occasion substantial loss to the intended Appellant. As to what substantial loss is, it was observed in *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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.”



16. It has been held that substantial loss occurring to the Applicant is the cornerstone of the jurisdiction of the High Court in granting stay of execution. See the case of Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018 where the Court of Appeal stated that:

“If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdiction for granting stay.”

17. The Appellant was therefore bound to place before the court such material and information that should lead this court to conclude that he stood a risk of suffering substantial loss if the order for stay is not granted. This would have laid the basis for grant of the orders for stay. In the instant case the appellant has not demonstrated what loss he is likely to suffer if the stay is not granted.

18. Additionally, as has correctly been pointed out by the Respondent, the dismissal of the appeal is a negative order which cannot be stayed. In the case of City Trustees of Majengo Muslim Women’s Group (supra) the court observed that where a negative order has been made, the question of substantive loss does not arise.

19. Regarding the question of delay, the application was made after less than a month after delivery of the judgment and there was therefore no delay.

20. With respect to security for costs, the Appellant has offered the sum of Kshs. 280,400 which was deposited in court.

22. Ultimately the Appellant was required to satisfy all conditions for stay which he has failed to do as he has not demonstrated that he will suffer substantial loss. The court must also bear in mind the interests of the Respondent who has had to wait for ten years to enjoy the fruits of his judgment.

23. Taking all factors into consideration, I am not satisfied that the Appellant has met the conditions for stay of execution and I therefore decline to grant the order for stay of execution

24. Having declined to grant a stay it follows that the application for release of the sum of Kshs. 280,400 which was deposited in court by the Appellant must be allowed.

25. Consequently, the application dated 26.9.24 is granted as prayed.

26. The costs of both application shall be borne by the Appellant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 20TH DAY OF MARCH 2025

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J. M. ONYANGO

JUDGE

In the presence of:

Miss Maseno for Mrs Ngala for the Respondent

No appearance for the Appellant

Court Assistant: Hinga

