



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kariuki v Tuyia (Environment and Land Appeal 001 of 2023)  
[2023] KEELC 22641 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 22641 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND APPEAL 001 OF 2023  
LC KOMINGOI, J  
JULY 13, 2023**

**BETWEEN**

**SEERU OLE KARIUKI ..... APPLICANT**

**AND**

**KIPISHI OLE TUYIA ..... RESPONDENT**

**RULING**

1. This is the Notice of Motion dated 20<sup>th</sup> January 2023 brought under;  
  
(Under Article 159 of the Constitution of Kenya, 2010, Section 13 of the Environment & Land Court Act, No. 12 of 2012, Order 42 rule 6 and Order 51 rule 1 and Section 1A, 1B, 3A & 63(e) of the Civil Procedure Rule and all other enabling provisions of law).
2. It seek Orders;
  1. Spent.
  2. Spent.
  3. That this honorable court be pleased to stay execution of the judgement of the trial court delivered on 22<sup>nd</sup> December 2022 in Kajiado ELC No.42 of 2020 and all consequential orders pending the hearing and determination of this appeal.
  4. Spent.
  5. That this honorable court be pleased to grant a stay of the consequential decree of the judgement delivered on 22<sup>nd</sup> December 2022 in Kajiado ELC No.42 Of 2020 and all other consequential orders against the applicant pending the hearing and determination of this Appeal.



3. The grounds, are in the face of the application and are set out in paragraphs a to f.
4. The application is supported by the affidavit of Seeru Ole Kariuki, the Appellant/Applicant, sworn on the 20<sup>th</sup> January 2023.
5. The application is opposed. There is a Replying Affidavit sworn by Kipishi Ole Tuyia, the Respondent herein, on the 31<sup>st</sup> March 2023.
6. On the 15<sup>th</sup> March 2023 the court with the consent of the parties directed that the Notice of Motion be canvassed by way of Written Submissions.
7. The Appellant's submissions are dated 20<sup>th</sup> June 2023 while the Respondent's are dated 31<sup>st</sup> March 2023. In their submissions parties have reiterated their positions set out in their respective affidavits.
8. I have considered the Notice of Motion and the affidavit in support. I have also considered the response thereto, the written submissions and the authorities cited. The issues for determination are;
  - i. Whether the Appellant's/Applicant's application meets the threshold for grant of orders of stay of execution pending appeal.
  - ii. Who should bear the costs of this application?
9. The principles guiding the grant of stay of execution pending appeal are well settled. Order 42 rule 6 (2) of the *Civil Procedure Rules* provides that;
  - (2) No order for stay of execution shall be made under subrule (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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
10. It is clear from the above Provisions that for an order of Stay of execution to be granted specific conditions must be met by the Applicant.
11. I have considered the Notice of Motion herein and I find that it has been brought without unreasonable delay. Judgement was delivered on 22<sup>nd</sup> December 2022 and this application was filed on 20<sup>th</sup> January 2023.
12. It is the Appellant's/Applicant's case that he'll suffer substantial loss if these orders are not granted. This is because the Respondent may dispose of the suit property to a third party thus rendering this appeal nugatory.
13. It is also his case that he is willing to abide by any terms set by this Honourable Court in regards deposit of security for the due performance of the decree.
14. The Respondent on the other hand states that the Appellant does not reside on the suit property being Kajjado/Kaputiei/South 6602. Further that he has failed to demonstrate what substantial loss he stands to suffer if these orders are not granted.
15. I find that the Appellant/Applicant has demonstrated that he will suffer substantial loss if these orders are not granted as he has been ordered to transfer the suit property to the Respondent yet he did not sell the same to the Respondent.



16. There is need to preserve the substratum of the Appeal. In the Case of *Feissal Jan Mohammed t/a Dunvia Forwarders Vs. Shami Trading Co. Ltd* (2014) eKLR Kasango J stated as follows;

“It is trite law that a stay of execution orders generally granted if the applicant has successfully demonstrated that a substantial loss may result to him unless the order is made, that the application was made without unreasonable delay and that the applicant has offered proper security”.

17. In the Case of *Kenya Commercial Bank Ltd Vs. Sun city Properties Ltd & 5 Others* (2012) eKLR , the court held that;

“In an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of Appeal should be safeguarded from his Appeal being rendered nugatory. These two competing interests should always be balanced”.

18. I have considered the circumstances of this case and I find that Justice will be better be served if the order of stay is granted.

19. The Appellant/Applicant has stated that he is ready and willing to abide by the first terms of stay granted by this Honorable Court.

20. In conclusion, I find merit in this application and grant the orders sought namely;

a. That there be stay of execution of the judgment and decree issued on 22<sup>nd</sup> December 2022 by B. Cheloti, SRM and all consequential orders pending the hearing and determination of the Appeal herein on condition that the Appellant does deposit Kshs.300,000/= as security for costs in a joint earning account in the name of his counsel and counsel of the Respondent within forty five (45) days from the date of this ruling. In default, the orders of stay of execution shall lapse automatically.

b. That costs do abide the outcome of the Appeal.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 13<sup>TH</sup> DAY OF JULY 2023.**

**L. KOMINGOI**

**JUDGE.**

In The Presence Of:

Mr. Kasyoka for the Appellant.

Ms. Wanjiku for the Respondent.

Court Assistant – Mutisya.

