



**Mulei v Mulli (Environment and Land Appeal E009 of 2024)
[2025] KEELC 249 (KLR) (29 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 249 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E009 OF 2024**

**TW MURIGI, J
JANUARY 29, 2025**

BETWEEN

MARTIN KIMWELI MULEI APPELLANT

AND

JONATHAN WAMBUA MULLI RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 10th July, 2024 brought under Sections 1A, 1B, 3A and 63 of the *Civil Procedure Act* in addition to Order 42 Rule 6(1), (2), (3), Order 51 Rule 1 of the Civil Procedure Rules in which the Applicant seeks the following orders:-
 1. Spent.
 2. Spent.
 3. That this Honourable court be pleased to issue orders of stay of execution of the judgment delivered on 21/6/2024 and do issue preservative orders preserving the status prevailing as at 21/6/2024 of all that property known as Plot No. 24 the suit property herein situated at Mwaani Market pending the hearing and determination of the appeal.
 4. That the costs of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Martin Kimweli Mulei sworn on even date.

The Applicants' Case

3. The Applicant averred that vide the judgment delivered on 21/06/2024, his suit was dismissed with costs and judgment entered for the Respondent as prayed in the counterclaim. He further averred his



family has been in active occupation of the suit property since the year 1973 and has made substantial developments thereon.

4. The Applicant contended that the Respondent will execute the judgment and dispose of the suit property if the orders sought are not granted. He further contended that he has an arguable appeal with high chances of success which will be rendered nugatory if execution proceeds. In conclusion he contended that he is ready and willing to abide by any condition that the court may impose.

The Respondent's Case

5. The Respondent filed a replying affidavit sworn on 23rd of June, 2022 in opposition to the application. He averred that he substituted and replaced his late father as the Defendant in Civil Case No. 55 of 2012. He further averred that the Applicant sold Plot No. 24 Mwaani Market and was now claiming Plot No. 27 which belongs to his late father and is occupied by his family.
6. He went on to state that after the Applicant trespassed into Plot No 27, the County Council of Makueni issued a restraining directive against him. He further averred that the Applicant constructed a house despite having been restrained by the court from trespassing into Plot No. 27. He denied the Applicant's allegations that he is in possession of Plot No. 27 Mwaani Market.
7. He went on to state that in the year 1999, his late father purchased Plot No. 27 from Zacharia Mwangela Ndunda and was subsequently transferred to his name by Makueni County Council. He explained that his late father did not develop the plot but used to pay rates for the same. He contended that the Applicant has constructed on Plot No. 27 and urged the court to dismiss the application with costs.
8. The application was canvassed by way of written submissions.

The Appellant/applicants Submissions

9. The Applicant filed his submissions dated 7th October 2024.
10. On his behalf, Counsel identified the principles governing the grant stay of execution pending appeal as set out in Order 42 Rule 6 of the Civil Procedure Rules.
11. On substantial loss, Counsel submitted that the Applicant's family has been in active possession of the suit property since the year 1973 and has made substantial developments thereon. Counsel further submitted that any adverse interference with the suit property will result into substantial loss to the Appellant which will render his nugatory.
12. On the second condition, Counsel submitted that the application was filed without unreasonable delay.
13. On the final condition, Counsel submitted that the judgment being appealed from is not a money decree to warrant a deposit of security for costs pending the hearing and determination of the appeal. Counsel submitted that the Applicant is ready and willing to abide by any conditions that the court may impose.
14. Counsel submitted that the Applicant has established a prima facie case to warrant the grant of preservative orders. Concluding her submissions, Counsel submitted that the Applicant has met the threshold for the grant of stay of execution pending the hearing and determination of the appeal. Counsel urged the court to allow the application as prayed.



The Respondents Submissions

15. The Respondent filed his submissions dated 17th October 2024.
16. On his behalf, Counsel submitted that the Applicant has not satisfied the conditions set out in Order 45 Rule 6 of the Civil Procedure Rules. Counsel further submitted that the Applicant has not demonstrated the substantial loss that he stands to suffer if the order of stay is not granted. Counsel further submitted that the Applicant has not offered any security for the due performance of the decree. Concluding her submissions, Counsel urged the court to dismiss the application with costs. To buttress his submissions Counsel relied on the case of *Chege v Gachora Civil Appeal 265 of 2023*.

Analysis And Determination

17. Having considered the application, the respective affidavits and the rival submissions, the only issue that arises for determination is whether the Applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for the grant of stay of execution pending Appeal.
18. Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules outlines the guiding principles to be met for the grant of stay as follows;
 - 6(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.
 - 6(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 such security of costs for the performance of such decree or order as may ultimately be binding on him has been given by Applicant.
19. The grant of an order of stay of execution is a discretionary. In the case of Butt Vs Rent Restriction Tribunal (1982) KLR 417 the Court of Appeal gave the following guidelines on how a court should exercise discretion as follows;

“The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s decision. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicants at the end of the proceedings. The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”



20. Similarly in the case of RWW Vs EKW (2019) eKLR the Court held that;
- “...the purpose of an application for stay of execution pending an appeal is to preserve the subject 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 the 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 damages.”
21. The Court is therefore called upon to balance both the rights of the successful party so as not to hinder him from his fruits of judgment and those of the Appellant whose Appeal may succeed and be rendered nugatory if stay of execution is not granted.
22. The purpose of stay of execution is to preserve the substratum of the case. In the case of Consolidated Marine vs Nampijja & Another Civil App No. 93 of 1989 (Nairobi) the Court held that;
- “The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.”
23. The Court will now determine whether the Applicant has satisfied the conditions upon which the orders can be granted.
24. On the first condition of proving that substantial loss may result unless stay orders are granted, the Applicant should not only state that he is likely to suffer substantial loss, he must prove that he will suffer substantial loss if stay orders are not granted.
25. In so finding, I am persuaded by the decision in the case of Charles Wahome Gethi vs Angela Wairimu Gethi (2008) eKLR where the Court Appeal held that;
- “...it is not enough for the Applicants to say that they live or reside on the suit land and they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”
26. What amounts to substantial loss was expressed by the Court of Appeal in the case of Mukuma vs Abuoga (1988) KLR as follows;
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.
27. In Tropical Commodities Suppliers Ltd and Others Vs International Credit Bank Ltd (in Liquidation) (2004) 2EA 331 the court defined substantial loss as follows;
- “substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal....”
28. The Applicant contended that he will suffer substantial loss execute if stay of execution is not granted since his family is in active possession of the suit property since the year 1973 where he has constructed



- a permanent house. He further contended that if execution proceeds, his appeal will be rendered nugatory. He produced photographs showing a permanent house on the suit property.
29. The Respondent on the other hand argued that Plot No. 27 belongs to his late father. He further argued that the Applicant sold his Plot and was now claiming his late father's plot as Plot. No 24.
30. The Applicant produced the pleadings and judgment in Makueni CMCC No. 55 of 2012. In his further amended defence and counterclaim dated 21st June 2022, the Defendant sought the following orders:-
- a) A declaration that the late Cleophas Muli Mbai is the rightful owner of Plot No. 27 at Mwaani Market.
 - b) An order of injunction restraining the Plaintiff, his servants, agents and/or anyone claiming under him from entering on to, cultivating, trespassing or interfering in any manner with the Defendant's Plot No. 27 at Mwaani Market.
 - c) Costs of the suit.
 - d) Any further or other relief that the court may deem fit to grant.
31. In the Judgment delivered on 21/06/2024, the court dismissed the Plaintiff's suit with costs to the Defendant and entered judgment for the Defendant as prayed in the counterclaim.
32. It is not in dispute that the Applicant has constructed a building within the suit property. It is also not in dispute that both parties are claiming ownership over the suit property. Based on the evidence presented before me, this Court is satisfied that the Applicant has demonstrated that he will suffer irreparable loss if execution of the judgment were to proceed.
33. In an application for stay of execution pending Appeal, an Applicant must also satisfy the Court that the application has been made without unreasonable delay. It is not in dispute that judgment was delivered on 21st June, 2024. The present application was filed in Court on 10th July, 2024. I find that the application was filed without unreasonable delay.
34. On the last condition as to the provision of security for costs, Order 42 Rule 6 (2) (b) of the Civil Procedure Rules is couched in mandatory terms to the effect that the Applicant must furnish security for the performance of the order or decree. In the case of *Arun C Sharma Vs Ashana Rakundalia T/A Raikundalia & Co. Advocates & 2 Others* (2014) eKLR, the court held that;
- “The purpose of the security under Order 42 is to guarantee due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor....civil process is quite different because in civil process the judgment is like a debt hence the applicant become and are judgment debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the civil procedure rules acts as a security for the performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”
35. The Applicant has expressed his willingness to provide security as directed by the Court.
36. In the end I find that the Applicant has satisfied the conditions required for the grant of an order of stay of execution pending appeal.
37. The upshot of the foregoing is that the application dated 10th July, 2024 is allowed in the following terms;



- i. Stay of execution of the ruling in Makueni CMCC No. 55 of 2012 is granted pending the hearing and determination of the Applicant's Appeal.
- ii. The status prevailing as at 21/06/2024 of all that property known as Plot No. 24 Mwaani Market be maintained pending the hearing and determination of the bAppeal.
- iii. The Applicants shall deposit Kshs 100,000/= as security for costs in court within 21 days from the date of delivery of this ruling in default the stay orders shall automatically lapse.
- iv. Costs to abide with the outcome of the appeal.

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HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 29TH DAY OF JANUARY, 2025.

IN THE PRESENCE OF: -

Ms Gladys Gichuki for the Applicant

Mrs Nzau for the Respondent

