



**Lengeseni & 3 others (Suing as Personal Representatives in Respect of the Estate of Rodah Tipis (Deceased)) v Umoja Developers Limited (Environment & Land Case 1418 of 2014) [2025] KEELC 1293 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1293 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1418 OF 2014  
AA OMOLLO, J  
MARCH 13, 2025**

**BETWEEN**

**ERIC TIPIS LENGESENI & 3 OTHERS & 3 OTHERS & 3 OTHERS . PLAINTIFF  
SUING AS PERSONAL REPRESENTATIVES IN RESPECT OF THE ESTATE OF  
RODAH TIPIS (DECEASED)**

**AND**

**UMOJA DEVELOPERS LIMITED ..... DEFENDANT**

**RULING**

1. The Plaintiffs/Applicants filed a notice of motion dated 16<sup>th</sup> September 2024 supported by an affidavit sworn on the same date by Serah Shiloo seeking for the following orders;
  - a. That the Honorable Court be pleased to order a stay of execution of the Judgment and resultant Decree issued on 18th July 2024 pending the filing of the record of appeal, hearing and final determination of the Plaintiff/ Applicants' Appeal at the Court of Appeal.
  - b. That costs of this Application be borne by the Respondents
2. The Plaintiffs/Applicants who are the children and administrators of the estate of Rodah Saiton Tipis, the legal owner of Land Reference Number 3734/240 stated that during her illness, Prof. Nathan Kahara, an alleged director of the Defendant, took advantage of the family's vulnerable position and unlawfully trespassed on the property, leading to the filing of a suit by the Plaintiffs to evict the Defendant.
3. That in a judgment delivered on July 18, 2024, the court declared the Defendant as the bona fide purchaser of the land, ordered the Plaintiffs to surrender the title and execute transfer documents to the Defendant, and granted costs. The Applicants, being dissatisfied with the judgment filed an appeal.



4. Now they seek a stay of execution, citing that they would suffer substantial loss if the property was transferred, as there was no guarantee that the Defendant would not sell or dispose of it. They argued that the property had been a family property since 1969 and that they are willing and ready to provide security as directed by the court and argued that their appeal has a high chance of success.
5. They further contended that the decree if executed then their appeal would be rendered nugatory unless a stay of execution was granted as the court's order required them to surrender the title and transfer the property to the Defendant.
6. The motion was opposed by the Defendant/Respondent vide replying affidavit sworn by Prof. Nathan Kahara on 16<sup>th</sup> October 2024. The Defendant argued that the application for stay of execution pending appeal does not meet the conditions set under Order 42 Rule 6 of the Civil Procedure Rules, and it should be dismissed.
7. The Defendant deposes further that the court in its judgment delivered on July 18, 2024, found the Plaintiffs' case to be weak and dismissed their claim. That following the delivery of the impugned judgment, the Plaintiffs sought for and was granted a stay of execution for a period of 60 days. Therefore, the court having already exercised its discretion and granted the stay, it is "functus officio" and lacks jurisdiction to reconsider the matter.
8. Further, that the Defendant avers that the Plaintiffs have not shown any substantial loss that cannot be compensated by damages. It asserted that the Plaintiffs' application is simply a tactic to frustrate its lawful use and development of the property, which has a projected value of Kshs. 800 million.
9. In response, the Applicants filed a further affidavit sworn by Serah Shiloo Tipis on 4<sup>th</sup> November 2024 stating that the Defendant has misrepresented facts and proceedings related to a judgment delivered on July 18, 2024, in an attempt to mislead the Court. That the Plaintiffs made an application for certified copies of the proceedings, judgment, and decree on that same date in preparation for an appeal.
10. Additionally, the stay of execution granted by the Court for 60 days was to allow time for filing a formal application, considering the Court's scheduled vacation. That a Notice of Appeal was filed on July 19, 2024, and the formal appeal was subsequently filed in the Court of Appeal on October 9, 2024. The Plaintiffs strongly refutes the Defendant's allegations that a stay of execution pending appeal was granted by the Court on July 18, 2024.
11. That the Court did not grant a stay pending appeal, as the appeal had not yet been filed, and that the application for a stay was made immediately after the judgment so as to comply with the rules for filing a formal stay request under the Civil Procedure Rules as evidenced by the audio and transcript recordings of the judgment delivery, noting the Court's upcoming vacation.
12. The Applicants filed submissions dated 9<sup>th</sup> December 2024 stating that the issues for determination are two; whether the Court has jurisdiction to grant a stay of execution of its judgment pending an appeal, and whether the Applicants have met the threshold for such a stay. The Applicants assert that the Court has jurisdiction to grant a stay pending appeal under Order 42 Rule 6 of the Civil Procedure Rules, despite the Respondent's argument that the Court is functus officio. They argue that the stay was granted for 60 days pending the filing of a formal application, which was within the Court's powers, and that the Respondent's claims about the stay being granted prematurely are based on a misinterpretation of the law.
13. The Applicants further argue that a stay of execution is necessary to avoid substantial loss, as the execution of the judgment would transfer the ownership of the suit property that has been in their family for generations to the Defendant. The Applicants contend that the Defendant intends to



demolish the property and develop apartments, which would substantially alter its value and usage, rendering the appeal academic.

14. The Applicants submitted that they have demonstrated diligence and timeliness in pursuing their appeal in line with the principle outlined in *Elena Doudoladova Korir v Kenyatta University* [2014] eKLR, where the court held that timely filing is crucial for justifying a stay of execution. Also, they have demonstrated good faith in offering security for the appeal, ensuring that the subject property will not be charged, transferred, or sold during the pendency of the appeal and in support cited the case of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another* [2018] eKLR which highlighted that offering security is a sign of good faith and supports the application for a stay.
15. Additionally, the Applicants argue that granting the stay will not cause undue prejudice to the Respondent, citing the decision in *Soft White Beach Limited v Joseph Kashuru Mumbo & 4 others* [2023] where the Court emphasized the importance of balancing the interests of both parties. The Applicants submitted that the appeal itself is based on serious legal questions, particularly concerning allegations of forgery, as outlined in the Applicants' draft Memorandum of Appeal and in support relied in the case of *Stanley Kangethe Kinyanjui v Tony Ketter and 5 others* (2013) eKLR among others, which affirmed that even a single arguable ground is sufficient to warrant a stay.
16. The Defendant/Respondent's submissions were not on record as at 11<sup>th</sup> March, 2025. If any was filed thereafter, the same have not been considered because of late filing.

#### **Analysis and Determination:**

17. The Defendant/Respondent has contended that the application at hand is *functus officio*, asserting that the issuance of a 60-days stay of execution following the delivery of judgment effectively rendered the Court's authority in this regard exhausted. In contrast, the Applicants maintain that the 60-days stay was intended solely to provide them with an opportunity to file an application seeking a stay of execution pending the hearing and determination of the appeal.
18. In the case of *Jersey Evening Post Limited v Al Thani* (2002) JLR, which case was cited by the Supreme Court in the case of *Raila Odinga & 2 Others Vs Independent Electoral and Boundaries Commission & 3 Others* 2013 eKLR the Court held as follows: -

“...A court is *functus officio* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus* when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available...”
19. In addressing whether the court is *functus officio*, it is essential to distinguish between the two distinct stages referenced by the parties. The initial stay of execution granted for a period of 60 days post-judgment served as an interim measure. This is expressed under Order 42 rule 3 & 5 of the Civil Procedure Rules which states as follows,

“3. Notwithstanding anything contained in subrule (2), the Court shall have power without a formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.



5. An application for stay of execution may be made informally immediately following the delivery of judgement or ruling”
20. It was not, in and of itself, an indefinite suspension of execution, but a temporary reprieve, with the assumption that a subsequent application would be made to address the issue of a stay pending appeal. Hence the argument that the court is functus officio having given a temporary stay is without merit.
21. On whether to grant or refuse the stay of execution pending appeal sought, I will consider if the Applicants have demonstrated the principles guiding the grant of a stay of execution as provided for under Order 42 rule 6(2) of the Civil Procedure Rules. The Rule states thus:
- “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 the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
22. As to what constitutes substantial loss is, it was observed in the case of *James Wangalwa & Another v 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.”
23. In the instant case, the applicants aver that they stand to suffer substantial loss of losing property that has been in their family since 1969. The loss of property cannot be gainsaid. It is also my view that there has been no inordinate delay in bringing the instant application since the judgement and decree was delivered on 18<sup>th</sup> July 2024 and the present application filed in September, 2024, after the lapse of two months only.
24. 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.
25. Upon considering the rival positions above, I am of the view that the circumstances of this case, the Plaintiffs/Applicants has reasonably demonstrated the manner in which he stands to suffer substantial



loss if an order for stay of execution is denied. It serves the interest of justice and rights of parties that stay be granted pending determination of the appeal. noting that the Applicant has offered to make any provision for security for the due performance of the decree or for security for costs.

26. On the question whether there is need for provision of security? I think not because the Defendant is in physical occupation of the suit premises and what is sought to be stayed is the decree which ordered for transfer of the title in favour of the Defendant. Secondly, the Applicants have also made an undertaking that the subject property will not be charged, transferred, or sold during the pendency of the appeal.
27. Consequently, granting the stay of execution without provision of security would not occasion the defendant/respondent extreme prejudice. However, the stay will be limited to a period of eight (8) months from today. If the appeal would not have been concluded, the Applicants can move the Court of Appeal for any further orders.
28. The final orders issued are as follows;
  - a. That the Honorable Court do hereby issue an order of stay of execution of the Judgment and resultant Decree issued on 18th July 2024 for a period of Eight (8) months from the date of this order/ruling.
  - b. The costs of this application to the Defendant/ Respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF MARCH, 2025**

**A. OMOLLO**

**JUDGE**

